Deployment of External Personnel in Germany

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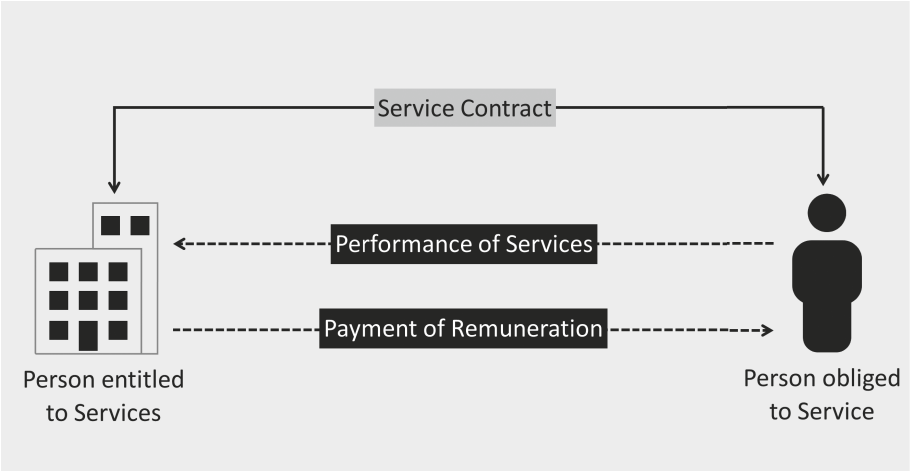

Figure 3: Illustration of a service contract

A service contract is a contract under the law of obligations aimed at exchanging service and remuneration. It is therefore subject not only to the provisions of the General Part of the Civil Code relating to legal transactions and contracts, and the provisions of the General Part of the Law of Obligations applicable to contractual obligations but also to the provisions on reciprocal (synallagmatic) contracts (sec. 320 et seq. BGB). **237**

The subject of the service contract according to sec. 611 para. 2 BGB can be services of any kind, such as contracts for lawyers, doctors, tax consultants, and architects (please be aware of the existing prohibition in the meat industry, see marginal no. **99**). Contracts with consultants or IT service providers are also regularly designed as service contracts. **238**

While the legislator considered the inclusion of higher-level services (e. g., legal services) in the type of service contract as requiring regulation, it did not recognise the regulatory problems associated with the employees' dependent work. Soon after the BGB came into force, the type of service contract practically broke down into two sub-cases: the self-employed person's service contract and the employment contract of the employee providing services dependet. This distinction was only later incorporated into the text of the Civil Code. In some cases, provisions of the law on a service contract, such for example sec. 612a, sec. 613a, sec. 615 sent. 3, sec. 619a, sec. 620 para. 3, sec. 622, and sec. 623 BGB, according to their wording, apply direct exclusively to employment relationships. In contrast, sec. 620 para. 3 BGB, and sec. 630 para. 4 BGB, clarify the existence of employment law outside the BGB. This development terminated by inserting sec. 611a into the BGB with effect from 1 April 2017. The employment contract has thus been given an independent statutory regulation. **239**

1. Legal Basis and Legal Relations

The service contract is regulated by law in sec. 611 et seq. BGB. The parties to the service contract are the person entitled to services (obligee to the service) and the person obliged to services (obligee to the claim for remuneration). **240**

The person entitled to services commissions the person obliged to services to perform a specific service and owes the agreed remuneration for this activity, sec. 611 para. 1 BGB. **241**

The person obliged to services is obliged to perform the promised services, sec. 611 para. 1 BGB. He shall make his work available to the person entitled to services in return **242**

for the agreed remuneration. Suppose the parties have not concluded a remuneration agreement. In that case, remuneration shall be deemed to have been tacitly agreed based on sec. 612 para. 1 BGB, if the circumstances indicate that the service can only be expected in return for remuneration. The amount of remuneration is based on the usual remuneration according to sec. 612 para. 2 BGB.

