Agencies of Slavery: The Exploitation of Migrant Workers by Recruitment Agencies

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AGENCIES OF SLAVERY: THE EXPLOITATION OF MIGRANT WORKERS BY RECRUITMENT AGENCIES

Elaine Dewhurst†

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I. Introduction

The concepts of slavery and indentured labour generally evoke powerful negative emotions in human beings all over the world, espousing international condemnation and a general abhorrence toward such phenomena. Much relief can be expressed at the sight of immigrants moving across the world in search of work today; seemingly free to choose the location and type of work they wish to engage in. This notion of freedom is grounded on the fact that such workers have consented to their migration, unlike the earlier systems of both slavery\(^1\) and indenture\(^2\) where consent was minimal or non-existent. Society has, however, become complacent. International experience suggests that the reality for present day immigrants is not one graced with free choice and consensual movement. The process of recruitment for employment has essentially taken the place of its predecessors due primarily to the rise of recruitment agencies and the various malpractices associated with them.\(^3\) The danger with the present system, as compared to its predecessors, is that it is presumed that consent to the migration and to the terms and conditions of employment to which the migrant worker is later subjected is proffered. It is questionable in this regard whether real consent has actually been obtained from the migrant worker\(^4\) and whether their rights to dignity, freedom, economic security, and equal opportunity are being respected.\(^5\)

This paper has been led by the desire to reinstate the concept of real consent back into the discourse on migration and the recruitment process. An examination of the concept of recruitment for employ-

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1. In the case of slavery, there is no consent on the part of the migrant worker—either to the decision to migrate or to the terms and conditions of employment to which they will later be subjected.

2. While those affected by the system of indenture may have expressed a certain level of consent to the process of migration, their consent to the terms and conditions of employment to which they were later subjected was non-existent.


4. Real consent, in this context, refers to consent given when all the true and accurate information is not only given to the migrant worker, but is also understood by them. Information should be provided about the migration and the terms and conditions of employment.

5. Declaration Concerning the Aims and Purposes of the International Labor Organization (Declaration of Philadelphia) 1944, art. 2, para. (a), [Oct. 9, 1946, 15 U.N.T.S. 35], available at http://www.ilo.org/public/english/about/ilconst.htm#annex. It states that all “human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and economic opportunity.”
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ment and of recruitment agencies will reveal the important role such intermediaries play in the international migration process. This will be followed by a brief description of both the international and national regulations presently governing recruitment agencies. The experience of Ireland and its recent unique encounters with international migration for employment will be used as a case study to demonstrate the types of obstacles that prevent real consensual recruitment for employment. The lack of regulation at an international and national level causes these obstacles. It is this author’s opinion that certain measures are more effective than international action in this regard due to the inevitable flexibility and compromise inherent in international law. It is only when such obstacles are removed that real consent can finally be reinstated back into the lives of those migrating for employment, allowing the development of an open, transparent, and exploitation free recruitment process.

II. DISCUSSION

A. Recruitment and the Recruitment Agency

Recruitment can be defined as “the engagement of a person in one territory on behalf of an employer in another territory” or “the giving of an undertaking to a person in one territory to provide him with employment in another territory.” Naturally, there are various routes through which migrant workers can seek, locate, and take up employment in another state. However, the use of third-party intermediaries, known as recruitment agencies, has always been the most popular choice for migrant workers because of the range of services they provide for the worker and the employer alike. There are three major types of employment agencies that are regulated to varying degrees both nationally and internationally depending on the types of services they provide to the migrant worker.

The first type of agency, known as a matching agency, provides migrant workers with “offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom.” This is perhaps the most typical form of employment agency. It provides poten-


8. The most common four methods of recruitment are government-sponsored migration, recruitment through an employment agency, direct recruitment by the employer and chain migration.

tial migrant workers and employers alike with a medium to seek and advertise employment. Strict regulation of such agencies exists in both international and national law. The International Labour Organisation has advocated the regulation of such agencies since 1933 and continues to encourage strict regulation today. Most states that have ratified the ILO Conventions on fee-charging employment agencies will regulate this type of agency to some extent. In Ireland, the Employment Agency Act (1971) regulates this type of employment agency.

The second most common type of employment agency is known as a leasing agency. This type of agency employs workers "with a view to making them available to a third party, who may be a natural or a legal person ... [who] assigns their tasks and supervises the execution of these tasks." In this case, a triangular relationship comes into existence between the worker, the agency, and the user-enterprise. In effect, the agency becomes the "surrogate employer" of the migrant worker. This has caused much controversy in common law jurisdictions where the dual concepts of the traditional employment relationship and voluntarism have hampered judicial attempts to come to a definitive conclusion on the identity of the employer, the person responsible for ensuring compliance with employment statutes governing the employment rights of workers, in these relationships.


11. Ireland ratified ILO Convention No. 96 in 1972 but has yet to ratify the new ILO Convention No. 181. See International Labour Organization Database on International Labour Standards, http://www.ilo.org/ilolex/english/newratframeE.htm (last visited October 23, 2006). The United Kingdom has never ratified any of the Conventions on private employment agencies. Despite the poor ratification of the Conventions, however, both of these states have maintained some regulation of private employment agencies. In the United Kingdom, this type of employment agency is regulated by the Employment Agencies Act. Employment Agencies Act, 1973, c.35, § 13(2) (Eng.). It is described as the business of providing services ... for the purpose of finding persons employment with employers or supplying employers with persons for employment by them. See SIMON DEAKIN & GILLIAN S. MORRIS, LABOUR LAW 179 n.6 (2d ed. 1998).


13. ILO No. 181, supra note 9, art. 1.1.


15. Cf. id.
Likewise, this type of agency has been the subject of strict regulation at both international⁶ and domestic levels.⁷

The final type of employment agency is the agency which seeks only to provide services to the migrant worker, such as information provision, but which does not become involved in any matching or leasing process.⁸ Due to the fact that these agencies are not directly involved in any placing process for migrant workers, international and national⁹ regulation of such agencies was scarce. In 1997, the International Labour Organisation introduced the Convention on Private Employment Agencies, which sought to impose certain regulations on these recruitment agencies.¹⁰ States now intending to ratify this most recent ILO Convention on recruitment agencies will have to ensure national legislation regulates these agencies also.¹¹

B. Existing International and National Regulation of Recruitment Agencies

The international regulation of fee-charging employment agencies was, and still is, based upon a firm conviction that the business of employment agencies is “subject to grave abuses; involving frauds and impositions upon a peculiarly helpless class, among which the exaction of exorbitant fees was perhaps the least offensive.”¹² The Interna-

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6. ILO No. 34, supra note 10, art. 1.1(a); ILO No. 96, supra note 10, art. 1.1; ILO No. 181, supra note 9, art. 1.1.
8. ILO No. 181, supra note 9, art. 1.1.
9. In Ireland, no provision is made in the Employment Agency Act (1971) for the regulation of such agencies. The United Kingdom, however, does include a provision for the regulation of information-providing services in its legislation. Employment Agencies Act, 1973, c.35, § 13(2) (Eng.).
10. ILO No. 181, supra note 9. There is no mention of this type of agency in either ILO Convention No. 34 or No. 96. See generally ILO No. 34, supra note 10; ILO No. 96, supra note 10.
11. Thus in order for Ireland to ratify the most recent ILO Convention it will need to revise its definition of employment agencies so as to include this type of agency within its parameters. See EMPLOYMENT AGENCY ACT WHITE PAPER, supra note 17, at 4–5 (proposing to include a new definition for “work-finding services” in any new legislation).
12. Ribnik v. McBride, 277 U.S. 350, 361 (1928) (Stone, J., dissenting). This case concerned the constitutionality of a Statute, which regulated the fees which could be

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tional Labour Organisation's first recommendation ever concerned the prohibition of fee-charging employment agencies. This reflected its commitment to the regulation of such agencies.\textsuperscript{23} Where such agencies already existed, the recommendation suggested that those agencies be operated only under strict government supervision and licence and that measures be taken to ensure their progressive abolition.\textsuperscript{24} This prohibitive formulation was carried through two more ILO Conventions on fee-charging employment agencies,\textsuperscript{25} and it was maintained until 1997 when the ILO introduced a new Convention\textsuperscript{26} that substantially altered this earlier position. In this new Convention, the ILO appears to depart from its earlier stance, which advocated progressive abolition; instead, the ILO now sanctions the continued operation of such agencies subject to stringent regulation\textsuperscript{27} in recognition of the important role private employment agencies play in the functioning of the labour market and of the importance of flexibility in this area.\textsuperscript{28}

National regulation of recruitment agencies appears to follow that international trend closely.\textsuperscript{29} The Employment Agency Act (1971) reflects Ireland's ratification of Convention No. 96 on fee-charging employment agencies.\textsuperscript{30} This Act was introduced to provide protection for Irish workers who were both seeking employment in Ireland and going overseas to work and to ensure that rogue agencies and unscrupulous employers did not exploit such workers.\textsuperscript{31} The Act does not, charged by an employment agency. It was held that under the due process clause of the fourteenth amendment a state could not fix the fees which an agency may charge for its services. This decision was, however, overturned in the case of Olsen v. Nebraska, 313 U.S. 236, 240–44 (1941).

