



WEBINAR: SECONDMENT

Bryan Cave European Labour and Employment Team
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Speakers



Martin Lüderitz focuses his practice on Labor and Employment Law in Germany.

He advises companies as well as national and international businesses on all aspects of individual and collective labor law, including in the critical and complex area of German works councils consisting of reconciliation of interests and social plans, and tariff agreements.

His main practice comprises advising employers in the drafting of employment contracts, including post contractual non-competition clauses, restructurings, transfer of undertakings and mass redundancies; in matters of enforced redundancy and dismissals due to operational reasons, conduct or illness; and in the context of pre and post transactional labor and employment issues arising out of mergers and acquisitions (M&A) and restructurings. He is also experienced in advising on pension schemes, incentive plans and Employee Stock Options (ESO).

Mr. Lüderitz is Counsel in the Hamburg office and a specialized attorney for Labor Law. He represents employers before labor courts as well as before civil courts and advises clients in various industries such as the hospital and health care sectors.

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Speakers



François Alambret is based in Paris, France and dedicates his practice to labor and employment law. He has extensive experience in advisory work, as well as in handling litigation before the labor courts on both an individual and collective basis.

Mr. Alambret's practice includes all aspects of day-to-day HR matters (including drafting employment contracts or working time agreements, professional elections, disciplinary procedures). His employment litigation experience includes advising on sensitive cases (such as union-led disputes, sexual or racial discrimination, workplace bullying, illegal strikes or employee fraud).

He has also developed a recognized practice in dealing with the employment aspects of companies' reorganizations (for example, closure of industrial plants, redundancy schemes, negotiation with unions and works councils, bankruptcy and collective dismissal).

As a lawyer in private practice since 2000, Mr. Alambret has acquired in-depth knowledge of automotive, retail and luxury sectors.

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Speakers



Federica Dendena began her legal apprenticeship in Milan and was seconded to the local Legal Department of Sony Europe Limited (2012) before joining SILS, the Italian law firm affiliated with Bryan Cave's international network, in 2013.

Her current practice focuses on civil, corporate and commercial law and litigation.

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Speakers



Gary Freer is head of the UK employment team at Bryan Cave. He advises and represents clients in all aspects of employment law, including in particular Executive Severance, team moves (including drafting and enforcement of garden leave clauses and restrictive covenants), unfair and wrongful dismissal, discrimination and all kinds of Tribunal claims. He also advises on transfer of undertakings (TUPE) and on global mobility issues.

He is recognized as a key individual by Chambers UK 2015 – "Gary Freer of Bryan Cave LLP advises on all aspects of employment law for his predominately respondent client base." One source notes his strength on tricky issues and calls him "a consummate employment lawyer." Also, The Legal 500 UK 2013 notes that clients regard Gary for his "expertise in all areas."

Gary is Chairman of the Employment Committee of the City of London Law Society. He is a regular speaker and writer on employment law issues.

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Agenda

1. Case study
2. Insight from Germany
3. Insight from France
4. Insight from Italy
5. Insight from the UK
6. Conclusion



Case study

Imagine your company has obtained a major contract to provide services globally, in particular in France, Germany, Italy and the UK.

Although you may have offices in these countries, you need to temporarily second employees to these locations for three months or more.

What are the challenges and pitfalls?



Insight from Germany



Insight from Germany

Work Permit

- EU-citizens, Swiss citizens and citizens of the European Economic Area (EEA)
 - do not need visa or specific work permit
 - Family members of such citizens usually need no specific work permit either, regardless of their nationality
- Non-EU citizens
 - need residence permit for Germany that includes work permit
 - need permission from German Federal Labor Office
 - ⇒ Wide range of exceptions, e.g. highly-qualified employees, college graduates, top managers, journalists and correspondents
 - ⇒ Bluecard as specific exemption, facilitated access for highly-qualified employees
 - International treaties may provide different rules in individual cases



Insight from Germany

Applicable law

- Secondment: employee shall work temporarily for a host company, but still under instruction of his current employer
 - Without choice of law: German law applies because employee habitually carries out his work in Germany during secondment
 - Even if it is possible to choose applicable (foreign) law for employment relationship, compelling German provision on protection of employees apply
- ⇒ Secondment agreement should be thoroughly drafted



