

## AGENCY WORK AND THE IDEA OF DUAL EMPLOYERSHIP: A COMPARATIVE PERSPECTIVE

Luca Ratti†

### I. INTRODUCTION: COMPARING THE OPPOSITES

He is the servant of one or the other, but not the servant of one and the other.<sup>1</sup>

The idea of a bilateral contract of service set within a monolithic employing entity<sup>2</sup> has permeated all European legal systems for the last few decades, as far as it was the most common object of study for both economical and juridical doctrines concerning labor and firm organization.

While the economical analysis has tended to give a factual and “horizontal” view of organizational phenomena,<sup>3</sup> labor law has increasingly struggled to find a satisfying set of rules for agency workers, either adapting old regulatory instruments to new organizational trends, or introducing new remedies imported from the comparative experiences of other countries.<sup>4</sup>

In an ambitious attempt to construct an efficient conceptualization of agency work as a triangular labor relationship, this research examines some economic changes in the forms of organization and integration of enterprises, in order to find out how one of the traditional tasks for labor

---

† Ph.D. from Alma Mater Studiorum, University of Bologna, Italy. This paper is one of the outcomes of the analysis I developed in my Ph.D. thesis, titled “La somministrazione di manodopera. Duplicità di datori di lavoro e tecniche di tutela” (June 2007), and was written during a research period in the United Kingdom, University of Reading, financed by the Marco Polo Programme 2007.

1. See *Laugher v. Pointer*, (1826) 5 B & C 547.

2. Paul Davies & Mark Freedland, *The Complexities of the Employing Enterprise*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAW 273* (Guy Davidov & Brian Langille eds., 2006); MARK FREEDLAND, *THE PERSONAL EMPLOYMENT CONTRACT* (2003). I deliberately chose the expression “employing entity” assuming Freedland’s perspective, to point out from the beginning that labor law should use fresh concepts whilst analyzing social and economic changes, such as the ones connected with multilateral employment relationships.

3. Gene M. Grossman & Elhanan Helpman, *Outsourcing in a Global Economy*, 72 *REV. ECON. STUD.* 135 (2005).

4. ALAIN SUPIOT, *BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE* 18 (2001).

law—that of identifying the “real employer” beyond formal structures and corporate combinations<sup>5</sup>—should be amended.

The disintegrated concepts of enterprise, employer, and worker can be rebuilt with the insights gleaned by comparing two legal systems that are traditionally seen as being very far removed from one another. The failure of British courts’ analysis of triangular work relationships can be testified by recognizing that some rules of interpretation of standard contracts of employment can no longer be efficiently used in governing the dynamics of more complex frameworks, such as the one characterizing the agency worker in front of a “doubled” employer. The more systematic civil law approach has much to offer in this regard.

The current work will thus focus, on the one hand, on Italian labor market reform of 2003, which set an analytical regulatory regime for agency work, created a new typical framework called “*somministrazione di Lavoro*” and introduced a detailed distribution of duties, powers, and prerogatives upon the three parties of the arrangement. On the other hand, this paper will examine the statutory regulation on agency work in the United Kingdom and some recent decisions of British courts and employment tribunals, most of which seem to ask for clear-cut concepts and at the same time suggest unusual and fascinating solutions to the lack of protection of agency workers. From this point of view, a comparison of the Italian civil law and the British common law system can bring new solutions to the former, traditionally incapable of deducting legal concepts from practical solutions given by courts, and also lend to the latter some guiding principles.

Continental and British labor law systems have different histories. While in most of the continental labor law systems the presence of an intermediary—called *marchandeur*, *Meister*, *caporale*—between the employer and the worker was traditionally banned or at least marginalized to some specific cases, a general acceptance of that phenomenon took place in the United Kingdom. At one end of the spectrum, Italy was one of the most hostile countries to the use of intermediaries supplying workforce and imposed restrictions on the use of service contracts; at the other end, the more liberal approach of the British legal system has seen a remarkable degree of freedom in relation to the arrangement to be followed for the purpose of the firm. The present moment is unique and promising, because the increasing convergence of the two legal systems allows one to appreciate several interesting similarities.

---

5. For a general view, see Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 OXFORD J. LEG. STUD. 353 (1990).

Using in this research the concept of “dual employership,” I identify all those situations in which two different employing entities exercise on the working performance of a person, synchronically (i.e., in the same lapse of time), exclusively, or in cooperation, some of the typical prerogatives of the employer, each fulfilling its own economic purpose.

I am well aware that the idea of a dual employer is not a new one for labor lawyers.<sup>6</sup> However, many recent attempts to affirm it have faltered when faced with traditional constructions *de iure condito* and with policy reasons. As I will try to demonstrate at the conclusion of my argument, none of these reasons is an insurmountable barrier to building a broader and fuller concept of the employment relationship, nor, at a practical level, is any able to solve the most significant problems arisen from recent cases of agency workers.

As for the methodology, I am also aware of the risks concerning a misleading use of the comparative method in the process of transplanting foreign legal institutions from one country to another.<sup>7</sup> As Otto Kahn Freund himself admitted, however, individual labor law “lends itself to transplantation very much more easily” than collective labor law, especially in an age in which the trend of European statutory legislation is to converge toward more homogeneous rules and labor standards. Thus, the current work is based on a comparative method, using both statutory and judicial materials, and recommends the use of fresh concepts and systematic interpretation rules, since continental European legal systems seem to be “better at recognizing joint or multiple employers in situations of contracting out or employment via agency.”<sup>8</sup>

Arguably, one should be more confident in analyzing future changes in the enterprise organization not only from the point of view of the employee,

---

6. As to the Italian scholarship, see LUISA CORAZZA, ‘CONTRACTUAL INTEGRATION’ E RAPPORTI DI LAVORO (2004); P. Ichino, *Somministrazione di lavoro, appalto di servizi, distacco*, in IL NUOVO MERCATO DEL LAVORO 294 (M. Pedrazzoli ed., 2004); Mariorario Lamberti, *Ragionando di esternalizzazioni: la prestazione di lavoro nei contesti multidatoriali*, in SVILUPPO E OCCUPAZIONE NEL MERCATO GLOBALE. STRAVOLGIMENTI ECONOMICI, COMPETIZIONE DEI SISTEMI LOCALI, METAMORFOSI DEL LAVORO 403 (G. Ferraro ed., 2004); Patrizia Tullini, *Identità e scomposizione della figura del datore di lavoro (una riflessione sulla struttura del rapporto di lavoro)*, 85 ARGOMENTI DI DIRITTO DEL LAVORO (2003); OLIVIA BONARDI, L’UTILIZZAZIONE INDIRECTA DEI LAVORATORI (2001); M. TIRABOSCHI, LAVORO TEMPORANEO E SOMMINISTRAZIONE DI MANODOPERA. CONTRIBUTO ALLO STUDIO DELLA FATTISPECIE LAVORO INTERMITTENTE TRAMITE AGENZIA (1999); GISELLA DE SIMONE, TITOLARITÀ DEI RAPPORTI DI LAVORO E REGOLE DI TRASPARENZA (1995).

7. Otto Kahn Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 6 (1974). Using the metaphor of the transplant either of a kidney into a human body, or of a carburetor into a car, “[i]t makes sense to ask whether the kidney can be ‘adjusted’ to the new body or whether the new body will ‘reject’ it—to ask these questions about the carburetor is ridiculous,” so, effectively, pieces of legislation are not mechanical parts.

8. Mark Freedland, *Developing the European Comparative Law of Personal Work Contracts*, 28 COMP. LAB. L. & POL’Y J. 487, 490 (2007).

but also (*rectius*: especially) from that of the employing entity,<sup>9</sup> since this dismisses what seems to (but in fact should not) be an imminent principle of labor law, that of the binary model of the personal employment contract.

## II. CHANGES IN THE ORGANIZATIONAL STRUCTURE OF THE ENTERPRISE, ECONOMIC ANALYSIS, AND NEW CHALLENGES FOR LABOR LAW: PIERCING THE CORPORATE VEIL, AND BEYOND

Trends toward globalization of the economy, together with a certain shift of a large part of the dependent employee to the service sector, have imposed a flexible model of enterprise and, as a consequence, a more flexible use of the workforce according to the daily needs of the market.

This has meant a silent metamorphosis in the concept of labor from a sociological point of view, such that the enterprise structure and production models have evolved through progressive disintegration, and labor's intrinsic value can now be considered immaterial, because it takes part of the contemporary knowledge society and capitalism.<sup>10</sup> Though fascinating, such sociological analyses do not of themselves indicate which legal tools should be used in interpreting these trends, as it is often a matter of empirical realization. Thus, the famous representations of a modernity that "constantly dissolves"<sup>11</sup> and of a capitalism pushed by a "creative destruction"<sup>12</sup> where "nothing is constant except changing"<sup>13</sup> tend to blur one's analysis with a lens that is too heavy, and perspectives too distant to give a sober and eventually correct legal view of those phenomena.

Although social sciences often offer interesting insights into changes in the very concept of labor, labor lawyers must endeavor to pursue their aims with proper juridical tools and strive to identify rules and principles that can be effectively adapted to the changing concepts of employer, employee, and contract of employment. Prescriptive concepts and arguments should be used instead of descriptive ones, to find the best solutions to the emerging issues of agency workers and to understand if and how these concepts may cause affect the basic categories of labor law as much as on the monopoly of the bilateral contract of employment in the exchange of labor for remuneration.

---

9. The employer, in fact, is not "an element that sometimes only and in particular occasions, helps in identifying the typical framework of subordinate employment, but has to be seen as a structural element of it. Thus it is typologically always essential to subordination, and since it changes shape in the several factual circumstances, it offers a support for its internal analysis." See M. PEDRAZZOLI, *DEMOCRAZIA INDUSTRIALE E SUBORDINAZIONE* 374, 374 (1985).

10. ANDRÉ GORZ, *L'IMMATÉRIEL. CONNAISSANCE, VALEUR ET CAPITAL* (2003).

11. KARL MARX & FRIEDRICH ENGELS, *MANIFEST DER KOMMUNISTISCHEN PARTEI* (1848).

12. JOSE SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 91 (Routledge 1994) (1942).

13. ERNST JÜNGER, *DER ARBEITER* (1932).

In recent years, outsourcing has fundamentally challenged this bilateral matrix. Economic studies reveal that outsourcing processes can be at least of two types. The first type tends to build up a network of contractual arrangements, namely service contracts, that concern specific phases or pieces of production to be done outside the firm's premises; by contrast the second type of outsourcing involves enterprise contracts with an intermediary agency for the supply of a certain number of workers to work within the undertaking. Although economically more convenient, the former type often brings with it risks connected with the loss of direct control of quality standards of the single performance; the latter type of outsourcing permits more frequent and pressing tests, both by using labor flexibility and by reducing core employer's responsibilities.<sup>14</sup> According to some comparative studies, this abatement of responsibility must be seen as the main reason for the growing importance of the demand of contingent work in the form of agency work.<sup>15</sup> What is peculiar to the second type of outsourcing is that, according to the law and also to contractual practice, "core business" management exercises exactly the same powers and prerogatives on "core" workers as it does on agency workers. These powers and prerogatives, however, are legally exercised without any typical contract of employment, an unusual state of affairs for labor lawyers.

The second situation described lays in the grey zone between making and buying, between hierarchy and market, such that the reorganization of the firm tends to revert the traditional assert of the transaction cost economics theorized by Ronald H. Coase and Oliver E. Williamson, that of an enterprise that reduces its costs by choosing hierarchy instead of the market, and using typical powers connected with the existence of the enterprise to acquire some resources (in particular, labor) rather than by looking for those assets within the market and, thus, by "spot contracting."<sup>16</sup>

Instead of only being applied to explain the origins of the firm, or even of the growing importance of the internalization of productive assets, this

---

14. The sociological basis of this model is very well explained by Beck. ULRICH BECK, *RISIKOGESELLSCHAFT AUF DEM WEG IN EINE ANDERE MODERNE* (1986).