\textsuperscript{23} Id'l Labour Org., Unemployment Recommendation (Withdrawn), 1919, ILO No. 1, \textit{available at} http://www.ilo.org/ilolex/cgi-lex/convde.pl?RO01.

\textsuperscript{24} ILO Recommendation No. 1, para. 1.

\textsuperscript{25} ILO No. 34, supra note 10, art. 2; ILO No. 96, supra note 10, art. 2.1.

\textsuperscript{26} ILO No. 181, supra note 9.

\textsuperscript{27} Id. art. 2.3.

\textsuperscript{28} Id. pmbl.

\textsuperscript{29} However, the United Kingdom no longer operates this licensing approach and in recent years has moved in favour of a more flexible system of job placement and recruitment. This was achieved by the Deregulation and Contracting Out Act, 1994, c. 40, § 35 (U.K.) \textit{available at} http://www.opsi.gov.uk/si/si2003/20033319.htm. However, in 2003 the Government of the United Kingdom introduced a number of specific regulations for the purpose of protecting workers who utilise employment agencies. \textit{See} Conduct of Employment Agencies and Employment Businesses Regulations, 2003, S.I. 2003/3319 (U.K.) \textit{available at} http://opsi.gov.uk/si/si2003/20033319.htm.

\textsuperscript{30} Ireland ratified this Convention in 1972. It chose to ratify Part III of the Convention which allowed the state to continue the operation of private employment agencies as long as they were stringently regulated by the state. \textit{See} International Labour Organization Database on International Labour Standards, http://www.ilo.org/ilolex/english/newratframeE.htm (last visited October 23, 2006).

\textsuperscript{31} During the Employment Agency Bills passing through the Dáil, the Minister for Labour, Mr. J. Brennan noted that the "provisions of this Bill then are such as to ensure I would hope that ultimately we will have none but genuine agents doing a good job so that people who seek advice or use these agencies for the purpose of
however, protect those workers who are entering the state for employment. At the time of the development of the Act, the concept of migration for employment was not envisaged and thus did not seek to regulate the actions of those agencies dealing with migrant workers coming to Ireland. As such, the Act seeks only to regulate those employment agencies operating within the state by insisting that the businesses that fall under the definition of employment agency operate under a licence granted by the state. The licence will only be granted where the Minister for Labour is satisfied that the premises upon which the agency is operating conform to the prescribed standards of accommodation, and where the applicant complies with the prescribed standard of suitability and fitness and has not been convicted of an offence under the Act in the preceding five years. The licence can be revoked if false information is given to the Minister on an application for a licence or if the holder is convicted of an offence under the Act.

C. The Obstacles to Real Consent Created by Inadequate Regulation of Recruitment Agencies at a National and International Level

The present national and international regulation of recruitment agencies reflects the view that migrant workers are a vulnerable group of workers who are often, as a result, subjected to various malpractices.
practices. As early as 1908, a leading American academic noted the susceptible condition of such workers:

Ignorant of our language, the country, and the American standard of wages, and compelled by his poverty to accept the first possible work, the immigrant is especially defenceless when he offers himself in the labour market. At no time does he need disinterested guidance and help more than in securing his first work, and yet he is dependent in most cases upon the private employment agent and he becomes, because of his ignorance and necessities, a great temptation to an honest agent and a great opportunity to an unscrupulous one.  

Similar sentiments could also be expressed today. In spite of the international and national regulation of recruitment agencies, migrant workers continue to experience exploitative working conditions. Such workers are often misled into applying for and travelling to fill jobs that do not exist and which are substantially different from the jobs and contracts the migrant worker expected or agreed to perform. Therefore, it has become increasingly obvious that the present regulation of recruitment agencies is not sufficient to prevent the exploitation of migrant workers because it allows obstacles to the provision of real consent to the migration to develop and it prohibits free consensual migration for employment. An examination of the current situation in Ireland of migrant workers who are recruited through recruitment agencies provides an excellent overview of the types of problems inadequate regulation of the recruitment process can present to migrant workers.

1. Obstacle 1: The Situation of the Leased Migrant Worker in Ireland

In recent years, Ireland has experienced increased economic growth and, with it, the inevitable changes in both the structure and needs of the labour force. The result of such transformations in the domestic market has been complimented by a proliferation in migration to Ireland and the emergence of flexible working trends in the indigenous

work force. Increasingly, employees, both national and non-national alike, and employers have turned to the ever-popular recruitment agencies and have sought out the often coveted position of the leased worker, otherwise known as an agency employee. National workers are drawn by the flexible nature of the work offered by such agencies which allows them time to meet family commitments and pursue leisure activities. Also, non-national workers are impressed by the lucrative offers of such agencies and are much relieved to have found a stable employer who is capable of simplifying the often-complicated recruitment process and providing certain employment in a host state. Similarly, the range of services offered by such agencies is especially enticing to busy enterprises which may enjoy the benefits of workers but without the hassle of hiring and maintaining an employee.

Despite the apparent simplicity of such arrangements, the position of the leased migrant worker in Ireland has caused much controversy in common law jurisdictions. The agency employs workers “with a view to making them available to a third party, who may be a natural or a legal person . . . [who] assigns their tasks and supervises the execution of these tasks.” In effect, this means that the agency becomes the “surrogate employer” of the migrant worker. The controversy is caused by the triangular relationship that comes into existence between the worker, the agency, and the user-enterprise. The traditional common law approach to the employment relationship, structured on the law of contract and the concept of voluntarism, did not envisage the interference of a third party acting as a “surrogate employer” in the contract of employment. As such, both the legislature and the courts have failed to provide any definitive conclusion as to whether in such relationships, the responsibility of legal employer should fall upon the agency or the user-enterprise.


42. ILO No. 181, supra note 9, art. 1.1.

43. Lobel, supra note 14, at 114.


45. Lobel, supra note 14, at 114.

a. The Present Situation of Leased Migrant Workers in Ireland

The process of identifying the legal and responsible employer of any worker is “the most intractable, as well as the most basic, in the whole of employment law.”47 Given the important and simplistic nature of the problem, it could be expected that the employment legislation would provide a suitable solution. Yet, the legislation has failed to come to any definitive conclusion on the matter. Some legislation provides that in the case of agency workers, either the individual responsible for paying the worker or the individual who actually pays the worker is the employer for the purposes of the legislation.48 Unfortunately, not all of the employment protection legislation relies on such a simple formulation. The Unfair Dismissals (Amendment) Act (1993) provides that the user-employer is considered to be the employer of the worker for the purpose of an unfair dismissals claim, despite the fact that the user-employer may have no control over the payment or other entitlements of the worker.49 Other legislation remains silent as to the status of the agency worker.50 In the latter case,

the final arbiter in deciding the status of the worker will be the court. First, it will have to assess whether a contract of employment actually exists\(^5\) and second, if a contract of employment does exist, between which two parties it operates.