Insight from Germany

Applicable law

- Employment of a foreign employee by a foreign company, e.g. UK or US legal entity:
 - indispensable Posting of Workers Act (*Arbeitnehmer-Entsendegesetz*) listing minimum employment conditions for all employees working in Germany, i.a.
 - Minimum wage
 - Minimum days of paid holiday
 - Maximum working hours and minimum rest times
 - Provisions on safety at the workplace
 - Also applicable:
 - Collective bargaining agreements (“*Tarifverträge*”) if employee is member of a union and company bound to such agreement
 - Generally binding collective bargaining agreements
 - Works agreements (“*Betriebsvereinbarungen*”)

Insight from Germany

Social Security Contributions

- Statutory social security system in Germany
- Territorial principle
 - Social security is governed by employee's place of employment
 - Exemption: posting of employee during existing foreign employment relationship and previously determined limited duration of secondment
 - ⇒ Foreign employees often not interested in becoming part of social security system; main reason to choose fixed-term secondment agreement over new employment agreement
- International social security agreements may provide different rules
 - Such bilateral agreements exist between Germany and other countries, such as the United States, Canada, China, Japan and Australia
 - Not every bilateral agreement covers all parts of social security, often applicable for pension insurance only



Insight from Germany

Income Tax

- Foreign employee:
 - Unlimited tax liability in Germany
 - Tax liability is governed by employee's (habitual) residence or habitual abode
 - May also be subject to double tax treaty and additional tax obligations (e.g. notification of US tax authorities) may apply
- Foreign employer:
 - May be regarded as “domestic” employer for taxation purposes, in case it has its statutory business seat, its permanent establishment, the management based in Germany, or a permanent representative in Germany
 - Obligation to pay-as-you-earn deductions / wage tax



Insight from France



Insight from France

Conditions

Two conditions for secondment:

- (i) Employment contract entered into with the home company which operates the secondment ;
- (ii) Employment contract maintained throughout the secondment



Insight from France

Social security

- Social security
- (i) Citizen of the European Union (EU), the European Economic Area (EEA) or Switzerland: continued affiliation with the home social security scheme (no affiliation to the French social security)
- (ii) Not a citizen of the (EU), the (EEA) or Switzerland:
 - Bilateral agreement: maximum duration of continued affiliation to the home social security scheme [USA (5 years), Canada (3 years), India (5 ans), Japan (5 years), Israël (1 year)], No affiliation to the French social security
 - No bilateral agreement (China): registration with the French social security and risk of double taxation



Insight from France

Before seconding

- Immigration formalities
 - (i) Citizen of the EU, the EEA or Switzerland: no visa required
 - (ii) Not a citizen of the EU, the EEA or Switzerland: visa required (exception for citizens of the following countries: USA, Canada, Israël, Japan)



Insight from France

Before seconding

- Labor regulations: prior work authorization?
- (i) Citizen of the EU, the EEA or Switzerland: not required
- (ii) Not a citizen of the EU, the EEA or Switzerland: required

Conditions :

- Seniority of at least 3 months with home company
- Skilled worker
- Remuneration: paid at least minimum wage x 1,5



Insight from France

Before seconding

- Labor regulations: prior declaration?
- For citizens of the EU, the EEA or Switzerland: required prior declaration with the French labor inspector (« *Inspecteur du travail* ») competent for the workplace in France www.sipsi.travail.gouv.fr



Insight from France

Before seconding

- **Limited information to be provided** (Article R.1263-4 of the French Labour Code):
 - ✓ home company (address, registration number, activity, etc.)
 - ✓ host company
 - ✓ employee (including his address in France during secondment)
 - ✓ activity to be performed in France



Insight from France

During secondment

- **Purpose:** to avoid any « dumping » or unfair competition between the EU countries
- **Mandatory French labor regulations** (Article L.1262-4 of the French Labor Code):
 - ✓ Minimum wage;
 - ✓ Working time (including overtime);
 - ✓ Protection of pregnant women (maternity leave);
 - ✓ Paid vacation and public holidays;
 - ✓ Right to strike;
 - ✓ Occupational health surveillance;
 - ✓ Health and Safety rules



Insight from France

During secondment

- Other French labor regulations not applicable (for example):
 - ✓ Mandatory profit scheme
 - ✓ Optional profit scheme
 - ✓ Time-saving scheme
 - ✓ Training scheme



Insight from France

During secondment

Prohibited illegal **discriminations** (for example):

- ✓ gender discrimination;
- ✓ union discrimination, etc.