15. E.g., Kate Purcell & John Purcell, *Insourcing, Outsourcing and the Growth of Contingent Labour as Evidence of Flexible Employment Strategies*, in 35 *NON-STANDARD WORK AND INDUSTRIAL RELATIONS: BULLETIN OF COMPARATIVE LABOUR RELATIONS* 163, 163 (M. Biagi & R.H. Blanpain eds., 1999). For further references, see also Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 *J. POL. ECON.* 691, 710 (1986) (where the authors analyze through economic models the allocation of costs between two integrated enterprises, pointing out that "the optimal ownership structure will be chosen to minimize the overall loss in surplus due to investment distortions.").

16. Ronald Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING* (1985) [hereinafter WILLIAMSON, CAPITALISM]; OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* (1996) [hereinafter WILLIAMSON, GOVERNANCE].

model has been frequently used in recent years, especially by labor lawyers, as an economic background to the juridical analysis of the outsourcing phenomena as a whole, thus precisely the opposite function of the former model.<sup>17</sup> The trends of contracting out periphery functions of an enterprise are nothing but a contradiction of transaction costs theory, because mere costs are thought to be the enterprise's central issue.<sup>18</sup>

In fact, as Williamson himself admits, transaction cost theory explains firm's vertical integration as a condition of asset specificity, not of technological development.<sup>19</sup> However, it describes integration, not disintegration. In other words, taking for granted an economic theory to understand a phenomenon that is opposite to that which is explained by it, can be hazardous. As a recent study explains, the risk is to overestimate the value of economic theories about an enterprise's boundaries and the outcomes of a single theory in particular.<sup>20</sup>

The "obsession" of some labor lawyers with transaction costs theory cannot be accepted, as far as some basic concepts are concerned, and it is in practice denied by the factual behavior of firms in recent years. Transaction costs theory's prediction of a vertically integrated firm, especially in specific assets, does not correspond with recent trends that have seen a massive demand for high skilled workers in outsourcing<sup>21</sup> connected with the needs of an increasing knowledge-based economy.<sup>22</sup>

Many issues arising from recent trends in outsourcing can be explained through alternative theories, such as the theory centered on the "growth of the competence based firm"<sup>23</sup> or the one that emphasizes the power of control of the employer on employees.<sup>24</sup> By and large, however, all economic theories try to re-focus their traditional analyses on some shifted concepts.

Penrose's theory on the growth of the firm, for instance, in its latter edition admits that there has been a "metamorphosis" of the firm, so that we must now take into account also the concepts of "core" and of "network." They are, in fact, referred to those contractual arrangements or alliances

---

17. Hugh Collins, *Why are There Contracts of Employment?*, 149 J. INST. & THEORETICAL ECON. 762, 765 (1993).

18. A. LO FARO, *PROCESSI DI OUTSOURCING E RAPPORTI DI LAVORO* 45-47 (2003).

19. WILLIAMSON, *CAPITALISM*, *supra* note 16, at 86.

20. LO FARO, *supra* note 18.

21. As to the DTI, a quarter of agency temps are working in a managerial and professional positions and may sometimes earn more than the regular employee in the user company. *See* HOUSE OF LORDS, *MODERNISING EUROPEAN UNION LABOUR LAW: HAS THE UK ANYTHING TO GAIN? REPORT WITH EVIDENCE*, 2007, HL Paper 120.

22. Chris Forde & Gary Slater, *Agency Working in Britain: Character, Consequences and Regulation*, 43 BRIT. J. INDUS. REL. 249, 251 (2005).

23. EDITH PENROSE, *THE THEORY OF THE GROWTH OF THE FIRM* (3d ed. 1995).

24. S. Marglin, *Knowledge and Power*, in *FIRMS, ORGANIZATION AND LABOUR: APPROACHES TO THE ECONOMICS OF WORK* (1984).

among a limited number of firms, that are bound together in an interrelated managerial framework, sometimes even referred as “quasi firms” or “virtual corporations.”<sup>25</sup> In the same extent, within Williamson’s binary analysis of the opposites (make/buy; hierarchy/market) it is arguable that *tertium datur*: two concepts lie in the middle of that “imperfect” dichotomy. The first is called the “firm without hierarchy,” which is cooperation between firms that create networks based on trusts and shared capital; the second is “hierarchy without firm,” which occurs when one main firm tends to dominate small contractors using *de facto* the same hierarchical means that characterize the internal relationship between management and workforce.

This distinction brings the analysis to focus on the former concept, the latter being concerned more with the contractual integration of firms through commercial contracts<sup>26</sup> rather than with the changed role of the employer “within” the enterprise. Since the traditional object of labor law has been the firm and its relationship with employees, the question that arises from a “firm without hierarchy” is whether agency or periphery workers should be considered by law the same as “core” workers and, in that case, whom do they legally work for, who is liable for their wage and whom they have to obey.<sup>27</sup>

In this respect, the main theoretical question lies in the alternative between the inclusion of agency work within the broad category of personal employment contracts, or others similar, and the exclusion from this category, with agency work falling outside the scope of labor law and social security protections. As it is clearly shown by recent European scholarship, a new frontier of labor law is now involved, and few answers come from legislation and jurisprudence. In fact, the pursuit of the “true” employer might sometimes be pointless,<sup>28</sup> as a consequence of the ongoing process of dissolving the monolithic role of the employer, and although to some extent the lack of conceptual structures “which would enable a holistic view . . . of multilateral work relationship”<sup>29</sup> has been filling up, much work still remains.

One of the most outstanding struggles of labor law in this sense has focused on the problem of legal responsibility of complex entities bound

---

25. Penrose, *supra* note 23, at XIX.

26. For an excellent perspective of law and economics, see CORAZZA, *supra* note 6.

27. Michael Wynn & Patricia Leighton, *Will the Real Employer Please Stand Up? Agencies, Client Companies and the Employment Status of the Temporary Agency Worker*, 35 INDUS. L.J. 301 (2006).

28. FREEDLAND, *supra* note 2, at 17; Collins, *supra* note 5; Simon Deakin, *The Changing Concept of the “Employer” in Labour Law*, 30 INDUS. L.J. 72, 72 (2001) (noting “the growing practice of supplying labor services to an end user through intermediaries, such as personal service companies or employment agencies” and the subsequent “problem of identifying the employer.”).

29. Paul Davies & Mark Freedland, *Labor Markets, Welfare and the Personal Scope of Employment Law*, 21 COMP. LAB. L. & POL’Y J. 231, 244 (1999).

together albeit formally separated.<sup>30</sup> The main issue that arose from the need to provide a conceptual framework, as to “pierce the corporate veil” and the monolithic principle of personal responsibility, was identified as the “capital boundary problem.” This was consistent with three forms of bonds between distinct firms—ownership, contract, and authority—and the basic hypothesis was that common law had been failing to develop a general principle of group responsibility where more than one capital unit (“complex economic organizations”) was involved. Thus, firms are free to determine their own size and, as a consequence, are able to choose the limits of their legal responsibilities, notwithstanding some statutory intervention to limit their freedom in some areas, such as employment protection rights, insolvency of subsidiaries, and secondary industrial actions.

Albeit prompted by a similar intention, that of identifying new protection techniques to cover situations in which the traditional tools of labor law are more vulnerable and effectively fruitless, the current analysis has a slightly different object than the one just mentioned. In fact, the “capital boundary problem” deals with two or more firms corresponding to a unique concept of capital, while the current study does not make this claim as far as agency work is concerned, because of the narrower bond that exists between the agency and the end-user, which may only be a contractual one (thus excluding ownership and authority relationships), and because the very economic purposes of the agency and the end-user are totally different, such that it is impossible to identify the contractual arrangement between the two entities as a unique capital unit.

Therefore, the challenge for labor law seems to be much more difficult, since the protection techniques provided by law have much less to do with the Marxist dichotomy between capital and labor, and concern the concept of labor itself and the consequences of its use. As a result, together with profound changes in the use of the workforce (the concepts of flexible, shared, casual, intermittent, quasi dependent, and voluntary labor), the question that arises is no longer “who is the real employer?” but, rather, “who are the economic entities hold to be responsible for the use of workforce?,” the former question being fruitless every time the law shoulders liability on the weaker employing entity involved.<sup>31</sup>

As will be shown, the theoretical relevance of this argument concerns not only the British system, with one of the largest agency workers’

---

30. Hugh Collins, *Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration*, 53 MOD. L. REV. 731, 732 (1990).

31. Wynn & Leighton, *supra* note 27, at 302.



industries<sup>32</sup> and some of the less protective legislation in the field,<sup>33</sup> but also the Italian legal system, which is mainly centered on the role and responsibility of the end-user, still disregarding that of the intermediary.<sup>34</sup>

Moreover, comparative researches reveal that the “real” employer is identified differently in different legal systems. While in most continental European countries the employer is thought to be the agency, in Canada it is the end-user, and in the United States it is quite often both.<sup>35</sup> Thus, attention should be drawn to statutory techniques that can cover situations in which not only one but both “employers” play the role of the traditional “master,” exercising its typical powers and prerogatives, in a firm where core employees work side-by-side with agency workers (temporary and/or permanent) that are hardly distinguishable.

### III. PROTECTION VS. FREEDOM: HISTORICAL DEVELOPMENT AND CONTEMPORARY CONVERGENCE IN THE “AVANT CONTRAT” PHASE

*Medias in res*, we must now consider divergent developments in the Italian and the British legal systems in tolerating an intermediary’s taking part in the employment relationship, earning profit from the employer/user simply for the supply of one or more workers.

A deeply rooted ideological argument against the supply of labor through intermediaries relates to the idea that “labor is not a commodity”: since labor is not something that can be bought, sold, or eventually used, a worker cannot be merely supplied by an intermediary to perform under the control and within the firm of an employer.<sup>36</sup> A more substantial reason is connected with the exploitation of the “used” worker by the intermediary, through an inverse proportionality of the latter’s earnings in respect of the wage paid to the former. Thus, there is the argument that the legal system should ban labor intermediaries to protect workers from injuries, old age, or sick periods, since the intermediary does not provide for such protections.

---

32. DTI, SUCCESS AT WORK: CONSULTATION ON MEASURES TO PROTECT VULNERABLE AGENCY WORKERS (Feb. 2007), at <http://www.berr.gov.uk/files/file37724.pdf>. As to this revenue “[t]he private recruitment industry has grown significantly in recent years and currently there are around 17,000 employment agencies and employment businesses in the UK with around 1 million temporary, business and contract workers. Agency work is a key element in our labour market – providing a route into employment for those previously excluded from it or economically inactive. Indeed, evidence indicates that approximately 36 per cent of agency workers were previously economically inactive.” *Id.* at 4.

33. Gillian Morris, *Approaches towards Temporary Work*, in TEMPORARY AGENCY WORK AND THE INFORMATION SOCIETY 101, 102 (R. Blanpain & R. Graham eds., 2004).

34. See the recent case decided by the Italian Corte di Cassazione Sez. Un. 26-10-06, n. 22910, in *Il Lavoro nella Giurisprudenza*, 2007, n. 3, 275.

35. Guy Davidov, *Joint Employer Status in Triangular Employment Relationship*, 42 BRIT. J. INDUS. REL. 727, 732 (2004). For an interesting overview about the role of the American courts in the joint employment doctrine, see also James Dworkin & Richard Posthuma, *The Joint Employer, the NLRB, and changing Rights for Contingent Workers*, 48 LAB. L.J. 19 (1997).

36. HUGH COLLINS, EMPLOYMENT LAW 3 (2003).

The Italian legal system has traditionally prohibited the use of intermediaries in the labor market. The Civil Code, which was drafted during the fascist period and entered into force in 1942, prohibited at article 2127 the so-called "cottimo collettivo autonomo," or collective piecework, that is a situation in which a group of workers is hired and paid together by an intermediary/employee, to perform at a particular task for an employer. Problems arose from this article, however, concerning its effectiveness and scope of application.