Unfortunately, an analysis of the case law reveals similar unpredictability. As Forde notes, particularly in the Irish context, the identity of the employer will depend, to a very large extent, upon the agreement between the parties.\(^5\) This is in stark contrast to the European model of a more “collective labour law,”\(^5\) where the situation of agency workers is more certain and secure. The most common approach by the courts has been to insist upon a contract of employment coming into existence between the two parties who have the greatest mutuality of obligation. Most often, they then find the existence of a contract of employment between the intermediary agency and the worker.\(^5\) In the United Kingdom, however, there have been judicial dicta to the

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\(^5\) The rules governing the determination of a contract of employment by the courts are particularly uncertain but recently the courts have tended towards a “reality” test, which looks at all the circumstances of the situation, the existence of control and the existence of the right to terminate the employment of the worker, to determine whether a contract of employment actually exists.

\(^5\) Michael Forde, Employment Law 32 (2d ed. 2001).

\(^5\) Von Prondzynski links the basis of the Irish approach to the theories of Sir Henry Maine who described this movement as one away from “feudalism and towards self-determination by individual citizens.” Von Prondzynski, supra note 44, at 4.

\(^5\) In Ireland, in the case of Zuphen v. Kelly Technical Services (Irl.) Ltd. IEHC 117 (2000) at paragraph 86 Murphy J. noted the existence of a relationship between the agency and the worker which was capable of being defined as “one of master and servant, to use the old-fashioned term”. Similarly, in the case of Minister for Labour v. PMPA Insurance Co. (under administration) (1986) High Court unreported 16/4/86, Barron J. felt the contract clearly indicated that the employer was the agency and proved this by demonstrating that no contract of employment could possibly have come into existence between the user-employer and the worker. In the United Kingdom, it is generally accepted that a contract of employment comes into existence between the intermediary agency and the worker. See for example McMeechan v. Secretary of State for Employment IRLR 353 (1997) per Waite LJ; Stephenson v. Delphi Diesel System ICR 471 (2003, EAT); Bunce v. Postworth Ltd., [2005] EWCA (Civ) 490 (Eng.). The latter case held that, on the facts of the case, no contract of employment came into existence at all. However it did express agreement with the dicta of Waite LJ in McMeechan. See also Edwards, Legal Update: Employment Law: Agency Workers, 102 Law Soc. Gaz. 27, 30 (2005). See also News, 155 N.L.J. 714, at 717 (2005). See Deakin & Morris, supra note 11, at 179 where they note that as a matter of construction, “an agency worker will almost certainly have a contract with the agency, but is much less likely to have one with the user.”
effect that the user-enterprise will, on certain occasions, be considered
to be the employer.\textsuperscript{55} In both jurisdictions, the courts have often
chosen to describe the relationships which come into existence as being
governed by a contract \textit{sui generis}.\textsuperscript{56} In the latter two cases, however;
"striking features"\textsuperscript{57} distinguish the cases from the more usual scen-
arios. In many cases, a large degree of control by the user-enterprise is
discernible.\textsuperscript{58} In others, little consideration was given to the possibility
of an implied contract of employment between the agency and the
worker.\textsuperscript{59}

\textbf{b. Difficulty in Enforcing Employment Rights}

As a result of the lack of uniformity in the legislation and in the
decisions of the courts there are "now a large and growing number of
people in full-time or nearly full-time work who, because they work
under agency agreements, do not enjoy the full range of employment
rights conferred under the legislation."\textsuperscript{60} In such cases, both national
and non-national workers find themselves in a legal vacuum when it
comes to enforcing their legitimate employment entitlements against
their employer.\textsuperscript{61}

\begin{footnotes}
\item[55] Dacas v. Brook St. Bureau (UK) Ltd., [2004] IRLR 358 \S\ 53 (expressing the
view that an implied contract of employment could come into existence between
the user-employer and the worker).
\item[56] In Ireland this was held by the Circuit Court in the case of Jacinta Cervi v.
Atlas Staff Bureau (unreported). \textit{See Employment Agency Act White Paper,
supra note 17, at 4–5. \textit{See} Deakin \& Morris, supra note 11, at 39. There is also
implicit acceptance of this approach in Minister for Labour v. PMPA insurance Co.
(under administration) (1986) High Court unreported 16/4/86, where Barron J quoted
with approval the judgment of Cooke LJ in Construction Industry Training Board v.
Labour Force Ltd. All ER 220 (1970). In the United Kingdom, this concept of a con-
tract \textit{sui generis} has been found in many cases. \textit{See}, e.g., Ironmonger v. Movefield
E.R. 220.
\item[57] Motorola Ltd. v. Davidson, [2001] IRLR 4, \S\ 2 (E.A.T. 2000) (appeal taken
from Scot).
\item[58] In Motorola, the court held the user-enterprise to be the employer because it
provided the employee with induction courses, instructions as to how to do the job,
the tools for the job, the permission for holidays and absences and dealt with the
issues of overtime and any grievances. \textit{Id.} at \S\ 8. Lindsay J noted that the user-enter-
prise was for all intents and purposes the employer and exercised "the same or even a
greater degree of control over [the worker] than it would have had over a full-time
'orthodox' employee." \textit{Id.} at \S\ 10. Similarly in the case of \textit{Construction Industry
Training Board}, it was held that the respondent was not an employment agency at all.
The Court did consider the possibility of a contract of employment between the re-
spondent and the worker but a sufficient degree of control did not exist. \textit{Constr.
Indus. Training Bd.}, 3 All E.R. 220.
\item[59] \textit{See} Ironmonger, [1988] IRLR 461.
\item[60] Bunce v. Postworth Ltd., [2005] EWCA (Civ) 490, [32] (Eng.).
\item[61] \textit{See} Jeffrey Jupp, \textit{Agency Work: Legal Black Hole}, 155 N.L.J. 1447, 1447
(2005). The author notes that there are over 700,000 agency workers in the United
Kingdom who "can never be sure, even with the best legal advice, whether an em-
ployment tribunal will find that they have a contract of employment with the agency
or the 'end-user'." \textit{Id.}
\end{footnotes}
For migrant workers in particular, this can have devastating effects. This is most conveniently demonstrated by examining the case of Ms. Orge, a migrant worker hired as a beautician to work on board an Irish-registered passenger vessel. Ms. Orge was recruited by a Philippine-based agency, one of the largest employment agencies for seafarers in the Philippines. Her contract of employment was characterised by illegal recruitment practices, underpayment of wages, few hours of rest, and lack of representation. Her user-enterprise, however, claimed that it was completely unaware of the terms and conditions of Ms. Orge’s employment because the contract operated between Ms. Orge and the employer identified in her employment contract, the recruitment agency. This left Ms. Orge with no option other than to pursue an expensive and potentially unsuccessful court action to establish her legitimate employment entitlements.

There is also the distinct possibility that due to the hiring out of the worker to various user-enterprises, who may or may not be classified as employers, the worker may be unable to enjoy the benefits of our protective employment regime. This result is possible because the legislation requires certain continuous periods of employment to be proven before the benefit of the legislation can accrue to the employee. The difficulty here is that an agency worker, employed under such conditions, may not have a continuous employer for more than a few weeks. While this may suffice in some cases, for some of the most important protections, including protection against unfair dismissal, it might not suffice for others because the agency worker will be unable to meet the requisite levels of continuous employment.

c. Procedural Difficulties in Enforcing Employment Rights

One of the other major pitfalls of the current uncertainty arises from the procedural difficulties involved in pursuing employment rights. This has caused many leased workers to fail in their quest to assert their rights. Where workers bring a case against an agency to assert their employment rights and they fail, they cannot then assert their rights against the user-enterprise where it is not also joined in the proceedings. In other words, a case must be brought against the agency and the user-enterprise to ensure that the contract can be enforced against at least one of the parties. In the case of *Dacas v. Brook*

62. The contract contained conditions that effectively sanctioned an hourly rate of pay of €1.08 and a twelve-hour day with three days rest a month. See Chris Dooley, *Woman to Stay on Board Ferry Pending Agreement, Irish Times* (Ir.), March 26, 2005, at 7.

63. Id.


Street Bureau (UK) Limited the user-enterprise was not joined as a party to the final proceedings in the Court of Appeal in the United Kingdom.66 For this reason, when the court ruled that Mrs. Dacas was the employee of the user-enterprise and not of the agency, her case could not proceed.