243 The service contract is characterised by the personal freedom of the person obliged to services. The person obliged to services is self-employed. He is free to decide in what way or at what time he fulfils the promised services. The person obliged to services solely ows the supply of the performance ("services") and not any particular performance result. Furthermore, he is not subject to personal instructions, so that the person entitled to services cannot instruct him to perform the service at a particular time and place. According to sec. 84 para. 1 sent. 2 of the German Commercial Code (*Handelsgesetzbuch* – "**HGB"**), the commercial agent's self-employment depends on whether he is essentially able to arrange his activities freely and determine his working hours. Anyone who cannot do so is a staff member and thus an employee (sec. 84 para. 2 HGB). This origin delimitation criterion for a commercial agent's activity, now adopted in sec. 611a para. 1 sent. 3 BGB, will also help in many cases of different job performance. If the employee is subject to a comprehensive right of instruction concerning time, duration, and place of performance of the promised work, he is an employee. As a rule, dependent work is firmly bound by instructions. If the contract grants the employer the relevant disposal of the employee's manpower, this indicates the existence of an employment relationship. An employee is dependent on instructions in terms of time if he is expected to be in permanent readiness to help or if the employee is called upon to a not inconsiderable extent, even without a corresponding agreement, i. e., the working hours are ultimately "assigned" to him or her. The constant readiness for help can result from the parties' express agreements or the practical implementation of the contractual relationships. In this respect, an employee's schedule in duty rosters without prior agreement is a strong indication of employee status.

244 However, the self-employed person working based on a service contract or a contract to produce a work may have to follow instructions in the same way as the mandatary (see sec. 665, 675 BGB). The person entitled to services can therefore give professional instructions that concern the service itself. This can be, for example, the instruction to perform the services in a particular order.

245 Thus, a service contract is present if the entrepreneur providing the services explicates the services owed either in person or through his assistants under his responsibility, and according to his plan (organisation of the service, temporal scheduling, number of assistants, suitability of the assistants, etc.). The decisive factor is that the assistants are essentially free of instructions from the employer's representative of the person entitled to services concerning the service perfomance to be rendered and can determine their own working hours by themselves.

2. Social Security Law

246 As already explained in the context of temporary agency employment, the statutory social security obligations solely apply at dependent employment (see marginal no. **37** et seq.). However, the person obliged to services acts independently and is therefore not dependently employed. Therefore, there is no compulsory insurance for him or her in health, nursing, unemployment, pension, and accident insurance. The person obliged to serviceis, however, is free to insure himself voluntarily in the statutory social security, in case he or she would like to take their coverage in an insured event sec. 2 para. 1 var. 2 SGB IV.

Since the person obliged to services is not employed as a dependent employee, the person entitled to services does not have any obligations under social security law, significantly, not the obligation to pay social security contributions for the person obliged to services under sec. 28e para. 1 sent. 1 SGB IV. **247**

3. Tax Law

According to sec. 1, 2 para. 1 EStG, the person obliged to services is liable to income tax liability. He must pay tax on his income. Under sec. 25 para. 1 EStG, income tax is generally assessed at the end of the calendar year (assessment period) based on the taxpayer's income derived during this assessment period. As a taxpayer, the person obliged to services must submit a personally signed income tax return for the assessment period, sec. 25 para. 3 sent. 1 EStG. Besides, the person obliged to services must make advance payments on the expected income tax due. Payment dates are each on **248**

- March 10th,
- June 10th,
- September 10th and
- December 10th

of each year, sec. 37 para. 1 EStG. The amount of income tax is determined, among other things, by the amount of income.

Additonally, the person obliged to services, as far as he fulfills deliveries and other services against payment as an entrepreneur within the scope of its undertaking, is subject to the obligation to pay value-added tax according to sec. 1 para. 1 of the Value Added Tax Act (*Umsatzsteuergesetz* "**UStG**"). Entrepreneur is a person, who carries out a trade or professional activity independently, sec. 2 para. 1 UStG. As a rule, the tax is to be calculated according to agreed remuneration, sec. 16 para. 1 sent. 1 UStG. Insofar as there is an obligation to pay value-added tax (VAT), the person obliged to services must issue an invoice per the requirements of the UStG and show the VAT (19 %, respectively, 7 %) separately, sec. 14 para. 4 no. 8 UStG. An invoice must, among other things, contain the following information: **249**

→ Name and address of the invoicing party (here: the person obliged to services) and invoice recipient (here: the person entitled to services)
→ Tax number or sales tax identification number
→ Date of invoice
→ Consecutive invoice number
→ Quantity and type of delivery of the or the other service (with description of the service to be specified)
→ Time of delivery or the other service
→ Value-added tax amount
→ Gross total

Besides, the person obliged to services is obliged to submit a preliminary VAT return. If a VAT payable amount of less than EUR 7,500 was incurred by the person obliged to services in the previous year, the preliminary VAT return must be submitted by the end of the tenth day of a quarter. If the previous year's VAT payable amount of the person obliged to services was more than EUR 7,500, the preliminary VAT return must be submitted by the end of each month's tenth day of. Preliminary VAT returns can also be submitted online. It should be noted that every undertaking must conduct the preliminary VAT return, therefore, even the person entitled to services. **250**

However, consumers or small business owners do not have to charge VAT or report it separately. Small businesses are establishments whose turnover (plus the tax payable on **251**

it) did not exceed EUR 22,000 in the previous calendar year and is not expected to exceed EUR 50,000 in the current calendar year, sec. 19 UStG.