Insight from France

During secondment

Work accident:

- Written declaration to be sent to the labor inspector competent for the workplace in France



Insight from Italy



Insight from Italy

Reform of the secondment law on the employment of the employees seconded to Italy by companies established in other EU Member States, that implements the Directive 2014/67/EC on the secondment of employees in Europe:

- (1) Legislative Decree No. 136 of 2016 in force as of 22 July 2016;
- (2) Ministerial Decree of Employment Ministry of 10 August 2016;
- (3) Explanatory Note of Employment Inspectorate of 22 December 2016;
- (4) Explanatory Note of Employment Inspectorate of 1 January 2017.



Insight from Italy

Obligations for the Seconding Employers and Sanctions

(I) 24 hours advance notice to the Employment Ministry;

(II) Notice to the Employment Ministry of any changes in the secondment within 5 days;

(III) Use of the on-line specific form so-called “MODELLO UNI-DISTACCO-EU” to send to the Employment Ministry for the notices above (I) and (II);

Sanctions for violation of points (I)-(II)-(III) above for the seconding employers: fine up to Euro 500 for each seconded employees involved.



Insight from Italy

Obligations for the Seconding Employers and Sanctions

(IV) Appointment of a delegate, domiciled in Italy, in charge of keeping the secondment documents (e.g. employment contract, pay-slips, working hours details, employment offer letter, applicable social security details etc.) and a second delegate in charge of the communication with the unions, if needed;

Sanctions for the violation of point (IV) above for the seconding employers: fine up to Euro 6,000.

(V) All documents concerning the secondment (point IV above) must be kept for at least two years and translated into Italian.

Sanctions for the violation of point (V) above for the seconding employers: fine up to Euro 3,000.



Insight from Italy

Obligations for the Seconding Employers and Hosting Employers

(I) The hosting employer shall grant equal treatment to the seconded employees and the other employees of its in the same host member state.

(II) The equal treatment is limited to these matters: maximum working hours and minimum rest period, holidays, minimum economic treatment, limits on the employment of temporary workers, protection of maternity rights and children, health and safety at work and equality of treatment between men and women.



Insight from Italy

Validity of the Secondment and Italian Labor Authorities' Investigative Powers – Sanctions

- (I) Increased investigative powers of Italian Labor Authorities concerning the misuses of secondment;
- (II) Assessment of whether the secondment is genuine based on the analysis of some information concerning the seconding company, the activity performed by the seconded employee, the number of implemented/completed secondment contracts, the costs' reimbursement.
- (III) Secondments that do not comply are invalid and the seconding and hosting employers are subject to penalties and sanctions:
 - The seconded employee will be deemed to be actually an employee of the hosting company;
 - Fine of Euro 50 per day up to a maximum amount of Euro 50,000 for the misuses of secondment.



Insight from Italy

Social Security Contribution Aspects of Secondment from/to EU Member State or from/to Italy

- EU Regulation No. 883 of 2004.
- EU Regulation No. 987 of 2009.
- Explanatory Note of Social Security Agency No. 83 of 2010.
- Working permit not requested for EU citizens.
- Secondment does not exceed the duration of 24 months.
- Activities shall be done on behalf of the seconding employer.
- No substitution of another seconded employee after the end of his secondment.



Insight from Italy

Social Security Contribution Aspects of Secondment from/to EU Member State or from/to Italy

The seconding employer remains responsible for the employment agreement, the dismissal, the payments of social security contributions (in the home country) and compliance with all payments and filings required by the national social security system, wages as exception of the principle of *lex loci laboris*.



Insight from Italy

Social Security Contribution Aspects of Secondment from/to Non-EU Member State or from/to Italy

- The secondment is allowed also in non-EU Member States, however the applicable rules change on the basis of a bilateral agreement with Italy.
- Presence of bilateral agreement implies a system similar to the secondment in the EU Member States from a social security standpoint, except for the exclusion of some social security aspects that shall be covered and increased by the seconding employer with the opening of a new specific position before social security authorities. Usually the working permit is requested.
- Non-EU Member States with a bilateral agreement with Italy are: Argentina, Brazil, Canada, Cape Verde, Korea, Japan, Israel, Canaries, Yugoslavia, Bosnia-Erzegovina, Macedonia, Monaco, San Marino, Vatican, Usa ,Tunisia, Turkey, Uruguay and Venezuela.