Other procedural difficulties arise in anti-discrimination cases where, due to the legal status of leased workers, it has become increasingly difficult to pursue equality with co-workers. This is due to the formulations developed by our current anti-discrimination regime, governed by the Employment Equality Act (1998). Under the Act, significant emphasis is placed on the existence of a suitable comparator against whom disparate treatment can be compared. The legislation makes it very clear that, in the case of leased workers, comparators can only be drawn from other leased workers.67 This means that leased workers are not entitled to compare themselves to other permanent employees employed by the user-enterprise. This has also been incorporated more recently in legislation governing the rights of part-time workers.68

The recently proposed Directive on Temporary Agency Workers69 has attempted to alter this conventional view of the comparable leased worker at a European Union level. Despite the contentious nature of the issue70 and the heated debate which it caused, the European Trade Union Confederation fought bravely71 for a provision that the conditions of employment of a leased worker must be at least identical to those a temporary worker would be offered if he or she were directly employed by the user-company. This formulation was adopted in the most recent proposals.72 However, due to the polarized views of the Member States concerned, no decision has yet been taken on the future of this all-important directive.73

71. See Emma L. Jones, Temporary Agency Labour: Back to Square One?, 31 Ind. Law J. 183, 185 (2002), for Jones's description of the debate between ETUC and UNICE.
72. Zappala supra note 70, at 315.
d. Potential Solutions to the Situation of Leased Migrant Workers in Ireland

The obstacles faced by leased workers in Ireland are due mainly to certain deficiencies in common law, legislation, and court procedure. These can be easily rectified by adopting a legislative framework which deals with the various issues raised by the concept of leased workers. An examination of legislation enacted in a civil law jurisdiction, where the concept of a third party to the contract of employment is not hampered by common law decisions based on privity of contract and voluntarism, reveals a coherent structure capable of generic application to all common law systems that encounter this difficulty.

e. Ameliorating Common Law and Legislative Difficulties

It is evident that the responsibility for employment legislation must be allocated to either the user-enterprise or the employment agent. There is, however, much opposition to finding an employment relationship between the user-enterprise and the worker. The reason for the opposition is that it puts into question "the most basic assumptions upon which the whole of that industry has hitherto conducted its business" because the benefits obtained by the employers of such workers are the very reason that employers decide to hire workers through employment agencies in the first place.

On the other hand, little opposition is expressed against the opinion that the intermediary agency should be classed as the employer of the worker. This is often due to the fact that "[e]mployment agencies have the advantage of deeper pockets and more stability . . . . [A]gencies also have a greater interest in learning the practices of the market and a greater stake in preserving their reputations." Most of the decisions in the United Kingdom and in Ireland support this view. The International Labour Organisation, in its most recent Convention on Private Employment Agencies, was also convinced that this was the most appropriate solution. Most Member States of the European Union have adopted legislation to the effect that the agency will be

76. Orly Lobel, Class and Care: The Roles of Private Intermediaries in the In-Home Care Industry in the United States and Israel 24 HARV. WOMEN'S L.J. 89, 100 (2001). Willborn comments that often when individual employers are small relative to the leasing company, the agency may be able to provide better rates and coverage than the user-employer. He concludes that special regulation of leasing companies "will be counterproductive because it will discourage employers from entering into these relationships and hence, make it harder for workers to obtain the advantages of leasing arrangements." See Steven L. Willborn, Leased Workers: Vulnerability and the Need for Special Legislation, 19 COMP. LAB. & POL'Y J. 85, 91–92 (1997).
77. ILO No. 181, supra note 9, art. 12.
the employer for the purpose of employment legislation, with the exception of Ireland and the United Kingdom. In 2002, the European Commission published a draft Directive on Temporary Agency Workers, which proposed to settle the dispute by insisting that the agency take responsibility for the employment rights of the employee.80

In Germany, the situation of both national and migrant workers who operate as leased workers is protected by the Employee Leasing Law,81 which in agency cases brings into effect a three-party contract that is strictly regulated and sets out the duties and responsibilities of all the parties to the contract. The basis of the agreement is the employee-leasing contract between the user-enterprise and the agency,82 which effectively provides that the agency will provide the user-enterprise with a worker without the user-enterprise becoming the employer of the worker.83 Another contract, which is very clearly a contract of employment, also comes into existence between the worker and the agency.84 The employment contract should be unlimited in duration85 and should, as in any employment contract, detail clearly the terms and conditions of employment.86

The agency is responsible for the payment of wages not only during the leasing period, but also during any intervening periods in which the worker may not have any work. This is to be determined by the contract of employment. Therefore, no situation may arise whereby migrant workers may find themselves without remuneration for a substantial period of time.87 The workers, whether they are national or migrant workers, are also entitled to paid sick, maternity and parental leave, as well as paid vacations.88

This system also reduces the effects that Ireland's present system has on national and, particularly, migrant workers, where because they are hired out on a short-term basis to different employers, they

79. See id. at 4.
80. See id. at 19.
81. Arbeitnehmer um überlassungsgesetz, otherwise know as the Employee Leasing Law (1972) (Germany). For more information, see Peter Schüren, Employee Leasing in Germany: The Hiring Out of an Employee as a Temporary Worker, 23 COMP. LAB. & POL'Y J. 67 (2001).
82. In France, a similar legislative scheme is in force. The three party contract is regulated by what is known as the contract of assignment. See C. TRAV. art. L. 124-3 (Fr.).
83. Employee Leasing Law 1972, 1, P.1.
84. This is similar to the situation under the French Labor Code. C. TRAV. art. L. 124-4 (Fr.). See also Schüren, supra note 81, at 68.
86. See Schüren, supra note 81, at 70.
87. Id. at 71.
88. Id. at 71-72.
may not be able to meet the required working periods necessary to claim many of their rights under employment law. An application of similar provisions of the German Employee Leasing Law in Ireland would reduce this effect because the worker would only have one employer, the agent responsible to them for these rights, at all times.

f. Ameliorating Procedural Difficulties

Similar to the provisions of the proposed Temporary Agency Workers Directive, under German law, the agency worker is entitled to equal remuneration as another employee at the user-enterprise. By replacing Ireland’s existing provisions, which insist upon a comparable agency employee, with this more forward-thinking provision, a fairer and more suitable approach to our equality legislation will be achieved. It will also protect against the exploitation of migrant workers who can expect to be treated the same as other workers in the user-enterprise, and not as presently occurs with workers in the agency.

While this legislation may effectively allocate rights and responsibilities between all the parties in the process, user-enterprises might utilise agency workers in place of core employees so as to completely eliminate their responsibilities altogether under employment law, despite the fact that the same user-enterprise may employ the agency worker almost permanently for many years. To curb this misuse of our employment protection regime, this legislation should allot a maximum amount of time for which an agency worker may remain employed by a user-enterprise without becoming an employee of that user-enterprise.

2. Obstacle 2: Exploitation by Agencies Operating Overseas

Efforts made to regulate employment agencies operating in other jurisdictions have always been met with substantial opposition from states and businesses alike because such efforts are impossible given the fact that national legislation cannot have extra-territorial effect. Most legislatures believe there is no possible way foreign agencies can be regulated because such agencies are outside their jurisdiction.

89. Willborn, supra note 76, at 85.
90. Despite trenchant criticism, the Temporary Agency Workers Directive proposes to apply the principle of equality to agency workers and to utilise the regular employees of the user-enterprise as the comparators. Temporary Workers Directive, supra note 69, at 21.
91. See also C. Trav., art. L. 124-4-2 (Fr.).
Therefore, national regulations remain outmoded and inappropriate. In Ireland, the legislative insistence upon a standard form premises is unreasonable because most employment recruitment in Ireland occurs not only outside the State, but also through more intangible mediums such as the Internet where the business owner may remain completely anonymous. Thus, workers who are recruited to Ireland through agencies operating overseas or over the internet may experience various malpractices and instances of exploitation and have no State protection.

a. The Civil Law Solution

The German legislature, however, has stretched the concept of regulation far beyond the boundaries of German territory without difficulty. Similar to Ireland, the German Government operates a state licensing system for employment agencies.93 Foreign agencies, however, who wish to lease employees to employers in Germany, must, unlike Ireland, produce evidence of a licence to practice as an employment agency from both the native country and from Germany.94 However, in order to protect against an undercutting of wages, the law states that agencies with a registered place of business outside the European Economic Community may not operate leasing companies that provide services within Germany.95 These protections protect migrant workers entering Germany from various recruitment malpractices with which migrants entering other states may have to contend.