252 The person entitled to services may, in turn, deduct the value-added tax shown separately in the invoice by the person obliged to services as so-called input tax at the tax office, sec. 15 UStG (so-called *input tax deduction*). Input tax deduction must only occur under the following conditions:

- The input tax has to result from the incoming invoices (invoice received by the person entitled to services himself) of the person entitled to services.
- The invoices have to contain the minimum information required by sec. 14 para. 4 UStG.
- The person obliged to services and the person entitled to services have to be entrepreneurs themselves. The invoice of a small business owner does not entitle for the input tax deduction.

4. Distinction from the Employment Contract

253 A subset of the service contract is the employment contract according to sec. 611a BGB. The distinction between service contracts with self-employed persons (service contracts in the narrower sense, "free" service contracts) on the one hand and employment contracts, on the other hand, is of considerable practical importance because the legal norms of labour law also apply to the latter. The courts for labour matters are responsible for legal disputes arising from employment contracts rather than the civil courts (see sec. 2 para. 1 no. 3 ArbGG). Above all, however, the demarcation between a service contract under sec. 611 BGB and an employment contract is of fundamental importance in practice. That is because considerable legal differences arise concerning the mutual obligations to perform and social and tax law obligations. Therefore, the typical characteristics of an employment contract according to sec. 611a BGB will be explained in the following in differentiation to a free service contract.

a) Legal Basis and Legal Relations

254 The employment contract is concluded by two concurrent declarations of intent.

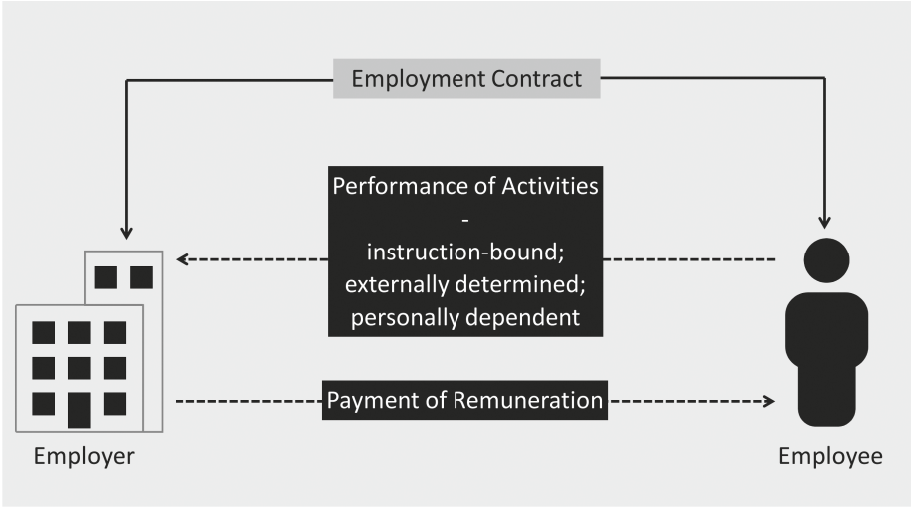

Figure 4: Illustration of an employment relationship

The two concurrent declarations of intent have to aim at establishing an employment relationship and be made with the will to bind oneself legally. The employment contract is not subject to any formal requirements so that it can be concluded orally. However, one month after the agreed commencement of the employment relationship at the latest, the employer has to set down the essential contractual conditions in writing, sign the minutes and hand them over to the employee (sec. 2 NachwG). The conclusion of a written employment contract is always recommended for documentation's reasons and in case of dispute to prevent proof difficulties. **255**

The parties may principally determine the content of the employment contract freely. However, numerous legal limits are inflicted on private autonomy in German employment contract law, restricting the freedom of content, and not permitting individual contractual agreements that deviate from the law. For example, every employee is entitled to receive a salary's payment that is at least equal to the statutory minimum wage, sec. 1 para. 1 of the German Act Regulating a General Minimum Wage (*Gesetz zur Regelung des allgemeinen Mindestlohns* "**MiLoG**"). If the employer and employee reach a deviating agreement, it is invalid, according to sec. 3 MiLoG. This type of legal regulation, which cannot be waived to the employee's disadvantage, also exists in the areas of vacation (Federal Vacation Act – *Bundesurlaubsgesetz* "**BUrlG**"), continued remuneration in the event of illness (Continuation of Remuneration Act – *Entgeltfortzahlungsgesetz* "**EFZG**"), time limits or termination (for the first see the provisions of the TzBfG; see for the latter KSchG). **256**