Insight from Italy

Social Security Contribution Aspects of Secondment from/to Non-EU Member State or from/to Italy (without bilateral agreement)

- In non-EU Member States without a bilateral agreement with Italy, the risk for the secondment is the double taxation of the work both in the home country as in the hosting country.
- Pursuant to Legislative Decree No. 398 of 1987, Italy provides a minimum level of assistance that the seconding employer must grant to the seconded employee e.g. illness, maternity leave, involuntary unemployment, accidents at work, occupational diseases, diseases etc...
- Working permit is requested.



Insight from the UK



Insight from the UK

Summary

- Brief summary of immigration position;
- Employment law considerations in the UK;
- Tax considerations are outside the scope of today's presentation



Insight from the UK

Immigration Summary

- The immigration rules are complex, and changing constantly;
- The UK's forthcoming departure from the European Union may herald further major change, but that is in the future;
- Employers can be subject to serious civil and criminal penalties, if they get it wrong – even if they do not knowingly employ an illegal worker, but had “reasonable cause to believe” that they are doing so.



Insight from the UK

Basic Framework

- Citizens of states in the European Economic Area (including Switzerland, but not Croatia) may work in the UK without permission, and may bring their dependants with them to live (and work if the migrant has permission to come for more than six months);
- Non-EEA citizens already working for an EU employer may have a right to come to the UK for a defined period;
- Others will need permission to work while in the UK.



Insight from the UK

The Points-Based System (“PBS”)

This consists of five tiers:

- Tier 1 for high-value investors, entrepreneurs, those with exceptional talent (Unlikely to apply here);
- Tier 2 – for skilled workers. This will be relevant here. It has sub-categories



Insight from the UK

Tier 2

There are 2 key sub-categories

General – must be to a post which can not be filled by resident labour (may last up to 5 years):

- minimum salary of £25,000; and
- annual limit of 20,300 in total.



Insight from the UK

Inter-Company Transfer

Formerly very popular, now subject to increasing restrictions – from April 2017 no further short term transfers (for a year less):

- not subject to resident labour test;
- must have been employed overseas for at least 12 months'
- must be paid at least £30,000 per annum.



Insight from the UK

Sponsorship

- Under the PBS, those in Tier 2 must be “sponsored” before they can apply to enter or remain in the UK;
- UK employers must apply for and obtain a sponsor licence from UK Visas and Immigration before they can employ a Tier 2 migrant.



Insight from the UK

Family Members

- Spouses and civil partners and dependent children under 18 years of age may live in the UK, but must obtain entry clearance before they travel (this may involve providing biometric information (fingerprints and facial image));
- Spouses and dependants may work in the UK without any further permission or documentation (unless a doctor or dentist in training).



Insight from the UK

Employment Law Aspects

- Should be carefully considered, and necessary action taken, BEFORE the secondment/transfer begins;
- Important considerations may arise if things go wrong and the relationship ends while in the UK.



Insight from the UK

Which Country's Law Applies?

- General principle, the parties are free to choose which country's law applies;
- In the absence of any express choice, the law of the country in which they habitually (now) work will apply;
- Even where there has been an express choice of law (e.g. in an employment contract) the provisions of the contract will be overridden by mandatory rules of the country in which the employee works; which apply automatically.



Insight from the UK

Mandatory Rules

- The law of unfair dismissal (may be relevant even to those on short stays, e.g. whistle-blowers);
- Discrimination legislation;
- Laws on working time/holidays, minimum rates of pay, health and safety etc.
- Enforceability of post termination restrictions.



Insight from the UK

Jurisdiction over Disputes

- Whatever the Employment Contract may say, the UK Court will have sole and exclusive jurisdiction over any employment related dispute in which the defendant employee habitually works in the UK.



Insight from the UK

Conclusion – On Employment Issues

- Do not rely solely on any existing agreements, provide a UK specific agreement which will apply during stay in the UK.



Thank you for your attention !

For more information, you can contact us [here](#)

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