As with all systems, this one is not perfect. A skilled analysis of its provisions reveals a number of deficiencies, which militate against its effectiveness. Firstly, only a minority of migrant workers enter into leasing arrangements with employment agencies so as to become leased workers. Those who are not leased workers, but who merely utilise an employment agency to match them to a particular employer or to provide them with information on particular employments in a certain area, are not covered by such legislation. This effectively excludes a huge majority of migrant workers who utilise third party intermediaries in the recruitment stage of migration, and leaves them open to potential exploitation.

Secondly, the licensing system in one state may differ substantially from the licensing system in Germany. While agencies under both systems must comply with the conditions, it is possible that while on paper the agency does not commit any fraud or malpractice, the reality may be entirely different.

Thirdly, the legislation has the potential to significantly increase the migration costs for migrant workers. While employment agencies can-

94. Employee Leasing Law (1972), 3, P 2-5 (Germany).
95. Supra n. 94 at 3, P 2.
not technically charge migrant workers fees, this increased cost may factor into other costs, such as the journey costs, so as to substantially increase the debt owed by a migrant worker.

Finally, the legislation excludes all employment-leasing agencies that do not operate a registered place of business in the European Economic Community (EEC). This effectively excludes migrant workers from many states who will not be able to find a convenient agency that has a registered place of business in the EEC. It also invites potential irregular migrants, desperate for work, to operate through illegal agencies established to provide work.

b. A Modified Approach

In 2004, the Irish Government announced its intention to revise the current Employment Agency Act (1971) to include regulation of those agencies sending workers to Ireland, but who operate outside the State. The solution placed considerable responsibilities on the user-enterprise to inform the Department of Enterprise, Trade, and Employment or the equivalent authority when a foreign agency was used, and to provide them with documentary evidence of the method of recruitment used, the name of the recruitment agency, its location, contact details, and its licence or registration number. The only similar provisions that currently exist in Ireland, are on an application for a work permit, where the employer must indicate the name, address, and licence number (where appropriate) of any agency used. However, there is no registration or licence requirement when the agency is located outside the State. Similar provisions already operate in the United Kingdom where domestic agencies must be satisfied that the foreign agency is suitable to act as an employment agency, which is usually proved by evidence that the agency is registered by the corresponding authority.


98. See Conduct of Employment Agencies and Employment Businesses Regulations, 2003, S.I. 2003/3319, art. 23, ¶ (1)(a) (U.K.) available at http://.opsi.gov.uk/si/si2003/20033319.htm (providing that the agency should be suitable to act). The legislation does not mention proving suitability by evidence that the agency is registered by the corresponding authority, the formulation has come about through practice. How-
This approach is commendable because it places responsibility on the user-enterprise and the agencies. It recognises the fact that the user-enterprises and the agencies often have the greatest finances and know-how to seek such information, and it further recognises the growing responsibilities of user-enterprises and agencies to their employees, their workers, and to society. Similarly, it is beneficial that no distinction is made between the three types of agency as was done in the German legislation. Every employment agency registered outside the State is subject to the same terms and conditions. Furthermore, the proposed legislation does not exclude the utilisation of agencies registered outside the EEC.

Despite these possibilities, however, such regulations did not go far enough to protect migrant workers. There was the distinct possibility that user-enterprises would utilise Irish registered employment agencies, who would then contact overseas agencies, to avoid the hassle of providing the information under the Act. There was also the possibility that whether or not employers complied, a strict system of enforcement would have to be developed to ensure that the compliance was not merely a way of paying lip service to the statutory provision.

Instead, in a more comprehensive review of the current legislation in 2005, it was suggested that all recruitment agencies, including those operating over the Internet or in foreign jurisdictions, will be required to register in Ireland if they wish to become involved in the recruitment of migrant workers to Ireland. This will require evidence showing that they have no convictions, either against them or pending against them, in any state, as well as proving that they have the relevant licence or registration from a corresponding authority in the state of establishment. Other possible requirements include ensuring that the agency has relevant experience in the field, has expert knowledge of the particular post, has financial and economic standing,

\[ \text{ever, there is no restriction on domestic agencies utilising those foreign agencies that are not licensed or registered as long as they are satisfied as to their bona fides.} \]


100. See id. at 14–15.

101. This would alleviate any potential problems and associated costs caused by an agency’s failure to fulfil certain criteria, such as, making an application for an incorrect visa or permit.

102. This would ensure that migrant workers are not sent into positions for which they are not qualified thus reducing the risk that they will lose their job due to their lack of suitability and the risk to their health and safety caused by their completing a task for which they are not suitably qualified.

103. Economic standing is particularly important to those migrant workers who are also agency workers and who are paid by the agency. There is a possibility that if the agency business fails, the migrant worker will not be paid and will be forced to find work in the illegal market or face going home with little or no money. Even for those migrant workers who are not agency workers, however, the issue of economic standing is relevant to the whole recruitment process i.e. whether the worker will get a good deal or whether the worker will end up being exploited and forced to pay high recruitment costs.
and has a proven commitment to ethical and sound recruitment practices. This new system will do much to reduce the current malpractices existing in the recruitment process. It is similar in structure to the German legislation, but it does not appear to come with all the drawbacks associated with the German system.

c. Potential Difficulties

The only potential difficulty facing such a system would be the potential conflict between the State’s commitment to the protection of human rights and the States’ responsibilities within the European Union. Any attempt to regulate agencies operating outside the domestic sphere of the State may be seen as a potential restriction on the free movement of services in the European Union. According to Article 50EC, “services” mean services that are “normally provided for remuneration.” It is not necessary that the remuneration be provided by the recipient of the service as long as the service is remunerated “one way or another.” This is important because often recruitment agencies are paid not by the migrant worker, but by the user-enterprises. Any other decision of the court could mean that such agencies would not be covered by Article 50EC. The European Court of Justice considers the provision of recruitment services as constituting such a service under Article 50EC. It covers any situation where the service provider and the recipient are in different Member States. Also, it covers situations where both parties are in one Member State, but the provision of the service requires one of them to cross an internal Community border.

Article 49EC calls for the prohibition of restrictions on the free movement of services across the Community. Any provisions which are directly or indirectly discriminatory or which prohibit, impede, or render less advantageous the activities of a service provider in another Member State will be in breach of this fundamental principle. While the proposed regulation of agencies outside of Ireland could not be described as either directly or indirectly discriminatory, it

109. Lasok & Lasok, supra note 106, at 533. See also Arnulf, supra note 105, at 472.
110. The restrictions would, in their current formulation, apply equally to national and non-national service providers.
111. These apply equally to national and non-national service providers and would not require any extra efforts to be made by non-national service providers. See Derrick Wyatt & Alan Dashwood, European Community Law (3d ed. 1993).
could constitute an impediment to the free movement of services by requiring businesses to prove that they have been registered in another State by a corresponding authority before they could operate in Ireland.

In the case of Van Wesemael, the court had to consider national rules of one Member State which imposed licensing requirements on employment agencies established in other states that wished to pursue business in the former state. The European Court of Justice held that a state may not impose on the persons providing the service who are established in another Member State any obligation either to satisfy such requirements or to act through the holder of a licence, except where such requirement is objectively justified by the need to ensure observance of the professional rules of conduct and to ensure the said protection.

The court further held that such requirements could not be said to be objectively necessary where the agency operates under the public administration of another Member State or where the agency has been granted a licence by the proper authorities in their own state, have been subjected to comparable conditions, and are being adequately supervised in another member state. Despite arguments made by the Belgian government that the requirements of ILO Convention No. 96 on Fee-Charging Employment Agencies required states to adequately supervise the activities of agencies operating in their territory, the Court held it was an inadequate justification for restricting the free movement of services.

In the case of Re Alfred John Webb, however, the court reconsidered its earlier position in light of the “special nature of the employment relationships inherent in that kind of activity” and the fact that the “pursuit of such a business directly affects both relations on the labour market and the lawful interests of the workforce concerned.” It decided that in view of the differences there may be in conditions on the labour market between one member state and another, on the one hand, and the diversity of the criteria which may be applied with regard to the pursuit of activities of that nature on the other hand, the Member State in which the services are to be supplied has unquestionably the right to require possession of a licence issued on the same conditions as in the case of its own nationals.