Then came law No. 1369 of 1960, which has been one of the most important pieces of legislation in the field of workers protection until recent years and provided a general ban for all employers to use intermediaries of any kind in the hiring of employees. Sanctions for breach were both civil and criminal. Under the civil law regime, the consequence for hiring through an intermediary was that law implied a contract of employment between the worker and the end user, meaning that the civil law punished the stronger party, the end-user. At criminal law, by contrast, both the end user and the intermediary were held to be responsible. The policy rationale, which was a protective one, shaped internal labor market and limited firms' freedom to contract out. In fact, firms were required to contract with reliable subjects, which had to be "true" entrepreneurs, not just hirers of the workforce, using appropriate machinery and means of production. Thus, the law imposed restraints on the constitutional freedom of enterprise (article 41 Cost.), this value being balanced with employees' right not to be exploited.<sup>37</sup> At the same time, public intervention in the economy was so strong that only the public placement service could collect job seekers to be hired by employers. This meant that every time employers needed employees, they had to ask the placement service for assistance. The effect of this was a significant, if totally inefficient, monopoly of public services.

New forms of service contract in fact challenged the effectiveness of law No. 1369 of 1960, whenever contractors were "real" entrepreneurs, albeit not in the sense of relevant capitalists or massive users of machinery.<sup>38</sup> This was the advent of so-called labor intensive contractors, such as cleaning services and IT consultants, in which the contribution of capital was not fundamental for the business. The jurisprudence tried to expand the concept of means of production, thus including organizational skills and specific know-how, in coping with this restrictive legal framework.<sup>39</sup>

---

37. F. Scarpelli, *Iniziativa economica, autonomia collettiva, sindacato giudiziario: dall.art. 41 della Costituzione alla recente legislazione sulle trasformazioni dell'impresa*, LAVORO E DIRITTO 15 (1996).

38. PIETRO ICHINO, *IL CONTRATTO DI LAVORO* (2003).

39. See Corte di Cassazione Sezioni Unite, 19-10-1990, n. 10183, (1992) *Il foro italiano* I 524.

The difficult dialogue between courts and the legislation could not last, nor could the public monopoly of placement services meet labor market needs. In 1997, the well known European Court of Justice (ECJ) case *Job Centre II*,<sup>40</sup> which dealt with the European discourse about freedom of competition, held that public employment services were no longer entitled to exist as a monopoly, one of the reasons being that they were not capable of efficiently satisfying the needs of job seekers in the labor market. Public employment services were to be considered just like other economic activities, meaning that Italy was required to allow private companies to enter the labor market as intermediaries.<sup>41</sup>

Because of the propitious time for liberalization in the field, a new law was approved, No. 196 of 1997, albeit not repealing the law of 1960. But a “hole in the wall” was made:<sup>42</sup> some private agencies were permitted to hire workers and *temporarily* supply them to end user firms, and an exhaustive discipline was set up to regulate the position of each and every person within this triangular work relationship and to regulate the authorizing process for the agencies.

In 2003, the Italian government decided to modify the 1997 regulations on temporary work and introduced a new form of agency work to cope with firms’ demands of long term agency workforce, called “somministrazione di lavoro a tempo indeterminate.” Meanwhile, the 1960 law was repealed.<sup>43</sup> Agencies play a crucial role and are now active subjects in the labor market, being authorized not only to supply personnel, but also to recruit job seekers, to select them according to the client user, to train them after periods of unemployment (article 20, Decree No. 276 of 2003). Agencies have to comply with many restrictions before entering a contract with the user firm, concerning in particular organizational structure, minimum capital requirements, and professional qualification of its employees.<sup>44</sup>

---

40. C-55/96, *Job Centre Coop*, 1997 E.C.R. I-7119.

41. For an outstanding overview on this judgment, see Silvana Sciarra, *Job Centre: An Illustrative Example of Strategic Litigation*, in *LABOUR LAW IN THE COURTS: NATIONAL JUDGES AND THE EUROPEAN COURT OF JUSTICE* 241, 257 (Silvana Sciarra ed., 2001), where it is stressed, in particular, the “political pressure” exercised by Court’s ruling upon the national Parliament, so that “the attempts to reform the Italian placement system, exposed as they were to critical public evaluation, became as much an embarrassment for law-makers as a challenge for academics.”

42. Pietro Ichino, *Il lavoro interinale e gli altri varchi nel “muro” del divieto di interposizione*, *GIORNALE DI DIRITTO DEL LAVORO E DELLE RELAZIONI INDUSTRIALI* 503 (1997).

43. Although one of the effects of the new regulations is to consider outlaw those arrangements which fall outside the legal paradigm, thus implying that the old principle still endures. *See ex multis* MARIA TERESA CARINCI, *UTILIZZAZIONE E ACQUISIZIONE INDIRETTA DEL LAVORO: SOMMINISTRAZIONE E DISTACCO, APPALTO E SUBAPPALTO, TRASFERIMENTO D’AZIENDA E DI RAMO*. *DIRITTO DEL LAVORO E NUOVE FORME DI ORGANIZZAZIONE DELL’IMPRESA* 38 (Giappichelli ed., 2008)

44. This is also called the “*avant contrat*” phase. *See, e.g.*, the analysis in TIRABOSCHI, *supra* note 6, at 260.

Statutory intervention in the field of intermediaries remains relevant, and no longer concerns the very existence of agencies but, rather, the economic and organizational reliability of subjects who merely supply workforce. Also, as we will see, the law intervenes to fix the most essential elements of the contracts between the agency and the user, and the agency and the worker, and this means a complex system of protections for workers involved in triangular relationships.

Eventually, in 2007 the center-left government decided to repeal the open-ended contract called “*somministrazione di lavoro a tempo indeterminato*” (Law No. 247 of 2007), permitting agencies to supply workforce using fixed term contracts only, and after having verified the existence of objective economic needs of the user firm. For the comparative purposes of the present research, however, the systematic role played by agency work as a triangular work relationship is still valuable.

At the opposite end of the spectrum, the British legal system has traditionally refused to intervene in firms' freedom of contract and has never outlawed the possibility of user firms asking agencies and contractors to supply workforce. The first statutory intervention in this field, the 1973 Employment Agencies Act, centered on the notion of the “employment business,” “the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity,”<sup>45</sup> where the worker is supplied under either a professional engagement or a contract for services.

Although “employment agency” in this context is referred to recruitment agencies, the term commonly overlapped “employment business.”<sup>46</sup> This, however, is not surprising in a legal system in which the placement service has been traditionally dominated by private bodies,<sup>47</sup> as opposed to the public monopoly that existed in Italy in the same years. It should also be pointed out that the Act does not extend to sub-contracting, i.e., independent contractors undertaking specific tasks using their own staff acting and remaining under their direction and control.

One of the main features of the 1973 Act and the subsequent 1976 Conduct of Employment Agencies and Employment Business Regulations was that they placed certain duties of conduct on the employment agencies and the employment businesses. These parties had to obtain adequate

---

45. Employment Agencies Act 1973, § 13 (1), (3) (Eng.).

46. Morris, *supra* note 33, at 106.

47. For the debate on the opportunity to introduce a public monopoly in Great Britain as to abolish the fee-charging employment services, see Bob Hepple, *United Kingdom*, 36 PRIVATE EMPLOYMENT AGENCIES 380, 380 (1999).

information from the employer and worker clients in choosing the suitable worker for a vacancy and vice versa. They were then required not to offer workers financial benefits or benefits in kind to persuade them to use their service and had to ensure that the worker and employer were aware of conditions imposed by law that the worker or employer had to satisfy.

Before 1995, employment businesses and agencies had to obtain a special license for the purpose of the protection of the public interest, a measure then replaced by the power, given to the Secretary of State, to issue a prohibition order against a specific person not to let him/her engage in one of the activities connected with recruitment or placement services. This order had to be granted by an employment tribunal, unless it was satisfied that the person was, "on account of his misconduct or for any other sufficient reason, unsuitable to do what the order prohibits."<sup>48</sup>

The fact that statutory intervention had been confined to the regulation of employment agencies and businesses as labor market actors, and not as bodies directly involved with individual and collective labor rights of the workers, reflected a liberal approach to the matter of agency work and had, as a consequence, the effect that the only subsequent regulation in the field would be of the same kind. The huge debate in recent years about individual rights to be granted to agency workers<sup>49</sup> eventually gave birth to another weak discipline, the Conduct of Employment Agencies and Businesses Regulations 2003,<sup>50</sup> which shares the same rationale as its predecessors and maintains the distinction between employment agencies and employment businesses.

Clear regulations governing the conduct of agencies and business is supposed to be the best way to protect users, rather than creating bureaucratic schemes to control entry into the industry. As will be shown later, the improvement of the individual rights of an agency worker is actually better achieved by prescribing the circumstances in which an employment business can enforce a transfer fee against a user enterprise and by asking the employment business to obtain information about health and safety risks inherent to the end user.

Although in general abolished in 1995, a specific license has now been reintroduced in some specific sectors. The Gangmasters Licensing Act 2004, which came into effect in 2006, requires a license for employment businesses supplying a workforce in agriculture, shell fishing, and processing and packaging activities related to agriculture and fishing. This

---

48. Employment Agencies Act 1973, § 3 (A) (Eng.) (inserted by the Deregulation and Contracting Out Act 1994).

49. Well summarized by the Trade Union Congress 2003. See TUC, *AGENCY WORK IN BRITAIN TODAY* (2003).

50. Most of the provisions of the Regulations 2003 came into force in April 2004.

Act provides several technical mechanisms very close to the strict regulations adopted in Italy concerning intermediaries. In particular, Section 6 provides that a person shall not act as a gangmaster except under the authority of a license, all licensed persons being registered by the Gangmasters Licensing Authority (described at Section 1). Similarly to article 2 of the Italian law No. 1369/60, Sections 12 and 13 of the Act create specific offences of acting as a gangmaster, being in possession of false documents and entering into arrangements with unlicensed gangmasters for the supply of workers or services.

The rationale for this latest statutory regulation concerns the empirical statement that the more an intermediary position and activity is regulated, the less supplied workers have to fear for their individual rights. Far from being applicable to all cases of agency workers, such regulation is only a small part of the job of the legislature, and at the same time it has created many juridical and political problems for the British government, both in the description of the kinds of contractors to be considered as gangmasters and in the definition of the scope of the regime.<sup>51</sup>

This overview of the regulatory approaches of the Italian and the British legal systems, concerning intermediaries as bodies within the labor market, reveals a divergent historical development. While in Italy the general prohibition on workforce supply could only be obliterated where the intermediary was a “real” entrepreneur, acting in that particular moment for the purpose of his own business, in the United Kingdom the market’s freedom was supposed to guarantee the most effective balance between the prerogatives of the three parties involved.

In recent years, however, both countries have seen the growing importance of the “*avant contrat*” phase, which concerns specific requirements for the intermediary and the complex procedure of licensing. Quite relevant is the scope of application of the 2003 regulations: in fact, the distinction between agencies and businesses has been introduced in both legal systems, but with little or less importance, such that the Italian term “agency” corresponds to the British term “employment business,” albeit the latter term also commonly defines an agency in the United Kingdom.<sup>52</sup>

At a policy level, strong external state intervention is taking place in Britain instead of the liberal *laissez faire* approach that dominated after the Second World War until the late 1980s.<sup>53</sup> Both 2003 regulations provide

---

51. Davies & Freedland, *supra* note 2, at 292.

52. The normative distinction between mere recruitment services and leasing of personnel has no practical effect in the two legal systems, since the same “agency” carries out either the employment business, or the employment agency service.

53. PAUL DAVIES & MARK FREEDLAND, *LABOUR LEGISLATION AND PUBLIC POLICY* (1993) [hereinafter DAVIES & FREEDLAND, *LABOUR LEGISLATION*]; PAUL DAVIES & MARK FREEDLAND,

that the agency worker must be aware of the contents of the contract signed with the intermediary through a statement given before the assignment.<sup>54</sup> Also, both regulations require the agency to pay the worker in respect of the work done by him or her, whether or not he or she is paid by the hirer in respect of the work; a written statement must be given to the worker concerning this obligation.<sup>55</sup>

The relative convergence of the two regulations described above seems to arrest as far as individual labor rights are concerned, both in respect of the agency and of the user firm. This means that the two legal systems, although focusing on the strongest actor in the triangular relationship, the agency, developed different sets of rules for the preliminary phase, through different means, Italy using a primary source and the United Kingdom using a secondary one.