The employment contract results in mutual primary service obligations on both the employer's and the employee's side, which differ substantially concerning the obligations arising from a service contract relationship. **257**

To determine whether a contract is to be classified as an employment contract, an overall consideration of all circumstances must be made, sec. 611a para. 1 sent. 5 BGB. First of all, it is determined what the parties have agreed by contract, i. e., what has become its content. However, as sec. 611a para. 1 sent. 6 BGB, shows, in a second step, the contract's actual implementation is also taken into account for the assessment so that a different designation of the contract is ultimately irrelevant. **258**

aa) Obligations of the Employee. The employment contract obliges the employee to perform bound by instructions and externally determined work in personal dependence in the service of another person, sec. 611a para. 1 sent. 1 BGB. He must integrate himself into the employer's external work organisation and follow the instructions of his employer. The employer can issue instructions regarding the content, execution, place, and time of the work performance, sec. 611a para. 1 sent. 2 BGB. Limits to the right to issue instructions may indeed arise from statutory provisions, from provisions of applicable collective bargaining agreements, a works agreement, or from the employment contract itself, as is shown by sec. 106 of the German Trade Regulation Act (*Gewerbeordnung* – "**GewO**"). However, if the employer properly exercises his right to issue instructions, the employee must comply with these instructions if he does not wish to act in breach of duty. **259**

The most crucial distinguishing feature of the employment contract from the free service contract is the employee's personal dependence on his employer. The person obliged to services provides the person entitled to services solely with his manpower in the case of a free service contract but is otherwise essentially free to exercise the "how", "when,"and "where" of his activity. On the other hand, the employee is not subject to personal freedom regarding when and how he may use his workforce. **260**

In addition to the primary service obligation, the employee is also subject to ancillary service obligations, so-called fiduciary duties. The legal connecting factor is sec. 241 para. 2 BGB, which is also applicable to the employment relationship. Thus, the employee has to consider the rights, legal assets, and interests of the employer. In particular, he must **261**

observe the rules of conduct within an establishment, handle the employer's property with care, or report his incapacity to work in case of illness.

262 **bb) Obligations of the Employer.** The employer's primary service obligation is to pay the remuneration to the employee. However, the employee is obliged for advance performance, sec. 614 BGB.

263 The ancillary service obligations of the employer also find their basis in sec. 241 para. 2 BGB. The employer is obliged to employ the employee. This obligation arises from the employee's general right of personality, protected by the Basic Law, Art. 1 para. 1 in conjunction with Art. 2 para. 1 of the Basic Law (*Grundgesetz* "**GG**"). The employer is also obliged to take measures to protect the life, health and personality of the employee within the framework of the establishment organisation, for example, to provide appropriate work clothing or gender-separated changing rooms.

264 If there is an employment relationship, the entrepreneur as employer has many legally defined obligations in social security and tax law which deviate from the employment contract and which are not available to him. Therefore, the question, whether a contractual relationship is an employment relationship in the sense of sec. 611a BGB is of central importance.

b) Social Security Law

265 Regarding the employer's and employee's obligations under social security law, please refer to the comments on temporary agency employment in the relationship between the temporary work agency and the temporary agency worker (see marginal no. **37** et seq.).

c) Tax Law

266 Regarding the employer's and employee's tax law obligations, please refer to the information on temporary agency employment in the relationship between the temporary work agency and the temporary agency worker (see marginal no. **42** et seq.).

III. Contract to produce a work

267 In addition to the overt temporary agency employment and services, are work perfomances, i. e., cooperation based on a contract to produce a work, are the third basic case of external personnel deployment.

1. Legal Basis and Legal Relations

268 The contract to produce a work is regulated in sec. 631 et seq. BGB. The conclusion of the contract follows the general regulations of the BGB. Therefore, two concurring declarations of intent must be present, which are in content directed towards the conclusion of a contract to produce a work. Sec. 631 BGB names the parties to the contract to produce a work as a contractor (obligor of the work performance) and customer (obligee of the work perfomance).