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113. Id. at § 29.
114. Id. at § 30.
115. Id. at § 35–36.
118. See id.
However, two distinct requirements must be met when granting such licences. The first requirement is that no distinction on grounds of nationality is made when granting the licence; the second is that the state granting the licence must take into account the evidence and guarantee already furnished to it by the provider of the service relating to the pursuit of such activities in the country of employment.\footnote{119}

Therefore, if the State follows the two requirements laid down by the European Court of Justice in \textit{Re Alfred John Webb}, there will be no direct conflict with European Union law.\footnote{120} The state must pursue a policy of non-discrimination with regard to the distribution of agency licences and must ensure that it accepts evidence provided from other Member State applicants.

The adoption of regulations governing agencies operating outside the territory of the State will do much to alleviate the situation of migrant workers recruited through agencies operating in the sending state or over the Internet. Although international law has advocated the adoption of such principles for a considerable period of time, until such measures are adopted at a national level, the exploitation of migrant workers by recruitment agencies who are operating unregulated and unlicensed businesses will continue at the present rate and will continue to diminish the real consent migrant workers give to the decision to migrate for employment.

3. Obstacle 3: Misleading Information Regarding the Terms and Conditions of Employment

Migrant workers are generally in a more significantly disadvantaged position because of the lack of familiarity with the language, the culture, and the employment rights of their host state as compared to national workers who have that information and whose judgment is not impaired by their lack of awareness of their rights and responsibilities.\footnote{121} A recent Irish report\footnote{122} on the experiences of migrant workers in Ireland revealed that the lack of information regarding the employment and its terms and conditions was widespread during the recruitment process.\footnote{123} This, however, is not unique to migrant workers

\footnote{119. See id.}
\footnote{120. See id.}
\footnote{121. See Pauline Conroy & Aoife Brennan, Migrant Workers and Their Experiences 21 (2002), available at http://www.equality.ie ("Information about working conditions and employment regulations in Ireland provided at the point of recruitment was sparse according to most migrant workers \ldots\," and other migrants reported that they "obtained information only about their own working conditions \ldots\,".)}
\footnote{122. Id.}
\footnote{123. Gloria, a Filipino health-care worker was interviewed as part of this report. Her story is indicative of many other the health-care workers who came to Ireland to remedy labour shortages. \textquotedblleft At stage one, Gloria got no information about Ireland. At stage two of the process the Irish recruitment agency gave information about the hospital facilities, the expectations of the hospital and nursing responsibilities. She saw...\textquotedblright}
coming to Ireland. The ILO has reported that “wholesale fraud,” “exorbitant fees,” and “non-existent jobs” regularly face migrant workers in receiving states globally.\textsuperscript{124} Much criticism can be levelled at the international and national regulation of the migration process because it makes little provision for ensuring that migrant workers give real consent to the terms and conditions of employment to which they are regularly subjected.

The ILO Migration for Employment Convention (Revised) 1949 provides that special measures should be taken to repress misleading propaganda relating to immigration and emigration.\textsuperscript{125} In Ireland, the Employment Equality Act (1998) prohibits the display of any employment advertisement which discriminates or demonstrates an intention to discriminate on one of nine grounds provided for under the legislation.\textsuperscript{126} Other legislation in the consumer field which seeks to prohibit misleading advertising appears to apply to the services of employment agencies operating in Ireland. The Consumer Information Act (1978) prohibits any person acting in the course of a trade, business, or profession, from making either a statement which he knows to be false or from making a reckless statement as to whether it is in fact false with regard to the provision of services or certain aspects of the service.\textsuperscript{127} Publishers are equally liable under the Act if they publish or cause to be published any misleading advertisement which causes loss, damage, or injury to members of the public to a material degree.\textsuperscript{128} Penalties for breach of the legislation include fines and terms of imprisonment.\textsuperscript{129} There does not appear to be any right of compensation for migrant workers in the legislation; however, there is provision for the court to order that part of the fine be paid to the individual who suffered injury, loss, or damage as a result of the advertisement as compensation.\textsuperscript{130} The worker would also have a case at common law for damages due to misrepresentation.

pictures of the hospital. At stage three, she was told to bring warm clothes because it would be cold.” \textit{Id.} at 19 (describing experiences of Gloria, a Filipino health-care worker, and how information of the job in Ireland was given out in three separate phases of her recruitment).

\begin{itemize}
\item \textsuperscript{124} \textit{INTERNATIONAL LABOUR ORG.}, \textit{supra} note 3.
\item \textsuperscript{125} ILO No. 97, \textit{supra} note 7, art. 3.1.
\item \textsuperscript{126} Employment Equality Act, 1998, \textsection\textsection 10(1)–(2) (Act No. 21/1998) (Ir.) \textit{available at} http://www.irishstatutebook.ie/1998_21.html (last visited October 18, 2006) (grounds include gender, marital status, family status, sexual orientation, religious belief, age, disability, race, or membership of the travelling community; \textit{see} \textsection\textsection 6(2), amended by Equality Act, 2004, \textsection\textsection 5 (Act No. 24/2004) (Ir.).
\item \textsuperscript{127} Consumer Information Act, 1978, \textsection\textsection 6(1) (Act No. 1/1978) (Ir.) \textit{available at} http://www.irishstatutebook.ie/1978_1.html (last visited October 17, 2006).
\item \textsuperscript{128} \textit{Id.} \textsection\textsection 8.
\item \textsuperscript{129} On summary conviction the offender will be held liable for a fine not exceeding £500 and / or a term of imprisonment not exceeding six months. On indictment, the offender could be held liable for a fine of up to £10,000 and / or a term of imprisonment not exceeding two years. \textit{Id.} \textsection\textsection 17(1).
\item \textsuperscript{130} \textit{Id.} \textsection\textsection 17(3)(a).
\end{itemize}
AGENCIES OF SLAVERY

The difficulty with all of the legislation and common law actions is that they provide for a right of compensation after injury, loss, or damage has been suffered. This *ex post facto* approach means that migrant workers may still be mislead into migrating for employment and may still be subjected to contract substitution, and their only remedy will be one for damages. Also, it is unlikely that migrant workers will have the necessary financial resources or the will to take an action to court to challenge a misleading advertisement when it could cause them to lose their position in the agency or with an employer for doing so.

a. Preventing Misleading Information Regarding Employment

The approach brought about in the United Kingdom by the recent Conduct of Employment Agencies and Employment Businesses Regulations is more appropriate to the situation of migrant workers. It provides that all job advertisements made by agencies should be easily legible or audible, as the case may be. The advertisement should clearly indicate the name of the agency advertising the position, and it should give explicit details of the job and the qualifications, training and experience required for the job.\(^{131}\) Also in the United Kingdom, the Recruitment and Employment Confederation Ltd., the professional recruitment agency regulatory authority, insists that all advertisements be accurate and capable of substantiation by reference.\(^{132}\) Any advertisements of jobs that have been filled should be removed from display immediately.\(^{133}\) Such provisions should become essential features of all statutory codes of practice governing the operation of all recruitment processes, not just that of employment agencies. The legislation should be equally applicable to advertisements made in newspapers or on the Internet directly by employers, whether that employer is the State or merely a business. Such provisions have only recently been introduced in the United Kingdom, and they have caused little controversy. In fact, those provisions have been greeted with enthusiasm. Despite the "inconvenience of a little more paperwork[,] [those provisions should] result in greater standards of professionalism and better protection (and fewer disputes) for both clients and candidates – a good trade."\(^{134}\)


\(^{133}\) Id. at art. 15.