To select agencies with a reasonable expectation of economic reliability, a legal system can either require specific authorization or licensing or split powers between agencies and users and establish solidarity in employers' obligations, leaving the role of statutory intervention as a mere incentive. In the second scenario, the legal system relies on the company's behavior and the market's response, the more trustworthy the agency, the smaller the risk for the user to be responsible for employment obligations. While the Italian regulation 2003 provides a combination of regulatory techniques, the British approach reveals a liberal use of the market's devices, the only exception being in the agriculture and fishing sectors.

As the next paragraph explains, the divergence between the two countries may also be noticed when specific labor institutions are concerned, thus revealing opposite policy reasons in dealing with protection of agency workers, the Italian law 2003 developing a "systematic" discipline and the British system imputing specific rights "from outside" the triangular relationship.

#### IV. EMPLOYER'S CONTRACTUAL RESPONSIBILITY WITHIN THE TRIANGULAR ARRANGEMENT: THE AGENCY AS A STABLE BRIDGE?

Most of the issues arising from the relationship between an agency, an end user, and the supplied workers are related to the pivotal role of the former, which takes part both in the commercial contract with the user and

---

TOWARDS A FLEXIBLE LABOUR MARKET; LABOUR LEGISLATION AND REGULATION SINCE THE 1990S (2007) [hereinafter DAVIES & FREEDLAND, FLEXIBLE LABOUR MARKET].

54. Conduct of Employment Agencies and Businesses Regulations 2003, § 14(2)(b); Biagi Law, Legislative Decree 276 of Sept. 10, 2003, S.O. 159 Gazz. Uff. Art. 20(3).

55. Conduct of Employment Agencies and Businesses Regulations 2003, § 15(b); Biagi Law art. 21(1)(k).

in the peculiar contract with the worker. To tackle the problem of the status of agency workers, Italian law includes this latter contractual relationship within the category of the contracts of employment. This means that the typical role of the employer is played by a subject that is supposed to be reliable in the contractual obligation toward its employees. This presumption is clearly evidenced by the economic and organizational requirements described above, by emphasizing the “avant contrat” regulatory phase.

At a theoretical level, the Italian law of 2003 introduced a new typical framework with specific rules and conceptual consequences, since the traditional struggle of Italian labor law in identifying who is a worker—using the two concepts of disciplinary power and directive power—would now deal with a changed notion of subordination and a mixed arrangement of powers. Thus, comparing this model to the situation of agencies in the British system, the analysis will focus on three contractual positions<sup>56</sup> that are usually typical of the employer and are here mainly centered on the agency only, or shared with the end user, diachronically (subsequently) or synchronically.

#### A. *Hiring and Firing Power and Disciplinary Procedure*

The main task of an agency is to hire workers to be supplied to private or public bodies for the benefit of these bodies. To carry out this service, the agency enters into a contractual employment relationship with a worker<sup>57</sup> that can be either fixed term or open ended, regulated by the Civil Code and the other laws concerning employees. The contract of employment must be written, and the worker must be notified with the essential elements of the commercial contract between the agency and the user firm.

Although the worker is considered by law an employee of the agency, the agency has no legal obligation to provide continuous employment or a certain number of assignments. Vice versa, the worker is under the typical duties of an employee to the agency, so that if he or she breaches one or more of his or her duties, the agency can then act as a proper employer and fairly dismiss him or her. The worker can neither refuse an assignment or abstain to exactly perform his or her duties during the assignment.

---

56. I will use the term “contractual position” to refer to powers, duties or prerogatives typical of the employer vis-à-vis his employee in the normal bilateral contract of employment.

57. In the United Kingdom, the Regulations 2003 call him/her ‘work-seeker’, which means, according to Section 2, “a person to whom an agency or employment business provides or holds itself out as being capable of providing work-finding services.”



When worker's faults concern conduct or performance within the user firm, the Italian law of 2003 provides a shared and subsequent use of the disciplinary procedure, with the user having the burden of notifying the agency of the relevant facts assumed to be disciplinarily relevant, and the agency then having the power to inflict proportionate retribution.<sup>58</sup>

To compare the contractual position of the agency in Britain, one must point out the great importance, in the absence of any regulation, of agreements undertaken by the parties to regulate their own duties and prerogatives in front of the worker. Because in this field there is no statutory provision at all, the conduct of the parties must be interpreted according to common law principles.<sup>59</sup> Among them, a central role is played by the mutuality of obligation test, which tends to describe two levels of analysis of the mutual exchange between the employer and the employee, work for remuneration, and "mutual obligations for future performance."<sup>60</sup>

Very often, however, the application of the test has revealed its weakness when a trilateral work relationship has been involved, as mutuality of obligation can be supported only in its first and narrower meaning. This happened in *Montgomery v. Johnson Underwood*,<sup>61</sup> a case concerning whether a person who was engaged by an agency to provide her services as a receptionist to a third party could be considered under a contract of service by the employment agency or by the end user. The Court of Appeal, confirming the authority of *Ready Mixed Concrete*,<sup>62</sup> held that "mutuality of obligation and the requirement of control on the part of the potential employer are the irreducible minimum for the existence of a contract of employment."<sup>63</sup> Thus, the worker was found to have no contract of employment with the agency, nor with the user, since she lacked the minimum obligation of mutuality and control.<sup>64</sup>

As far as mutuality is concerned, agency workers fall outside the scope of application of labor law, not being implied a contract of employment with the agency for the insufficient mutuality of obligation. If one looks at the Italian regulation, an opposite result is reached in the similar situation in

---

58. Biagi Law, *supra* note 54, at art. 23(7).

59. In particular, the starting point of any judicial analysis of the contractual arrangements is the statement that the application of the common law tests identifying an employment relationship is a "question of mixed fact and law." *O'Kelly v. Trusthouse Forte plc*, [1983] I.R.L.R. 369. Further, the written statement required to be noticed to the agency worker, according to the 1976 regulations, will not necessarily determine his/her status in law. *Wickens v. Champion Employment*, [1984] I.C.R. 365.

60. MARK FREEDLAND, *THE CONTRACT OF EMPLOYMENT* 20 (1976).

61. *Montgomery v. Johnson Underwood*, [2001] I.R.L.R. 264.

62. *See Ready Mixed Concrete (S.E.) Ltd. v. Minister of Pension and Nat'l Ins.*, [1968] 2 Q.B. 497.

63. *Id.*

64. *See also Ironmonger v. Movefield Ltd.*, [1988] I.R.L.R. 461.

which the agency is not obliged to provide a future assignment and the worker himself or herself has no duty to accept after the expiration of the contract. Within the term of the contract, however, the agency must provide a specific income guarantee for periods during which no assignments are available, so it would be unfair for the worker to refuse a proposal for work during such times.<sup>65</sup>

Moreover, while the Italian law addresses the power to dismiss of the agency *because* it is considered the employer, according to the common law the power to conclude the contract and its concrete exercise are not sufficient elements to imply the employee status of the worker, nor *consequently* to claim for unfair dismissal.<sup>66</sup> In the British legal system, in fact,

it will be an exceptional case where a contract of employment can be spelt out in the relationship between an agency and the worker. Typically, the agency does not have the day-to-day control which would establish such a contract. Nor is the worker carrying out the work directly for the agency, and there is usually no obligation on the agency to find work or on the worker to accept it, let alone personally to do it.<sup>67</sup>

Notwithstanding the element of mutuality, English law provides “from the outside” a peculiar obligation to be accomplished as far as disciplinary procedures are concerned. In fact, agency workers are included in the number of those who have the right to be accompanied by a companion at a disciplinary or grievance hearing under the Employment Relations Act 1998.<sup>68</sup> If the individual has a worker’s contract with the agency, that right will be applied against the agency; otherwise, the right will be exercisable against both the agency and the user firm.<sup>69</sup>

### B. Remuneration and Solidarity Principle

Closely related to this but also as a consequence of the issue of mutuality is the obligation to provide for payment, usually centered upon the agency, and the connected question whether the agency is under a duty to pay the worker a minimum wage according to the national regulations in this field.<sup>70</sup>

---

65. This kind of income is called “indennità di disponibilità.” See Biagi Law, *supra* note 54, at art. 20(2), 22(3).

66. See *Bunce v. Postworth Ltd. t/a Skyblue*, [2005] I.R.L.R. 557.

67. See *James v. London Borough of Greenwich*, [2007] I.R.L.R. 168; see also the subsequent judgment of the Court of Appeal *James v. London Borough of Greenwich*, [2008] I.R.L.R. 302, in which eventually the appeal has been dismissed and the EAT confirmed.

68. Employment Relations Act 1998, § 13(1)(b).

69. *Morris*, *supra* note 33, at 108.

70. The minimum wage is guaranteed both in Italy and in the United Kingdom, although by different means: for the former, in fact, it is the result of the interpretation of a Constitutional principle

Considered a regulatory technique, the requirement of a minimum wage to be paid to the agency worker is one of the most relevant because of its consequences in terms of a firm's strategies and planning of costs. In fact, if a user firm is obliged to set equal treatment to periphery workers, it might believe to waste the benefits in the use of agency work and other flexible forms of labor. From the opposite perspective, to prevent the exploitation of workers, the law might intervene and fill the gap between individuals who often work side-by-side, even for periods of years.

The Italian law of 2003 provides two rules in this field. First, the agency must grant to the workers a treatment not lower than that given to comparable employees of the end user, according to the classifications contained in the relevant collective agreements.<sup>71</sup> Not only equal pay, but also equal working conditions, such as working hours, holidays, sickness, discipline rules, and equal social security services, must be granted to the agency worker. When a comparable worker cannot be found within the user firm, the comparison must be with a hypothetical comparable worker, according to collective agreements. Collective bargaining plays a central role and can also decide the result-related portion of the wage that must be distributed to all workers, whether directly employed or not.<sup>72</sup>

As to the second rule, there is a general principle of solidarity in obligations between the agency and the end user, concerning both remuneration and the social contributions owed to the workers.<sup>73</sup> The principle of solidarity, extended to include every payment related to the performance of the agency worker in favor of the user, represents the most characteristic normative institution in the Italian legal system and creates a powerful link between the formal and the effective employer to provide a guaranteed floor of rights for all workers involved in the triangular relationship.

At a theoretical level, the principle of solidarity requires two essential conditions to be satisfied: identity in the obligation (*eadem res debita*) and its unique source (*eadem obligandi causa*).<sup>74</sup> While no doubts may be cast on the identity of the obligation that has to be performed by the agency and by the user firm (the payment of remuneration), identifying the uniqueness of the source can be more complex, since within a triangular relationship there are two different contracts, both centered on the role of the agency, but without an explicit link between the worker and the end user.

---

(Cost. article 36) combined with collective agreements, while for the latter it is provided by a specific Statute (National Minimum Wage Act, 1998 (Eng.)).

71. Biagi Law, *supra* note 56, at art. 23(1).

72. *Id.* at art. 23(4).

73. *Id.* at art. 23(3).

74. FRANCESCO BUSNELLI, L'OBBLIGAZIONE SOGGETTIVAMENTE COMPLESSA 133 (1974).

In the context of Italian labor law, agency work should be considered as a whole, as a new legal framework, and effectively as a new means of personally performing labor. The position of the end user vis-à-vis the agency worker, in fact, should no longer be seen merely as a factual one, having now many legally binding consequences. Therefore, the unique source of obligation should be centered on the commercial contract between the agency and the end user, a contract that generates a number of contractual positions upon the three parties in the triangular arrangement. Finally, the principle of solidarity reveals an *eadem obligandi causa* because of the respective interest of each “employer” (the agency and the user) to the performance of the worker. Arguably this is a central element in the argument that this study suggests, that is the idea of a shared position in the role of the employer between two distinct persons and, though, the one of a trilateral employment contract.