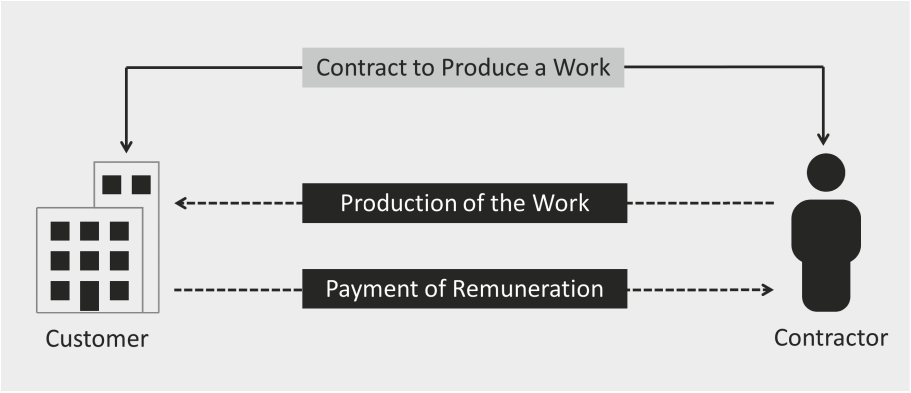

Figure 5: Illustration of a contract to produce a work

Unless a general ban prohibits the use of contracts to produce a work (see marginal no. **99** above for the prohibition in the meat industry), a contract to produce a work can generally be concluded orally. Even if there is no written form requirement concerning contracs to produce a work, the written form is recommended for documentation reasons alone. **269**

In the law governing contracts to produce a work, there are mutual contractual primary service obligations, which differ significantly from those of the service contract. **270**

a) Obligations of the Contractor

The contractor obliges the production of the promised work. Therefore, the contractor owes the customer to procure a particular success through his work performance. In the agreement between the parties, the promised work is specified. The contractor is self-employed. Regarding the achievement of success, the contractor is entirely free. In case of doubt, he does not have to produce the work personally but can have it produced by his employees or use another third party with whom he again concludes a contract. The contractor is free from the customer's instructions, both in terms of time and place and in his work organisation. The customer can only give the contractor factual instructions regarding the work, sec. 645 para. 1 sent. 1 BGB. **271**

The project-related right to issue instructions under a contract to produce a work within the meaning of sec. 645 para. 1 sent. 1 BGB is factual and result-oriented, and representational limited to the work performance to be rendered. Instructions of the customer, by which the type, sequence, and single contents of different or similar work performances within the scope of the previously agreed work items are determined. These instructions do not justify the assumption of the existence of temporary agency employment as far as they are only issued in relation to the specific work. However, the instruction limit in the employment contract is exceeded if the third party only determines the subject of the work to be performed by the employee by his instruction.[6] **272**

The regulations on the contract to produce a work do not exclude the possibility that the work to be performed is contractually agreed upon in such detail and in such a specific manner in all details concerning the execution, scope, quality, time and place of performance or creation. So that in that case, there is no leeway in decision-making left for the contractor regarding the creation of the work. The contractor is then contractually obliged to perform the work in accordance with the contract concerning all details. **273**

[6] Federal Labour Court, 30 January 1991 – 7 AZR 497/89.

274 Only result-related execution instructions shall, therefore, be assigned to the right to issue instructions under the contract to produce a work. As such qualified are:
- Instructions regarding quality specifications;
- Information on the size, quantity, and type of the object to be created;
- Production methods and sequence.

275 Given the possibility for the customer to issue instructions resulting from sec. 645 para. 1 sent. 1 BGB, the contractor must still have his own technical, concrete possibility to give instructions in the sense of sec. 106 GewO for the performance of the work.

b) Obligations of the Customer

276 If the contractor has produced the work free of material defects and legal defects, the customer is obliged to accept the work and pay the agreed remuneration. Upon acceptance of the work, the contractor's claim to his wage shall become due.

c) Lessons learned

277 Based on the principles of case law above mentioned, the Federal Employment Agency has laid down the following characteristics in its business instructions (page 16 of the Technical Instructions for the Act on Temporary Employment, AÜG, valid from 1 August 2019), which speak in favour of the acceptance of a contract to produce a work:
- Agreement and preparation of a qualitatively customisable work result attributable to the contractor,
- Entrepreneurial freedom of disposition of the contractor towards the customer,
- The Contractor's right to issue instructions to his employees working in the customer's business if the work is to be created there,
- Bearing the entrepreneurial risk, in particular the warranty by the contractor and
- Success-oriented accounting of the work performance.

2. Social Security Law

278 Concerning the contractor's social security obligations, please refer to the service contract's statements (see marginal no. **246** et seq.).

3. Tax Law

279 Regarding the tax law consequences of the contract to produce a work, reference is made to the explanations above of the service contract (see marginal no. **248** et seq.).

IV. Further Practice-relevant Forms of External Personnel Deployment

280 The above mentioned forms (see marginal no. **236**/**267**/**5** et seq.) can be described as basic contractual types of external personnel deployment. Based on these basic types, a wide variety of external personnel deployment constellations have developed in practice.

1. Employment Service

281 The entrepreneur may use a placement officer to find suitable workers.