\(^{134}\) Socca; Director at Sacco Mann Legal Recruitment Consultancy IN Career Brief: Agencies can serve and protect 101 Law Society Gazette 41, 41 (2004).
4. Obstacle 4: Lack of a Register of Recruitment Agencies and Fee-charging

First, it is suggested that third-party intermediaries involved in the recruitment process should, as a matter of law, maintain a register of all migrant workers and foreign intermediaries they deal with.\(^\text{135}\) Currently in Ireland, private employment agencies must report once a year to the Department of Enterprise, Trade, and Employment. Employment agencies must display all information relating to the terms and conditions of employment, including rates of pay and hours of work of all its clients, including migrant workers.\(^\text{136}\) Presently, in the United Kingdom there is no requirement that recruitment agencies or businesses register the customers or foreign intermediaries with the State. However, they must retain certain particulars on record relating to work-seekers, such as their name, address, date of birth if under the age of twenty-two, the terms of agreement, details of the qualifications, training and experience, the names of the hirers to whom the work-seeker is introduced, a copy of the contract, and any provisions regarding fees.\(^\text{137}\) Similarly, intermediaries must also retain details of the hirers to whom they introduce workers.\(^\text{138}\) Interestingly, the regulations also require the recording of details of other agencies or employment businesses with which they have had contact. This includes details of the name and details of the enquiries made with such agencies as to their suitability to act as an agency.

While these provisions are radical, in that they insist upon the detailing of information that other legislatures do not, the United Kingdom approach fails in that it does not insist upon a report to a supervisory body. The Irish approach, on the other hand, fails to insist upon sufficient details regarding the worker, the hirer, and the intermediary agencies. Therefore, the most appropriate solution seems to be a synthesis of these provisions because it would ensure that all the important details regarding the worker and the foreign agencies were included and that the agencies were being monitored for abuses by a supervisory authority.

\(^{135}\) See also International Labour Organization, Recruitment and Placement of Seafarers Convention, 1996, (entered into force Apr. 22, 2000), ILO No. 179, art. 5.1, available at http://www.ilo.org/ilolex/cgi-lex/convde.pl?C179 (advocating for the maintenance of a register of all the seafarers recruited or placed through private employment agencies, to be available for inspection by a competent authority).


\(^{138}\) Id.
Secondly, despite an international prohibition on excessive fee charging by employment agencies, a recent Irish report has demonstrated that migrant workers are still paying enormous fees to foreign and domestic agencies for their services. Both the Irish Employment Agency Act (1971) and its United Kingdom equivalent prohibit the charging of fees by recruitment agencies, subject to certain exceptions.

The Irish legislation allows for a certain level of fee charging where it does not exceed “a scale approved by the Minister.” The legislation, however, has not been utilised because it was impliedly considered prohibitive to set certain fee levels given that it was reasonable to expect that “commercial competition should prevent the charging of excessive fees.” Such a provision could prove extremely valuable in ensuring that migrant workers not be charged excessive fees by recruitment agencies. However, as the Minister has yet to introduce such a scale, such benefits have yet to be realised.

In the United Kingdom, the recent regulations again reassert the prohibition on fee-charging; however, they do allow fee-charging in certain defined circumstances. First, fee-charging is allowed where the occupation is one listed in Schedule 3 of the Regulations. Such occupations include artists, performers, and professional sports persons. In such cases, however, the fee charged must be based on commission for work found for the work-seeker. A fee may not be charged where the agency is also receiving a fee from the hirer. Where the agency

<table>
<thead>
<tr>
<th>Country of Payment of Fee</th>
<th>Amount Paid or Equivalent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Philippines</td>
<td>43,000 pesos (¢ £ 850)</td>
</tr>
<tr>
<td>Philippines</td>
<td>53,000 pesos (¢ £ 1,000)</td>
</tr>
<tr>
<td>Lithuania</td>
<td>One months Lithuanian salary</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Six months Lithuanian salary</td>
</tr>
<tr>
<td>Ukraine</td>
<td>Twelve months Ukrainian salary</td>
</tr>
<tr>
<td>Poland</td>
<td>No charging of fees reported</td>
</tr>
</tbody>
</table>

139. ILO No. 181, supra note 9, art. 7.1; supra n. 3 Annex II paragraph 3.1(a); See ILO No. 96, supra note 10, art. 6(b). See Anthony O’Donnell & Richard Mitchell, Employment Agencies: The Regulation of Public and Private Employment Agencies in Australia: A Historical Approach 23 COMP. LAB. & POL’Y J. 7, 8 (2001).
140. See CONROY & BRENNAN, supra note 121, at 20 (showing six examples of reported fees paid by migrant workers).
145. Id. at art. 26, ¶ 2.
146. Id. at art. 26, ¶ 3.
is connected to the hirer, the work-seeker must be informed of this link before any fee can be charged. 147 Second, a fee may be charged to the occupations listed in Schedule 3 which is not based on commission where: 1) the agency or business includes information about the work-seeker in a publication for the purposes of finding work-seekers employment in, or providing hirers with information about a work-seeker looking for work in one of the occupations listed in Schedule 3; 2) the information is the only service provided by the agency, or the fee resembles the cost of publication and circulation of the publication; and 3) the work-seeker has access to a copy of this publication. 148 Third, a fee can be charged for work-finding services where the work-seeker is a company 149 and where the employment is not listed in Schedule 3. 150 This latter regulation provides for companies that are in a substantially greater bargaining position than natural persons. Despite the various exceptions, these provisions clearly protect migrant workers migrating to the United Kingdom to work through an employment agency situated there.

The United Kingdom also recently introduced the concept of disclosure in the contracts with the migrant workers of the fee charged, its calculation, the person it is payable to, and the regulations governing its return. 151 This would be an interesting provision to adopt in Ireland because it would ensure that any scale set by the Minister is adequately monitored to ensure compliance. The situation in Ireland with regard to the prohibition on fee-charging is preferable to the situation in the United Kingdom where the various exceptions tend to over-complicate and take away from the central concept of prohibiting fee-charging.

5. Obstacle 5: Lack of Standard-Form Contracts

Throughout this chapter, the vulnerability of migrant workers in the recruitment process has been emphasised, yet little emphasis has been placed on the utilization of the recruitment process to subject migrant workers to everyday exploitation in the terms and conditions of their employment. The ILO has commented that, "in light of fraudulent practices taking place in the country of employment, such as contract substitution, 152 migrant-receiving countries should take a more active role in supervising the issuance and execution of contracts of employ-

147. Id. at art. 26, ¶ 4.
148. Id. at art. 26, ¶ 5.
149. Id. at art. 26, ¶ 7.
150. Id.
151. These provisions are now in existence in the United Kingdom thanks to the introduction of the Regulations in 2003. Id. at art. 13.
152. This is a process whereby a migrant worker is given one contract prior to departure which is then substituted by another, usually less attractive, contract upon arrival in employment. INTERNAT'L LABOUR ORG., 1999—MIGRANT WORKERS, ¶ 140, ILOLEX Doc. No. 251999G05 (1999), available at http://www.ilo.org/ilolex
Many states currently operate a system whereby migrant workers will not be given permission to work unless they are in possession of a contract of employment which has been approved by the competent authority in that state. This is similar to the provisions governing work permits that are currently in effect in Ireland. This does not, however, apply to migrant workers who come to Ireland on work visas or authorisations.

Currently in Ireland, under the Terms of Employment (Information) Act (1994), migrant workers are entitled to receive a copy of the terms and conditions of their employment within two months of commencement of employment. This information includes details of the employer, commencement date and expected duration of work (where appropriate), place of work, nature and title of the work, remuneration, hours of work, leave, sickness and pension information, notice requirements, and any collective agreements which may be in force. While these provisions may appear to be more burdensome on employers, they are actually equally burdensome on migrant workers. The workers cannot obtain the right to such information until they have been employed for over two months. This is of little assistance to migrant workers currently involved in the recruitment process.

The Department of Health Voluntary Codes of Practice requires that the employees be given, prior to recruitment, information about the place of employment, the job description, the place of any necessary probation periods, the recruitment process, the role of the recruitment agency and the employer, the costs, the salary scale and accommodation, the living and working conditions in Ireland, the social welfare, tax and pension entitlements, their rights under the equality and employment legislation, the recognition of their qualifications, and their health policies. Similarly, in the United Kingdom,
the REC Members' Code of Good Recruitment Practice requires that the work-seeker be informed of the written terms of engagement; mainly, whether it is an employment contract or otherwise, and all relevant information relating to the position for which they are hired. However, neither of these provisions is on a statutory footing, and they cannot be applied to all recruitment processes such as direct recruitment.