From another point of view, such a split liability in the most relevant obligation among the typical employer’s contractual positions reflects a partially changed perspective of labor law and its regulatory techniques. Clearly the law no longer centers responsibilities upon the person who bears the costs and risks of labor performance but, rather, put them on the party that derives some advantages from its use.<sup>75</sup>

By contrast, the approach followed in the United Kingdom about the right of agency workers for equal pay is totally different. Some statutes have included the workers in their scope of application, and one of the cases is the National Minimum Wage Act. Regardless of the existence of a worker’s contract, the Act applies in any case in which an individual is supplied by an agent to perform some work for an end user, also called the principal, under a contractual arrangement made between the two parties. By means of a *fictio iuris*, the statutory provisions concerning minimum wages have effect “as if there were a worker’s contract for the doing of the work by the agency worker made between the agency worker and whichever of the agent and the principal is responsible for paying the agency worker,” or if neither of the two is so responsible, “whichever of them pays the agency worker in respect of the work.”<sup>76</sup>

Although empowering agency workers in one sense, British statutes do not deal with the problem of the solidity of the person responsible for payments. By saying that minimum wage principles must be observed, whichever of the two is contractually or effectively responsible, the law fails to ensure that a reliable enterprise will pay for agency workers’

---

75. L. Corazza, *Appunti in tema di obbligazioni solidali e rapporti di lavoro*, I RIVISTA ITALIANA DI DIRITTO DEL LAVORO 77, 91 (1997).

76. National Minimum Wage Act, 1998 (Eng.), § 34(1), (2).

remuneration. The combination of this incoherence with the fact that no license is required to run an agency generates a lack of protection, as has been recently pointed out by British trade unions as evidence of the government's deficiency in the sector of agency work.<sup>77</sup>

*C. Health and Safety Duties and Protections*

The traditional prohibition on Italian employers to hire workers through intermediaries finds its origin in social security legislation of the early nineteenth century, that provided a specific income for women and children who were hired by employees and worked together for the same employer in the same plant. Subsequent health and safety provisions have always been conceived in light of a rationale according to which an employer who undertakes the business must grant his or her workers sufficient protection from the work-related risks that they might suffer.

While the Italian general regulation in this field refers to employers as persons who are bound by a contract of employment with an employee, a broader scope of application is provided as far as agency workers are concerned, because of the assumption that they are much more vulnerable than stable workers since they are less trained and informed of risks.<sup>78</sup> The law of 2003 splits duties and responsibilities between the agency and the user firm: the former must provide appropriate information about the general risks that workers undertake and specific training concerning the work assignment. The end user must give workers all information about specific risks related to the enterprise, must ensure medical support and surveillance, and is held responsible for all protection duties provided by law or by collective agreements.<sup>79</sup>

From a prescriptive point of view, albeit bearing in mind that in the law there is no reference to any kind of enforcement of the duties of the agency, this does not mean that the worker cannot claim for breach of contractual duties only against the user. In fact, the agency will be held responsible at all times for inadequate information that is given, also according to European provisions in this field, which include agencies in the category of those who are to be responsible as employers for the health and safety of their workers.<sup>80</sup> Also, the agency being able to decide at a first instance the total amount of labor costs, it must be held responsible for not

---

77. See TUC, *Below the minimum: Agency workers and the minimum wage* (2003).

78. The most recent survey about the risks of injuries of agency workers in Italy reveals that the injury rate is almost double than the one of stable workers, especially in the construction sector. See ISTITUTO NAZIONALE PER L'ASSICURAZIONE CONTRO GLI INFORTUNI SUL LAVORO (INAIL), 2005 ANNUAL REPORT.

79. Biagi Law, *supra* note 54, at art. 23(5).

80. Dir. 91/83/CE, article 1 (2) and 7.

having provided sufficient investment in this field. The combination of general and specific duties, lying respectively on the agency and the user firm, should in principle guarantee that the agency workers do not suffer higher risks of injuries during their assignments.

As will be shown, one of the most serious reasons for the weak protection of agency workers in the British legal system is that contractual obligations can hardly be implied with the user firm. Notwithstanding the frequent absence of contractual links with the worker, the end user is arguably responsible for duties related to health and safety provisions.

The Health and Safety at Work etc. Act 1974 provides for a specific duty on the employer to conduct his or her undertaking "in such a way to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."<sup>81</sup> Also, it shall be the duty of each person who has control of premises to take such measures as it is reasonable for a person in his or her position to take to ensure, so far as is reasonably practicable, that the premises are safe and without risks to health.<sup>82</sup> In practice, every user must tell the agency about risks to the worker's health and safety and about measures taken to control the risks and must guarantee, where necessary, appropriate health surveillance.

As a regulatory technique, this means that the user is under a legal obligation with regard to all persons employed in a specific plant, no matter which kind of contract they have. The consequences of this approach are that an agency worker injured while working for a user might sue for damages at common law for negligence or breach of a statutory duty against the user.<sup>83</sup>

As relates to health and safety provisions, both the Italian and British legal systems make agency workers liable to pay national insurance contributions as if they were considered to be employees, but with the difference that as to the former the worker must pay social contributions regarding to the business run by the user firm, while the latter scenario treats agency workers as employees of the agency. Although English law, for this purpose and for the purpose of income taxation,<sup>84</sup> continues to treat agency workers as employees, the common law still refuses to recognize any bearing on their employment status for other purposes,<sup>85</sup> since these provisions "cannot affect the use of the term employee in other contexts."<sup>86</sup>

---

81. *Id.* § 3(1).

82. *Id.* § 4(2).

83. Hepple, *supra* note 47, at 386.

84. *See* Income Tax (Earnings and Pensions) Act, 2003, pt. 2, ch. 7 (Eng.); Social Security (Categorisation of Earners) Regulations, 2006, S.I. 1978/1689 (Eng.).

85. SIMON DEAKIN & GILLIAN MORRIS, *LABOUR LAW* 173 (4th ed. 2005).

86. *See* *McMeechan v. Secretary of State for Employment*, [1997] I.R.L.R. 353.

V. THE END USER AS THE “FACTUAL” EMPLOYER: INTEGRATION AND CONTROL

The assumption that direction and control power should be the central issue in conceptualizing agency work is a notable point the Italian and English legislations have in common. In fact, both legal systems traditionally relied on the element of control as an essential characteristic of the contract of employment and of the notion of employee for purposes of applying the most relevant parts of labor rights. A convincing and coherent framework, it is suggested, also arises from an analysis of that power within the triangle typical of agency work, both at a theoretical level and at an empirical one, although this point is still controversial in the most recent case law.

In the Italian legal system, for many years the most relevant distinction characterizing the contractual position of the intermediary and of the user firm respectively has been that of a fake/formal employer opposed to a real/factual one. Ruled by the reality principle, labor law has traditionally centered upon the real employer, ascribing to him or her all responsibilities related to workers, regardless of whether the workers were supplied directly by the employer or by intermediaries. As we have seen, however, a change of perspective took place with the introduction of temporary work in 1997, and of leasing of workforce in 2003: the law only identifies the employer with the agency. Together with the fading of the distinction fake/real employer, the end user is no longer considered merely a factual employer, since he or she takes part in an illicit contractual arrangement, whose consequences are regulated by law no more as sanctions, but as common duties related to the peculiar position assumed in front of the workers.

Agency work greatly challenges the traditional assumption in Italian labor law according to which subordination is related to the elements of integration in and control by an employer's organization. Since these contractual positions upon the employer no longer take place, a first conceptual issue concerns the source of control legally exercised by the end user, which at first glance should not be considered an employer. It also might be difficult to justify how the juridical interest to the fulfillment of the work performance is allocated, whether upon the agency or upon the user firm. The Italian law of 2003 seems to have clarified most of these points by establishing that the source of control is arguably to be found in the commercial contract between the agency and the user: with that contract, in fact, the supplied workers must perform their work “upon the enterprise and in the interest of the end-user.”<sup>87</sup>

---

87. Biagi Law, *supra* note 54, at art. 20(2).

At the same time, this point causes theoretical disputes about the coherence of the creative allocation of powers and duties within the legal matrix of subordination described in article 2094 of the Italian Civil Code. Arguably after the regulations 2003 on agency work, a new and unique legal framework has been introduced in the Italian legal system, identified by the power to impose directives and controls centered on a “non-employer” or, *rectius*, on a doubled employer. In a functional perspective, therefore, the very role of the employer (duties, powers, and prerogatives) is legally shared by two persons that seem to be considered as employers of the supplied worker because of the simultaneous and/or concurrent exercise of the typical employer’s prerogatives.

At first glance, the British common law should not face such difficulties in allocating new forms of labor into narrow legal definitions, since it is governed by the principle *ubi remedium ibi ius*. Nevertheless, even in recent years this system has to cope with the integration and control tests, in order to define who is to be considered as an employee or a worker for purposes of many statutes providing important labor rights. One of the areas where these tests have shown relevant risks of misconception has been agency work, precisely because of some circularity in traditional assumptions.

In fact, if one considers integration as a circumstance in which a person is employed as part of a business and his work is done as an integral part of that business,<sup>88</sup> then one could conclude that a supplied worker is an integral part of the business of the user, and not of the agency. Again, the user and not the agency will be found as the counterpart of the employee if the control test is applied, including control “the power of the things to be done, the means to be employed in doing it, the time when and the place where it shall be done.”<sup>89</sup>

Quite often, courts and employment tribunals have struggled to find ways to escape from what seemed to be a blind alley. In many cases, in fact, the existence of an implied contract with the user firm has been denied, on the basis that if the individual fails to satisfy the tribunal that there is a contract of some kind with the user firm, then an implied contract of employment cannot be asserted.<sup>90</sup> Furthermore, when the agreement between the worker and the agency is merely an umbrella contract—that is a non-binding agreement through which the parties on paper are not obliged respectively to accept and offer a job opportunity—the worker can neither be considered an employee of the agency nor of the user firm, because of a

---

88. See *Stevenson, Jordan & Harris Ltd v. Mc Donald & Evans*, [1952] 1 TRL 111 (Denning LJ).

89. See *Ready Mixed Concrete (S.E.) Ltd. v. Minister for Pensions and National Insurance*, [1968] 2 Q.B. 515 (McKenna J).

90. See *Hewlett Packard v. O’Murphy*, [2002] I.R.L.R. 4 (U.K.).



lack of mutuality and control, and rather is considered to be self employed.<sup>91</sup>

Some decisions of the Employment Appeal Tribunal and the Court of Appeal have led the way to a more comprehensive analysis of agency work. In *Motorola*, for example, a contract of service was implied between the agency worker and the end user since the latter had a relevant degree of control over the worker and practically decided to terminate the assignment after a disciplinary hearing.<sup>92</sup> This might happen despite the absence of a contractual link with the user when dealings between the parties over a period of years are capable of generating an implied contractual relationship.<sup>93</sup>

One of the most outstanding cases in this regard is the very well known *Dacas v. Brook Street Bureau*, where a supplied worker's contract was ended by the agency because of the alleged misconduct.<sup>94</sup> The Employment Tribunal found that the applicant had been employed by nobody, neither by the agency nor the user, because of the lack of essential elements typical of any employment contract. In particular, the agency was not under an obligation to provide the applicant with work, and she was not obliged to accept proposals (absence of mutuality). Furthermore, the agency did not exercise day-to-day control over her work (absence of control). The Employment Appeal Tribunal overturned this decision and found that Mrs. Dacas should be considered as employee of the agency because of the fact that there was mutuality of obligation. The agency appealed to the Court of Appeal, and despite the second judgment had *de facto* excluded the user firm, the Court required its presence and stated that the first tribunal had erred in holding that there had not been an implied contract between the worker and the user.

