1. Introduction

Increased mobility of workers is a consequence of the intensification of international trade, together with the global expansion of companies. That mobility raises concerns about immigration and social security and also important questions of labour law.

Many enterprises which we shall refer to as “home” companies send their workers abroad for a temporary mission with what may be termed a “host” company. If this host company is part of the same group, the home company may choose between two structures: expatriation or secondment. If the host company is a client, reference will then be made to a secondment for the provision of cross-border services. Each of these different legal structures raises specific issues which must be considered when the time comes to envisage international employment relationships. We will look at the main issues here.

2. Expatriation

2.1 Definition

From an employment law perspective, the term expatriation is used when an employee is sent on an intragroup mission for a limited period of time and works for the host company on the basis of a local employment contract. The expatriate has no direct subordination relationship with the home company. He is no longer part of the home company’s staff and his employment contract with the latter is either terminated or suspended. From a social security angle, the employee is not mandatorily maintained under the social security system of the country in which the home company is based, as he is not employed by the latter anymore and does not work in the relating country anymore.

2.2 The employee’s return from expatriation

At the end of the expatriation period or in case of termination of the employment contract with the host company before the end of the expatriation, conflicts might arise in connection with the employee’s return to the home company. Several measures are essential in order to avoid these conflicts. In the first place it will be appropriate to make sure that the employee has only one valid employment contract at any given time. It is important to avoid the coexistence of two employers, which might then constitute a simple partnership with joint and several responsibility for all liabilities to the employee (Swiss Supreme Court, Ruling 4C.41/1999 of 12 July 2000). A return clause will also have to be signed with the home company. This clause will determine in particular whether, at the end of the mission or in the event of termination of the employment contract during the period of expatriation, the employment contract with the home company is to continue and if so under what conditions. If the home company is unable to respect its commitments, it is possible to foresee a penalty clause.

3. Secondment

3.1 Definition

The term secondment is used when the employment contract between the employee and the home company is maintained and the employee is seconded to a host company belonging to the
same group for a limited duration. The seconded person remains an employee of the home company to which he is still directly subordinated. If the rules of international social security so stipulate, the employee may remain covered by the social security system of the country in which the home company is based.

Secondment implies two contracts: a main employment contract and a letter of secondment setting out the terms and conditions of the secondment to the host company. These two documents signed with the home company which remains the employer will as a rule be governed by the law of the country of the home company, subject to the rules of public policy that apply in the country where the host company is based.

3.2 The identity of the employer in the case of an intragroup secondment

The Swiss Supreme Court defines the employer as being the person who, in virtue of an employment contract, is entitled to use the services of the worker, is authorised to give him instructions and has all the rights and obligations flowing from the employment contract (Swiss Supreme Court, Ruling 4C.158/2002 of 20 August 2002). Within a group of companies the employment contract is in principle concluded with one company only (ATF 130 III 213, JdF 2004 i 223).

It is important to be able to determine who the employer is in the event of an intragroup secondment so as to avoid a situation in which the seconded employee might have claims against the host company. The main criterion will be that of maintaining the link of subordination with the home company. However, the assessment of this criterion is not always easy because intragroup secondment sometimes involves the delegation to the host company, of a part of the authority to give instructions to the employee. That makes it imperative to draft contracts in precise and coherent terms in order to limit the risk that the host company might be regarded as a de facto employer; that might in turn have further consequences in the areas of taxation and social security.

4. Secondment for the provision of cross-border services

4.1 Definition

The term secondment for the provision of cross-border services is used when a home company sends a worker to a host company abroad to perform a mission on the basis of a precise mandate. In that case, the host company is not a member company of the group but a client company.

4.2 Distinction from the cross-border hiring of services

The hiring of services is defined as making a worker available by his employer to a different employer to perform work against remuneration. It is governed by the Federal Act on Employment Services and the Hiring of Services (LSE/AVG). The hiring of services from Switzerland to a different country requires authorisation. The hiring of services to be provided in Switzerland from a foreign country is prohibited. Penalties are imposed in the event of any breach of these rules.

The hiring of services differs from secondment in particular through the fact that the company which hires out the services abandon its authority to give directives to its worker; that authority is vested in the company which hires the services and assumes the commercial risk associated with its activity. In the case of secondment for the purpose of providing services, the client company will not have any authority to give directives and will confine itself to giving certain instructions relating in particular to employee safety.

To avoid a situation in which the LSE/AVG law may be breached, the company will have to make sure at the time when the secondment of an employee to a client abroad is envisaged, that the mission does not meet the criteria which define a hiring of services. If necessary, the mission will have to be structured accordingly through a suitable contract.

5. Conclusion

This concise overview shows the importance of a precise definition of the legal framework in which such an international employment will be established so as to avoid the problems specific to each of these different structures and the resulting potential conflicts.