In the United Kingdom, the recently-introduced regulations provide that the work-seeker must be informed of the identity of the hirer and the nature of the hirer's business; the date of commencement and the duration of the work; the position the hirer seeks to fill, including the type of work to be done, the location, the hours, the risks to health or safety known to the hirer and the precautions taken to prevent such risks prior to taking up employment. The worker also has a right to know the experience, training, and qualifications expected from the hirer any expenses payable by or to the work-seeker; and in the case of an agency, the minimum rate of remuneration and benefits and notice entitlements.

These regulations are excellent because they are extremely complete. They provide potential migrant workers with all of the information they may request from a particular job prior to taking up employment. On the other hand, the disadvantages of the regulations include that they do not apply to migrants recruited abroad through foreign agencies or through other forms of recruitment, such as direct recruitment by the employer, other than employment agencies in the United Kingdom.

In line with this, it is suggested that the granting of permission to work in any State should be conditioned upon the inspection of a standard-form contract which cannot be altered without prior agreement with the migrant worker and which is issued to the migrant worker prior to their departure. This already occurs in a number of states to various degrees. In some states standard-form model contracts are provided to all migrant workers entering the state in order to provide them with a minimum standard of rights to prevent exploitation. In

159. Recruitment & Employment Confederation, supra note 132, at arts. 31, 33.
161. Id. at art. 21, ¶ 1.
162. Id. at art. 18.
164. Migrant Workers, supra note 153, ¶ 151 (listing Antigua and Barbuda, Bulgaria, Croatia and the United Republic of Tanzania (Zanzibar) as examples).
other states, model contracts are available in industries that are considered particularly susceptible to abuse, such as domestic work and agriculture.\textsuperscript{165}

Such contracts should be provided to migrant workers, most appropriately, prior to departure from their state of origin.\textsuperscript{166} If at all possible, the contract should be incorporated into one single document.\textsuperscript{167} The embassies, the consulates, or the Department of Foreign Affairs in Ireland could issue these contracts. The contract should contain all of the details as to the remuneration, the conditions of work,\textsuperscript{168} and the nature of the work.\textsuperscript{169} It should also detail the nature of the relationship between the parties so as to avoid confusion and potential exploitation later.\textsuperscript{170} Copies should be distributed to the workers themselves, to the user-employer, and where practicable, to the embassy of the migrant-receiving state for inspection.\textsuperscript{171}

The contracts should be written in the migrant worker's and the employer's language.\textsuperscript{172} Ireland is proposing to introduce such a provi-

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\textsuperscript{165} \textit{Id.}, ¶ 152 (listing Hong Kong, Sri Lanka and United Republic of Tanzania (Zanzibar) as examples).

\textsuperscript{166} See ILO No. 97, \textit{supra} note 7, art. 5(1)(a), annex II art. 6(1)(a).


\textsuperscript{168} ILO Convention No. 97, \textit{supra} note 7, art. 5.1, annex II art. 6(1)(b).

\textsuperscript{169} Migrant Workers, \textit{supra} note 153, ¶ 150. There is no specific mention of the nature of the work in the ILO Convention No. 97, however, due to the possibility of a migrant worker being forced to do a job for which they are not qualified coupled with the attendant health and safety risks, it is this author's opinion that information as to the nature of the job and the work expected of the migrant should be detailed in the contract for employment. The ILO agrees:

In this respect, the Committee emphasizes that, in order to ensure that migrants are protected to the greatest possible extent from abuse and exploitation in relation to conditions and terms of employment, contracts of employment should be as complete as possible. In particular, the Committee considers it desirable that contracts should regulate such essential matters as hours of work, weekly rest periods and annual leave, without which the indication of the wage, as required by the annexes to Convention No. 97, may become meaningless.

\textit{Id.}

\textsuperscript{170} That is, is it a contract of or for services? In the case of an agency worker, the contract should also contain the proviso that the agency is responsible for the terms and conditions of employment of the migrant worker.

\textsuperscript{171} See ILO No. 97, \textit{supra} note 7, art. 5(1)(a) (stating that where a system of supervision of contracts is in place in a state, it should be ensured "that a copy of the contract of employment [should] be delivered to the migrant before departure or, if the [G]overnments concerned so agree, in a reception centre on arrival in the territory of immigration").

sion in a proposed statutory code of practice for employment agencies and businesses.\textsuperscript{173} This should avoid the situations that arose in Ireland with the Turkish GAMA workers. Before their departure from Turkey, the workers were requested to sign contracts of employment written in English. Few, if any, of the workers spoke English, and none of the workers asked for a copy of this contract. It later transpired that these contracts contained clauses that empowered GAMA to transfer the wages of each employee into an account in their names in Finansbank in the Netherlands. The workers, who knew nothing of these accounts or their contents, and who certainly never accessed them, were exploited at the recruitment phase to the benefit of their employer. There is only one way to ensure that such practices do not occur again.\textsuperscript{174} Providing the migrant workers with a contract of employment written in their own language would have prevented the exploitation that occurred in the case of those workers.

As a matter of international law, an orientation in the language of the migrant workers should be provided prior to the departure of the migrants from the sending state.\textsuperscript{175} In Ireland, there are no legislative provisions in place to support such orientations for migrant workers; however, some voluntary codes of practice in the recruitment industry have incorporated such details in their terms.\textsuperscript{176} These include information on the culture, location, cost of living and working, the social welfare, tax and pension entitlements, their rights under the equality and employment legislation, and their health policies. The European Convention on the Legal Status of Migrant Workers provides that the migrant worker should also be informed as to their rights to family reunification, housing, food, and the religious conditions in the receiving state.\textsuperscript{177} The provision of such information could mean the difference between a migration which is characterised by slavery-like conditions and one which is based upon the free and real choice of the migrant worker.


\textsuperscript{175} Compare ILO No. 97, supra note 7, art. 5(1)(c), annex II art. 6(1)(c) (stating that migrants should receive in writing before departure information concerning the general conditions of life and work), with International Labour Organization, Migration for Employment Recommendation (revised), 1949, ILO No. 86, art. 5.2, available at http://www.ilo.org/illex/cgi-lex/convde.pl?Ro86 (explaining how each country should advise migrants and their families in their own language).

\textsuperscript{176} See Nursing Policy Division, supra note 96, § 6.1.

AGENCIES OF SLAVERY

III. Conclusion

This paper has demonstrated that the situation of migrant workers presently involved in the recruitment process can be as distressing as the experience of their predecessors who were forced to suffer under the systems of slavery and indentured labour. There are many different actors in the recruitment processes, all of whom are responsible to some extent for the various malpractices experienced by migrant workers prior to, during, and after migration. Perhaps the most culpable are the recruitment agencies, and for this reason, this chapter has focussed specifically on such agencies, the present international and national regulations governing these agencies, and the effectiveness of such regulation and suggestions for reform.

As the International Labour Organisation has noted, “[w]orkers considering taking up employment in a country which is not their own are often, due to geographical distance as well as to the nature of the occupations they tend to undertake, in a disadvantaged position to determine reasonable terms and conditions of work in the country of employment prior to departure.”178 Such workers encounter considerable obstacles throughout migration for employment, whether those obstacles are encountered at the migration stage or later on during employment. What is clear about all of these obstacles is that they prevent migrant workers from making real and informed choices about their migration and their employment because they hide the real facts from the migrant worker until they have already migrated and begun work. The lack of regulation at a national level only perpetuates this situation.

An examination of the present experiences of migrant workers in Ireland, a country which has encountered a unique proliferation in migration in recent times, reveals many of these obstacles. The situation of leased workers in Ireland and the lack of regulations governing agencies operating outside the state reveal that without a coherent legislative framework, migration for employment continues to be a hazardous choice. Similarly, the obstacles raised by the lack of regulation of the day-to-day running of agencies, such as the fees they charge, the employment contracts they produce, the orientations which they provide, and the information they give to the migrant worker prior to departure reveal that protection of migrant workers against exploitation is a simple task that can be best achieved by suitable national measures that reflect international best practice. Until there is a complete reinstatement of consent back into the recruitment process, through the elimination of these obstacles, the analogy to slavery and indentured labour can be and should be maintained in

178. Migrant Workers, supra note 153, ¶ 150.
order to remind recruiters and workers alike that without real consent, recruitment for employment remains a hazardous and exploitative process.