The fascinating assumption of this case concerns the possibility to see the contractual position of the three parties as a whole, the degree of control over the work done being crucial, so that the function of the employer can be exercised together by the agency and the end user (Mummery, L.J.).<sup>95</sup> In analyzing triangular arrangements, the Court goes further, saying that there seems to be no overwhelming objection to a close combination of transactions, so that tribunals must consider the existence of two express contracts—a contract of employment between the worker and the agency and a commercial contract between the agency and the user—and of one implied contract (one of service between the worker and the user), the

---

91. See *Bunce v. Postworth Ltd.*, [2005] I.R.L.R. 557 (U.K.).

92. See *Motorola Ltd v. Davidson and Melville Craig Group Ltd.*, [2001] I.R.L.R. 4 (U.K.).

93. See *Franks v. Reuters Ltd.*, [2003] I.R.L.R. 423 (U.K.).

94. See *Dacas v. Brook Street Bureau (UK) Ltd.*, [2004] I.R.L.R. 358 (U.K.).

95. FREEDLAND, *supra* note 2, at 42–43 (Mummery LJ references Freedland).

agency acting in some extent as an agent both for the worker and for the end-user.

A similar result was achieved by the Court in *Cable & Wireless v. Muscat*, a rather complicate case where the basic principle of reality was applied.<sup>96</sup> Here the worker was asked by his employer to resign from his contract of employment and restart a contract for services provided through a limited company, *ad hoc* created. After a takeover, a new contractor took the place of the former employer and asked Mr. Muscat to provide his services not only through his company, but also through an agency. During all time the claimant had provided his services to Cable & Wireless (and before to the former employer) he was found to have a contract of employment, so that he could claim for unfair dismissal against the end user. An important finding of this case was that, to consider when a contract with the user must by necessity be implied, one should not look at a worker's choice not to accept the conditions imposed by the employer. Applying the *Aramis* test,<sup>97</sup> the Court found it necessary to imply such a contract in order to establish the enforceable obligations that are typical of the factual circumstances. Despite the absence of any specific normative provision about agency workers, the Court remarks that her conclusion was not an attempt to solve any social problem by judicial creativity, but rather an attempt to correctly apply the law.

In recent cases, British jurisprudence reverted the achievements of this doctrine and limited its effects. It would be a rare case where there will be evidence entitling the tribunal to find an implied contract between the worker and the end user: the mere existence of a relevant degree of control, in fact, does not itself mean that there is an implied obligation with the user.<sup>98</sup> Also, when the worker is employed by the agency under a contract of employment and is thus protected for unfair dismissal purposes, there seems to be no good policy reason for extending that protection to a second and parallel employer, nor there is any necessity to do it, since the ERA 1996 itself envisages one employer only to be liable in dismissal claims.<sup>99</sup>

These latest decisions give a clear impression that the interpretation of cases concerning agency workers is everything but clear, and that in some

---

96. See *Cable & Wireless v. Muscat*, [2006] I.R.L.R. 354 (U.K.). I would point out that the reality principle has always been an overwhelming rationale of labour law and in recent cases has been confirmed. See *Bushaway v. Royal National Lifeboat Institution*, [2005] I.R.L.R. 674 (U.K.) (His Honour Judge Reid) and *Consistent Group Ltd v. Kalwak*, [2007] I.R.L.R. 560 (U.K.) (Mr Justice Elias President), *overruled* by *Consistent Group Ltd. v. Kalwak*, [2008] I.R.L.R. 505 (U.K.), which allowed the appeal on the ground that the EAT had given any evidence that some clauses of the arrangement between the workers and the agency were in reality a sham, and, also, that it was not possible to imply into a contract a term that contradicted an express term (par. 23, per Rimer LJ).

97. See *The Aramis*, [1989] 1 Lloyd's Rep 213 (U.K.).

98. See *James v. London Borough of Greenwich*, [2008] I.R.L.R. 302 (U.K.).

99. See *Cairns v. Visteon UK Ltd.*, [2007] I.R.L.R. 175 (U.K.).

circumstances the common law finds many difficulties in challenging its typical tests, since the operation of stretching its basic concepts might be seen merely as creative judicial effort. What is peculiar of agency work is that often two concurring Gordian knots take place in the same situation, since difficulties arise not only from the multilateralism of the arrangement, but also from (real or fake) obligations of the parties respectively not to provide and to accept work. This means that sometimes the mutuality test has to be applied both to understand if the worker and his counterpart are under a mutual obligation (thus excluding self-employed and casual workers), and to find out who the real counterpart of the worker is (the formal employer or the factual one). Conclusively, what is undoubted is that a certain unease of interpreters leaks out from latest decisions, revealing different approaches of the judges, some being more consistent with the law as it is, some others more sensitive to experiment fresh remedies for agency workers, but all eventually requiring a specific intervention of statute law in this field.<sup>100</sup>

#### VI. VICARIOUS LIABILITY AND DUAL EMPLOYERSHIP IN TORTIOUS CONTEXTS

While the various attempts made by the common law of contracts—to establish a complex relationship within the triangular relationship typical of agency work—seem not to have reached uncontroversial results, some apparently unforeseen outcomes arrive from the law of torts. Both in civil law and in common law systems, it is a general principle that when an employee commits a tort while performing his or her work, vicarious liability is superimposed by law over the employer. Of this rule, also known as *respondeat superior*, many justifications have been given by scholars and jurisprudence, to figure out the very core rationale of what is, without any doubt, a case of objective or faultless responsibility.<sup>101</sup> And

---

100. I would quote a significant paragraph from the EAT case *James v. London Borough of Greenwich* by Mr Justice Elias: “We should not leave this case without repeating the observations made by many in the past that many agency workers are highly vulnerable and need to be protected from the abuse of economic power by end-users. The common law can only tinker with the problem on the margins. That is not to say that all agency relationships simply have as their objective to defeat the rights of the workers ... A careful analysis of both the problems and the solutions, with legislative protection where necessary, is urgently required.” *James v. London Borough of Greenwich*, [2007] I.R.L.R. 168, ¶ 61, *aff’d* [2008] I.R.L.R. 302.

101. A classical reading for common lawyers is PATRICK S. ATIYAH, *VICARIOUS LIABILITY IN THE LAW OF TORTS* ch. 2, 5, 17, 18 (1967), these chapters are very important for our analysis. In the same year in Italy two essential works for civil lawyers were published, R. SCOGNAMIGLIO, *CONSIDERAZIONI SULLA RESPONSABILITÀ DEI PADRONI E COMMITTENTI PER IL FATTO DEI DOMESTICI E COMMESSI* 163 (Rivista di Diritto Commerciale 1966); Luciano Spagnuolo Vigorita, *La responsabilità extracontrattuale e contrattuale del datore di lavoro per fatto del dipendente (artt. 2049 e 1228 c.c.)*, in *II NUOVO TRATTATO DI DIRITTO DEL LAVORO* 455 (L. Riva Sanseverino & G. Mazzoni eds., 1971).

many other reasons have been set to understand the functional aspects of this kind of non-personal responsibility, the question being whether it is attributed to the employer the action of the employee or the employee's liability for the damages he or she has caused.<sup>102</sup>

Since the classical justification that *cuius commoda eius et incommoda* was abandoned,<sup>103</sup> the need to find one or more legal principles able to found employer's vicarious liability has been felt, especially by courts and tribunals, to broaden its scope of application and for the ultimate purpose to give compensation to third damaged by the acts of employees. Curiously (or maybe not) some of those principles are closely connected to the traditional tests used in the common law to figure out whether a person is to be considered as an employee or a self-employed/agency/casual/home/zero hour worker.<sup>104</sup>

In many circumstances the justification of vicarious liability has been found in the better economic position of the employer than the one of his employees in respect to the third damaged, either because of his static features (an employer is supposed to have a "deeper pocket" than employees) or because of the dynamic elements of the business (the enterprise is able to spread the loss of the injuries through insurance or the price of its products). Conversely, many other cases indicate the employer as vicariously responsible because of his functional position over employees, so that he is held to be liable either for *culpa in eligendo* or for *culpa in vigilando*. It is especially these latter principles that seem to permeate, albeit not expressly, the more recent jurisprudence in Britain.

As far as agency work and the shared role of the employer are concerned, this should bring courts to make a blind choice or, to put it better, to decide whether to place responsibility on the shoulders of the agency (a) (also called *general employer*), who is able to choose the most suitable worker to be supplied, or on the end user (b) (the *temporary employer*) who in most cases exercises the day-to-day control, or even on both the agency and the user (c), because of their concurrent position of governing worker's performances. The leading authority in the British legal system for the first solution (a) is *Mersey Docks*, in which the worker's general employer was held responsible, because of the heavy burden of showing an opposite solution.<sup>105</sup> The relevant questions here

---

102. For an original, and in some extent, convincing point of view, see Robert Stevens, *Vicarious Liability or Vicarious Action?*, 123 L.Q. REV. 30 (2007).

103. Reflects of this rule seem to put the bases of some modern theories, such as Pollock's idea of danger or Trimarchi's idea of risk. F. Pollock, *Employer's Liability*, in *ESSAYS IN JURISPRUDENCE AND ETHIC* 114 (1882); PIETRO TRIMARCHI, *RISCHIO E RESPONSABILITÀ OGGETTIVA* (1961).

104. SIMON DEAKIN, ANGUS JOHNSTON & BASIL MARKESINIS, *TORT LAW* (2008).

105. See *Mersey Docks and Harbour Bd. v. Coggins and Griffith (Liverpool) Ltd.*, [1947] A.C. 1, 61.

were: who had immediate direction and control of the worker and whose responsibility it was to prevent the negligent act, the general employer. The same questions brought to an opposite solution (b) in *Denham*, being important in that case the assumption that the right of control carries with it the burden of responsibility.<sup>106</sup>

If we stopped our analysis to the (a) and (b) approach, we would see that the combination of the legal basis of vicarious liability with the suitable test to ascertain the nature of contractual relationship ends with bringing a detriment to the true subject of the vicarious liability principle: the third party. In most cases, courts still attach significance to the control test as an ultimate resort, without looking at the contractual operation between the parties as a whole. Had it been more deeply considered the statement “the law does not recognise a several liability in two principals who are unconnected,”<sup>107</sup> probably some decision would hold liable both the general and the temporary employers, since at least in agency work, the two are technically connected by a commercial contract and also they exercise in connection/cooperation with most of the employer’s functions.<sup>108</sup>

A recent case adopted solution (c) and restated the two-hundred-year-old assumption of *Laugher v. Pointer*, noting that at common law the contrary position has never been considered in depth. In *Viasystems v Thermal Transfer* the Court of Appeal held that both the general and the temporary employers were held responsible for the damages caused by a borrowed worker, since dual vicarious liability is likely to be imposed in situations where the worker is the counterpart of two co-employers.<sup>109</sup> By analyzing the historical development of common law principles in this field, and by taking suggestions from other jurisdictions (Australia, United States, Ireland, and Canada),<sup>110</sup> the Court took the view that the very basis of vicarious liability is the relationship between the employee and the employers.

However, the two judges give a slightly different reason of the identical result they have reached. While in May, L.J.’s opinion, the critical relationship is the employer’s right and obligation to control the relevant activity of the employees, so that dual vicarious liability derives as a consequence from the dual control over the employee, Rix, L.J. took the view that

---

106. See *Denham v. Midland Employers’ Mutual Assurance Ltd.*, [1955] 2 Q.B. 437.

107. *Laugher v. Pointer* (1826) 5 B & C 547 (per Littledale J).

108. ATTYAH, *supra* note 101, at 156.

109. See *Viasystem (Tyneside) Ltd. v. Thermal Transfer (Northern) Ltd.*, [2005] I.R.L.R. 983 (U.K.).

110. For references to the jurisprudence of the Supreme Court of Canada, see Robert Stevens, *Joint Vicarious Liability in the Supreme Court of Canada*, 122 L.Q. REV. 195 (2006).

what one is looking for is a situation where the employee in question . . . is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence. What has to be recalled is that the vicarious liability . . . is a doctrine designed for the sake of the claimant imposing a liability incurred without fault because the employer is treated by the law as picking up the burden of an organisational or business relationship which he has undertaken for his own benefits.<sup>111</sup>

This case has been variably interpreted and sometimes criticized by English scholarship. From one point of view, the decision would reveal conservatism in the approach in accepting end user's liability in few cases only as *Mersey Docks* did. Since contemporary labor law recognizes different forms of control that, especially as far as agency work is concerned, appears to be bifurcated into its right and its exercise, only the temporary employer should be liable for the torts of the borrowed employees, having the right to exercise control during the assignment.<sup>112</sup> What has been pointed out is that this case disturbs traditional assumptions over the allocation of consequences for employee's tortious actions and might help the development of the debate over the use of original techniques in analyzing new forms of labor. The central issue, here, is whether it would be possible/desirable to see these techniques deployed more extensively in the employment law field, and so to use them in building conceptual frameworks.<sup>113</sup>

A broad scrutiny of the latest cases on vicarious liability of temporary employers gives the impression that the influence of control test is still the most relevant factor in the judges' reasoning, *Viasystems* being accepted in its first assumptions only (about control), where in fact no conceptual innovations were argued. A clear example is *Hawley v. Luminar Leisure*, where a club was held to be responsible for the doorman's tortious actions because of the control exercised over his daily performance.<sup>114</sup> When regard is had not just to this case, but also to the other quoted, it is reasonable to conclude that British courts often have an "impressionistic" approach to the matter, common law rules being sometimes not suitable to be extended in a plethora of cases.<sup>115</sup> But except from considering the

---

111. See *supra* note 109, at 79.

112. Douglas Brodie, *The Enterprise and the Borrowed Worker*, 35 INDUS. L.J. 87, 91 (2006); *contra* Wynn & Leighton, *supra* note 27, at 313.

113. Simon Deakin, *Does the 'Personal Employment Contract' Provide a Basis for the Reunification of Employment Law?*, 36 INDUS. L.J. 68, 82 (2007).

114. See *Hawley v. Luminar Leisure Plc.*, [2006] I.R.L.R. 817 (U.K.). See also *Interlink Express Parcels v. Night Trunkers Ltd.*, [2001] E.W.C.A. Civ 360 (U.K.).

115. *But see* Frederic Reynold, *Negligent Agency Workers: Can There Be Vicarious Liability?*, 34 INDUS. L.J. 270, 272 (2005) (underlining that, as far as vicarious liability in tort is concerned, "the contractual relationship between the parties is not a crucial consideration.").

possibility to accept the idea of a divisible status of the employee,<sup>116</sup> depending on the purpose is it used for, it's arguable that courts should not waste the opportunity to re-found vicarious liability on more stable principles and, at the same time, to widen the results within a contractual context also. Such control has been used both to define an employee under a contract of employment and to identify the responsible employer for the torts of his employees, a more comprehensive test used in the latter case might yield some bearings on the former.

A forced passage to go through in demonstrating the need of broader perspectives is to analyze in brief the same question within the Italian labor law system, albeit by taking a different approach, since the starting point for vicarious liability is the legislative assumption that the end user is responsible for torts committed by the supplied workers during their assignments.<sup>117</sup>

The principle of *respondeat superior* is deeply rooted in Italian civil law and it is regulated in article 2049 of the Civil Code. According to this article, the rationale of the principle must be found in the need of protection of third parties, strangers to the contractual arrangement between the employer and the worker, this one being in a peculiar position for the economic purpose of the former and taking part to its organization or business.<sup>118</sup> Applying this justification to the case of agency work, the leading scholarship finds a coherent rule the one of holding the user responsible for the worker's torts, because of the close and peculiar position of the latter in respect to the former. Thus in this situation the agency would stay aside, not being responsible of any action done by the employee, although the article of the Civil Code would be applicable to the agency itself as the legal employer.

What might seem a contradiction of rules is instead an enriching key to interpret the allocation of powers and prerogatives upon what we are now able to call the "two employers." It can be suggested that, had regard been given to current law about agency work, supplied workers are not only part of the user's firm but also of the agency's organization, which should be conceived not just as a hiring company (like the British "employment agencies"). The very difference between former regulations and 2003 labor market reform has concerned the role of agencies within the labor market: though acting as previous public placement services, the agency has nowadays another substantial role over the contractual relationship with the workers. Notwithstanding this crucial point, the agency would reduce its

---

116. DEAKIN, JOHNSTON & MARKESINIS, *supra* note 104.

117. Biagi Law, *supra* note 54, at art. 26.

118. An outstanding analysis of the principle and its foundations is given by SCOGNAMIGLIO, *supra* note 101.

function merely as a hiring entity. Therefore, since the worker takes part of the organizational structure both of the agency and the end user—an issue deeply analyzed also in *Viasystems* (see Rix, L.J.)—there is no practical reason to exclude the former from the legal obligation centered on vicarious liability principle.<sup>119</sup> Technically then, it is conceivable that the element that yields this bearing is the concurrent interest of the two employers to the work performance, which is reflected in the shared position of powers, prerogatives, and duties upon them.

As a result, as far as agency work is concerned, the rule of vicarious liability is arguable to operate both against the agency and the end user, “leaving them to dispute among themselves who should bear the burden”<sup>120</sup> and, in any case, following the solidarity principle and thus holding the two responsible for an equal contribution.<sup>121</sup> This solution seems to take in great account the central rationale that permeates both article 2049 Civil Code and article 26 Decree No. 276 of 2003, that is the primary protection of third parties damaged by enterprises’ activity with a view to the Constitutional principles of social solidarity.

In a similar extent, the rule of dual employer’s liability for torts appears to fit also in a common law context, where recent cases showed some confusion in finding a basic principle to rely on. Since the problem of founding vicarious liability is strictly related with the juridical boundaries of the enterprise and its factors, only by considering agency work as a whole (and so employer’s liability as shared) one can balance the values and interests of every society. In tortious contexts, this is what has recently been called the “organizational liability,” to light the need of modern labor law to cope with the problem of fragmentation of the enterprise and the decline of hierarchically organized internal labor markets.<sup>122</sup>

#### VII. A WORKER OF ONE, NONE, OR TWO EMPLOYERS: DUAL EMPLOYERSHIP AS A CONCEPTUAL FRAMEWORK

Though not openly recognizing triangular employment relationships as such, both in the Italian and the English labor law systems there seem to be more and more hints and traces of original remedies to be employed in providing acceptable practical solutions and coherent theoretical concepts to the issues of agency workers. The very notions labor law traditionally was focused on are in some extent reshaped by the analyzed changes of

---

119. *Contra* Hawley v. Luminar Leisure Plc., *supra* note 113, at 112.

120. ATYAH, *supra* note 101, at 163.

121. See article 1294 of the Italian Civil Code and a similar rule given in *Viasystem* (Tyneside) Ltd. v. Thermal Transfer (Northern) Ltd., [2005] I.R.L.R. 983 (U.K.).

122. Simon Deakin, “Enterprise Risk”: *The Juridical Nature of the Firm Revisited*, 32 *INDUS. L.J.* 97, 113 (2003).



economic structures. Once the endeavors of scholars are addressed to the study of what has been called the “employing entity,”<sup>123</sup> one cannot help taking into account that new conceptual frameworks should be used very carefully in their prescriptive attitudes, the risk being that of creating more problems than solving them.

What is arguable after the broad analysis of the main law institution at work in the Italian and British systems is that in some extent a common matrix may be found in all cases when the duties of the employer are either shared (i.e., remuneration duty) or exercised in cooperation at different times (i.e., in the course of a disciplinary procedure) or for different purposes (i.e., health and safety provisions). This sharing of duties generates curious effects on what is still supposed to be a mere splitting of powers: only if we see the contractual triangular relationship as a whole, traditional common law tests will fit to the different situations, so that as a result the worker must be deemed as controlled by both employers, as well as a part of the business of both of them.<sup>124</sup>

Since the traditional assumption, especially in the Italian labor law context, is that the contract of employment is the central matrix of the enterprise as an organizational structure, what we see in agency work is that the triangular work relationship essentially creates two distinct but connected organizations. This is a point that cannot be ignored by the law, and in fact has been pointed out by many scholars in the common law.<sup>125</sup> The options here are either to have a functional approach to the various situations, so considering multiple employers for different purposes,<sup>126</sup> or to have a rather more comprehensive approach, regarding to the two employers as a whole and multiple employing entity.<sup>127</sup>

The problem with the first approach is that it might bring interpreters to ignore some factual elements or more frequently to exclude some solutions because of the absence of the factors considered essential to the doctrine, thus leaving a worker of one or even no employer for that particular purpose. Therefore I would agree with the broader approach albeit its bearings have to be carefully verified, in the light of the two most established arguments against the recognition of an employing entity that is doubled in its typical functions and duties: necessity and policy reasons.

---

123. FREEDLAND, *supra* note 2.

124. The clear reference here is at the never ending attempts of the British jurisprudence to define the boundaries of a progressively more altered enterprise, where (to put it with Jünger's words) “nothing is constant except changing.”

125. See Judy Fudge, *The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection*, in *BOUNDARIES AND FRONTIERS OF LABOUR LAW* 298 (G. Davidov & B. Langille eds., 2006).

126. Deakin, *supra* note 28, at 84.

127. Davidov, *supra* note 35, at 748; FREEDLAND, *supra* note 2, at 40.

In many cases both British and Italian jurisprudence denied protection to agency workers because of the absence of any *necessity* in doing so, that is to say that to imply a contract from the conduct of the parties, “it is not enough to show that the parties have done something more than, or different from, what they were already bound to do under obligations owed to others.”<sup>128</sup> Taking into account the test of necessity as the one able “to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist,” we should not skip over the agency worker’s point of view. To put it in better words, it is now unacceptable to consider the economic reality of agency work as if it were a “mono-dimensional unit,” the risk being of “dis-embedding the employment relationship from the organisational context in which the work is performed.”<sup>129</sup> It is quite clear, in fact, that if we look at the business reality as a situation where two distinct companies are acting as if they were effectively only one, it would be a rare case to imply such a contract with the user, or both with the user and the agency, when the arrangements are genuine.<sup>130</sup>

Instead, considering the same factual situation from the worker’s (juridical) point of view, the coexistence of two employers might be seen as the rule, the bilateral contract being the exemption that happens when the agency plays the merely formal role of a hiring subject. But British courts still appear unwilling to do so. A similar problem occurred when the Italian jurisprudence had to deal with the law No. 1369 of 1960 and decide whether the formal employer would have been held responsible for the worker’s payments in case of insolvency of the user firm. Notwithstanding the needs of protection of the workers involved in the triangular relationship, since the letter of the law addressed all responsibilities upon the “real” employer (the end user), creating *ex lege* a contract of employment with him, the Corte di Cassazione denied the possibility for the worker to claim against the “formal” employer (the hiring company).<sup>131</sup>

The second strong argument against the recognition of a triangular work relationship between the worker, the agency and the user has been the one concerning *policy* reasons, which are to be taken into account by common law courts, being instead (more or less) indifferent in a civil law context. Here the gap between the different approaches of the two countries

---

128. See *Mitsui and Co. Ltd. v. Novorossiysk Shipping Co. (The Gudermis)*, [1993] 1 Lloyd’s Rep 311 (per Staughton LJ); *The Aramis*, [1989] 1 Lloyd’s Rep 213 (per Bingham LJ).

129. Deakin, *supra* note 28, at 73.

130. See *James v. London Borough of Greenwich* [2007] (per Elias LJ at par. 58)

131. See Cass., sez. un., 26 oct. 2006, n. 22910, Foro It. I 2007, 275; Cass., sez. un., 2 oct. 2002, n. 14897, Foro It. I 2003, 188; Cass., sez. un., 21 mar. 1997, n. 2517, Foro It. I 1997, 705.

we are analyzing is significant, and lays on the rationale that is to be found in each and every case.

In *Cairns v. Visteon* the EAT, denying the existence of an implied contract with the user, held that as far as policy considerations are concerned vicarious liability cases must be distinguished from unfair dismissal ones. While a concurrent responsibility might be found in a tortious context—where the policy reason is the protection of injured third parties—it is unnecessary to find that the worker is employed under a contact of service by both the general and the temporary employer, being the protection under Part 10 ERA against unfair dismissal rather different. What curiously brought the judges in this case to deny the possibility of a triangular work contract has been the fact that there seems not to be any basis “for departing from what has been the common understanding from at least of the judgment of Littledale J in *Laugher v Pointer* in 1826: a servant cannot have two masters.”<sup>132</sup> The impression one can get from the reading of case law is that, by and large, some interpretations seem to be rather circular, yielding in many occasions the effect of overestimating contractual clauses on paper, and thus not taking into account implied obligations put on the shoulders of the agency worker, nor giving enough space to some rights typical of the employee.<sup>133</sup>

One field where the acceptance of dual employership as a key of interpretation would have relevant consequences is that of collective rights of agency workers. In Italy the issue is regulated by article 24, decree No. 276 of 2003, which tries to find adequate remedies to the fragmentation of the firm’s community, traditionally seen as the crucial element where collective rights developed. According to this provision, agency workers are allowed to exercise typical collective rights as if they were employees; although the norm doesn’t tell in which context these rights might be exercised, both the agency and the user firm must guarantee them, since practically agency workers are part of two organizations. Therefore agency workers have the right to summon assemblies, the right to strike and the right to collect contributions against both the employers, and both cannot make any discrimination concerning the union affiliation of agency workers. It seems quite clear that the dual employership perspective we adopted is in this field entirely fulfilled, referring as it does to the very core of labor rights. A similar bearing could be yielded in the British context,

---

132. See *Cairns v. Visteon UK Ltd.*, [2007] I.R.L.R. 175 (per Peter Clark J, at 17).

133. It must be said, however, that British courts traditionally refuse to assign too much importance to implied obligations, as recently stated in *James v. London Borough of Greenwich* [2008] (above at 67). See Edward Brown, *Protecting Agency Workers: Implied Contract or Legislation?*, 37 *INDUS. L.J.* 178, 181 (2008); Frederic Reynold, *The Status of Agency Workers: A Question of Legal Principle*, 35 *INDUS. L.J.* 320, 320 (2006).

where the law seems much less prepared to experiment new means of representation of atypical workers and the weakness of trade unions could be seen as a “fertile land” to affirm rights for agency workers.

#### VIII. AGENCY WORK RELATIONSHIPS AND NEW CHALLENGES FOR EUROPEAN LABOR LAW

The issue of providing a floor of rights for all those workers that fall outside the scope of application of labor law is not a new one in the European context. Facing the disadvantages of having many different disciplines (or having none) concerning agencies and employment businesses as active actors in the national labor markets, European institutions proposed a series of regulatory means of intervention in this area.

However, the regulation of temporary agency work at European level has been contentious for some decades, at least from the time the Commission first submitted a draft Directive in 1982, which was never adopted. In 2000, the social partner organizations ETUC, UNICE, and CEEP launched talks on a temporary work agreement, but after a year of negotiations “it became clear that the employers were not going to accept that temporary agency workers’ conditions should be on an equal footing with staff in the user company.”<sup>134</sup> In March 2002, taking into serious account the breakdown between social parts, the European Commission put forward a proposal for a Temporary Agency Work Directive,<sup>135</sup> endorsing the principle of non-discrimination between temporary agency workers and “comparable workers” in the user firm. This first proposal was then amended<sup>136</sup> so as to answer to the several questions moved by the European Parliament, but too many objections were then raised by Member States.<sup>137</sup> One of the main obstacles stressed by the British government and the business organizations was the qualifying period that an agency worker would have spent on a particular assignment before being subjected to “equal pay” rights, a point that, instead, had to be abolished according to other Member States.

---

134. ETUC 2006.

135. Commission Proposal for a Directive of the European Parliament and the Council on Working Conditions for Temporary Agency Workers, COM (2002) 149 (Mar. 2, 2002).

136. Commission Proposal for a Directive of the European Parliament and the Council on Working Conditions for Temporary Agency Workers, COM (2002) 701 final (Nov. 28, 2002).

137. Especially the United Kingdom, Denmark, Germany, Ireland, Poland, and Slovakia blocked the course of the Directive, which had to be approved following the co-decision procedure.

A recent document of the European Commission—the Green Paper “Modernising labour law to meet the challenges of the 21st century”<sup>138</sup>—expressly cope with the problem of “three work relationships,” asking Member States, social parties, and academics to answer three specific questions. The first one concerning the need to determine who is accountable for compliance with employment rights. The second one on the effectiveness and feasibility of subsidiary liability to establish such a responsibility in the case of sub-contractors. The last one, more rhetorical, about the possibility to see other ways to ensure adequate protection of workers in “three-way relationships.”

Because of the huge consultation process that followed the Green Paper, the current work cannot give an overview of the outcomes and the proposal put forward.<sup>139</sup> Among the others considered in the final Communication by the Commission to the European institutions,<sup>140</sup> the opinion of the European Parliament emerges, pushing for the opportunity to provide solidarity in obligations and joint responsibility between the agency and the user firm, also when contracting-out is concerned, for the aim of a more competitive and transparent labor market.

Some Member States have added that a general principle of subsidiary liability should permeate labor law as a whole at a European level, in the same way some national legislation yet provide. On the one hand, the Italian government answered positively to the three questions mentioned above; in particular highlighting that is arguable that the Commission present again a directive proposal including the principle of equal treatment and equal pay between agency workers and user firm’s comparable employees, and that of solidarity between the latter and the agency as far as the basic labor rights are concerned. British government, instead, on the premise that “all individuals should be aware of what their rights are” and who is responsible for those rights, rejected the issue of a clearer status for agency workers, because they are yet entitled to rights associated with “equality of opportunity (non-discrimination), a national minimum wage, health and safety in the workplace, working time entitlements . . . and the right to be a member of a trade union.” In this perspective, the idea of “giving everyone the same employment status,” should be refused not

---

138. Commission Green Paper: Modernising Labour Law to Meet the Challenges of the 21st Century, COM (2006) 708 final (Nov. 22, 2006).

139. Silvana Sciarra, *EU Commission Green Paper ‘Modernising labour law to meet the challenges of the 21st century*, 36 *INDUS. L.J.* 375 (2007); CATHERINE BARNARD, *TRIANGULAR AND MULTISIDED RELATIONSHIPS*, available at [http://ec.europa.eu/employment\\_social/labour\\_law/answers/documents/7\\_54\\_en.pdf](http://ec.europa.eu/employment_social/labour_law/answers/documents/7_54_en.pdf) (2007).

140. COM (2007) 627 of 24.10.2007.

reflecting the variable levels of responsibility typical of different employment relationships.<sup>141</sup>

Eventually, at the end of 2008, the European Parliament has approved the Council Directive 2008/104/CE, which introduces the principle of equal treatment between agency workers and workers directly employed by the user firm and endorses «basic working and employment conditions» for agency workers. Basic working conditions relate, in particular, to remuneration and working time, and Member States are allowed to derogate to the parity principle when an “adequate level of protection” is provided by arrangements partaken by social partners.

The impact of the Directive upon the two analysed legal systems is not easily deductable from its norms, and each Member State must implement them by December 2011. A notable point is the necessity to review restrictions and prohibitions on the use of agency work (Article 4(1) and 4(2)), which shall be justified «on grounds of general interest» only, thus compelling Italian regulations of 2003 to reshape the existing limitations concerning the technical and organisational reasons now required to stipulate a contract with an authorised agency. On the contrary, this provision sounds unlikely to be of any relevance for the British labour market, generally less regulated than Continental systems.<sup>142</sup>

Overviewing the new legal framework, the Directive has adopted an empirical and rather remedial approach, considering it more appropriate to promote the implementation of certain basic rights and recognizing the peculiar position of the agency and the end user as employers vis-à-vis the worker, a position that cannot be eventually detrimental. The European discourse seems to be closer to the continental model of a strong intervention of the law rather than to the British one, and this may be one of the reasons why British Trade Unions and CBI have reached an agreement upon the principles of equal treatment, integration of agency workers within the user firm, improvement of workers' access to training and career development opportunities.<sup>143</sup>

The means by which to ensure these rights and the tools to be used by national legislators are all but clear.<sup>144</sup> The concept of the triangular work relationship governing agency work, in fact, is far from being also accepted by the ECJ, as noticeably stated at last in *Allonby*,<sup>145</sup> concerning equal pay

---

141. DTI, GREEN PAPER ON LABOUR WORK: UK RESPONSE (Mar. 2007).

<sup>142</sup> N. Countouris and R. Horton, "The Temporary Agency Work Directive: Another Broken Promise?" (2009), ILJ (forthcoming)

143. BERR, TEMPORARY AGENCY WORKERS—JOINT DECLARATION BY THE GOVERNMENT, THE CBI AND THE TUC (May 2008).

144. See Loredana Zappalà, *The Temporary Agency Workers' Directive: An Impossible Political Agreement?*, 32 INDUS. L.J. 310 (2003).

145. See Case C-256/01, *Allonby v. Accrington & Rosendale College*, 2004 E.C.R. I-00873.

provisions, although its importance as an authority and in the context of the current work transcends this narrow field. The case concerned the issue whether the principle of equal pay for men and women was to be used comparing a worker employed in the same context as the claimant, but under contract with a third company. According to the ECJ, Ms. Allonby, a self-employed female lecturer who worked for long time side-by-side with other male colleagues employed by third parties, was not entitled to receive the same treatment as those colleagues. The applicability of Article 141(1) EC vis-à-vis an undertaking should not be “subject to the condition that the worker concerned can be compared with a worker of the other sex who is or has been employed by the same employer and who has received higher pay for equal work or work of equal value,” the very source of obligations being totally different. The interpretation of the Court is rather unable to see beyond the formal boundaries of the employing enterprise: albeit admitting that there is nothing in the wording of Article 141(1) to suggest that the applicability of that provision is limited to a single employer, the mere fact that the level of pay received by the worker is connected to the amount that the end user pays to the intermediary is not a sufficient basis for concluding that those two entities constitute a single source. As it has been noticed, the fragmentation of managerial powers typical of agency work has not been scrutinized by the ECJ, being rather “given” as factual evidence but without any attempt to find more comprehensive reference models.<sup>146</sup>

In this as well as in the *Lawrence* case,<sup>147</sup> the basic assumption was that to find inequality in pay levels there must be a fault of the employing entity. If we bear in mind that outsourcing decisions, concerning managerial prerogatives, cannot be substantially criticized by any judge, it seems the ECJ deliberately enters a blind alley and chooses not to find alternative solutions to the case, while the acceptance of the link between the agency and the user firm as one able to produce obligations against both—and so looking at agency work arrangement as a whole—would have meant the establishment of a “dual set of responsibilities.”<sup>148</sup>

In the context described above, the attempt to build a more general legal framework and, thus, to recognize that two employers represent in many cases a single employing entity might bring some coherent solutions to the political debate on agency workers’ rights, and at the same time make legislators guarantee a fair use of labor force, not only based on a cost-cutting attitude of outsourcing decisions.

---

146. Sandra Fredman, *Marginalising Equal Pay Laws*, 33 *INDUS. L.J.* 281, 281 (2004).

147. See Case C-320/00 *Lawrence v. Regent Office Care Ltd., Commercial Catering Group and Mitie Secure Services Ltd.*, 2002 ECR I-7325.

148. Sandra Fredman, *Women at Work: The Broken Promise of Flexicurity*, 33 *INDUS. L.J.* 299, 317 (2004).

874 COMP. LABOR LAW & POL'Y JOURNAL [Vol. 30:835

However, as far as national jurisprudence is concerned, the divergence between the Italian and the British systems seems to widen together with a certain “conservatism” of the Supreme courts of the two countries, the former still permeated by the traditional prohibition on triangular work relationships,<sup>149</sup> the latter recently re-assessed on a strong consideration of the parties’ contractual will.<sup>150</sup>

---

149. See Corte di Cassazione Sezioni Unite 26-10-06, n. 22910 and the others quoted above at *supra* note 130.

150. See *James v. London Borough of Greenwich*, [2008] I.R.L.R. 302 (U.K.).