

# Protecting the Wages of Migrant Construction Workers

Part Three: What can be learned from systems of  
**wage protection in**  
**China, EU, US and Latin America**





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## ABBREVIATIONS

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<b>CLAs</b>	Collective Labour Agreements
<b>EU</b>	European Union
<b>GCC</b>	Gulf Cooperation Council
<b>OCPs</b>	Other Contracting Parties
<b>OSHA</b>	Occupational Safety and Health Administration
<b>SC</b>	Supreme Committee for Delivery and Legacy
<b>TUs</b>	Trade Unions
<b>UAE</b>	United Arab Emirates
<b>WHD</b>	Wage and Hours Division
<b>WPS</b>	Wage Protection System

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## INTRODUCTION

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**This is the third in a series of papers addressing the issue of late, partial or non-payment of wages to migrant construction workers. Our work has a specific focus on the member countries of the Gulf Cooperation Council (GCC) where the construction workforce is almost entirely composed of temporary migrants from low wage economies in South Asia. In this paper we look beyond the GCC to examine policies and tools that have been adopted to protect the wages of construction workers in other parts of the world.**

Research in Qatar<sup>1</sup> found delay in payment of wages to be one of the most significant problems facing construction workers and this was echoed in other countries of the GCC. In [Part One](#) of this paper<sup>2</sup> the problem of wage delay was traced to the change to more flexible forms of employment that has taken place in the past few decades. Under the current business model, extensive subcontracting and outsourcing of labour has increased the distance that interim payments have to travel to reach the immediate employers of the workforce, which are often small firms with limited financial resources, unable to pay

1 Wells J, Improving employment standards in construction in Qatar, Engineers Against Poverty, 2014, available at: [www.engineersagainstpoverity.org/wp-content/uploads/2018/07/EAP\\_Qatar\\_Report\\_Web\\_Version\\_RGB\\_Revised\\_20131125110200.pdf](http://www.engineersagainstpoverity.org/wp-content/uploads/2018/07/EAP_Qatar_Report_Web_Version_RGB_Revised_20131125110200.pdf)

2 Wells J, Protecting the wages of migrant construction workers, Part One, Engineers Against Poverty, 2016, available at: [www.engineersagainstpoverity.org/wp-content/uploads/2018/07/Protecting-the-Wages-of-Migrant-Construction-Workers.pdf](http://www.engineersagainstpoverity.org/wp-content/uploads/2018/07/Protecting-the-Wages-of-Migrant-Construction-Workers.pdf)

wages until they have received payment for the work already completed. Clients do not pay on time and contractors in the upper tiers of subcontracting chains hold back payment to boost their own cash flow, starving the lower tiers of funds.

Because late payment is bad for the workers but also for the industry, many countries around the world have attempted to find ways to improve payment procedures and practices in the construction industry. [Part Two](#) of this paper<sup>3</sup> then draws on a White Paper prepared for the regional office of the International Labour Organization<sup>4</sup> which focused on measures that have been successful elsewhere to address the slow flow of funds down the subcontracting chain. It attempts to assess whether any of these measures could be introduced into the GCC to improve payment and ensure that employers have the funds to pay when wages are due.

However, employers not having funds (as argued in [Part Two](#)) is not the only reason why workers are so often deprived of the wages due to them. The predominant form of procurement in the GCC (as in much of the world) is international competitive bidding with contracts awarded to the lowest priced bidder and competition for contracts in the GCC construction industry is intense.<sup>5</sup> Reducing labour costs in order to win contracts is a priority for contractors and subcontractors, and cheating workers of their wages (often described as 'wage theft') is common everywhere.<sup>6</sup>

To resolve the increasing number of wage disputes the United Arab Emirates (UAE) introduced the Wage Protection System (WPS) in 2009 (updated in 2016) which has since been copied in the other five GCC countries. The WPS is an electronic salary transfer system designed to pay wages directly into the bank accounts of construction workers, so there is a record of when wages have (or have not) been paid. In two of the six GCC countries a fund has also been set up to pay wages when employers default.<sup>7</sup>

3 Wells J, Protecting the wages of migrant construction workers: Part Two, Addressing the problem in the Gulf Cooperation Council countries, Engineers Against Poverty, 2018, available at: [www.engineersagainstopoverty.org/wp-content/uploads/2018/12/EAP-OSF-final-for-web.pdf](http://www.engineersagainstopoverty.org/wp-content/uploads/2018/12/EAP-OSF-final-for-web.pdf)

4 Wells J, Exploratory study of good policies in the protection of Construction Workers in the Middle East, International Labour Organization, Regional Office for Arab States, 2018, available at: [www.engineersagainstopoverty.org/wp-content/uploads/2018/11/ILO-White-Paper.pdf](http://www.engineersagainstopoverty.org/wp-content/uploads/2018/11/ILO-White-Paper.pdf)

5 Newbould S, Butcher T, Anagnostou P, Haque A, Rahman H and Hammadi A, Time for Change: Construction in the GCC reaches a tipping point, DLP Piper, 2018, available at: [www.dlapiper.com/en/uk/insights/publications/2018/11/construction-in-the-gcc-reaches-a-tipping-point/](http://www.dlapiper.com/en/uk/insights/publications/2018/11/construction-in-the-gcc-reaches-a-tipping-point/)

6 Buckley M, Zendel A, Biggar J, Frederiksen L and Wells J, Migrant Work & Employment in the Construction Sector, International Labour Office, 2016, available at: [www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/publication/wcms\\_538487.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_538487.pdf)

7 In UAE and Qatar the fund has been changed to an insurance policy. We have been unable to find information on whether similar provisions yet exist in the other four countries.



The WPS is a genuine local innovation but it is not working as intended. While it may help to resolve payment disputes, it has so far failed to reduce them or to serve as a deterrent to late or non-payment of wages.<sup>8</sup> In an overview of the WPS in four of the six countries which have introduced the system, Ray Jureidini<sup>9</sup> highlighted a number of other serious limitations on the ability of governments to effectively monitor and verify that workers are receiving the wages due to them. He concluded that the WPS only checks if wages have been paid, but not whether the amount paid is the correct amount, as stated in the contract and including overtime.

To find out ways the WPS could be improved we decided to investigate how other countries around the world are implementing systems of wage protection. For completeness of the analysis, we assessed not only systems designed to check that workers have received their wages, but also any tool aimed at increasing the safeguards to secure the implementation of payment rights of the workforce. Safeguarding labour and working conditions in infrastructure projects is a critical issue that has risen rapidly in the regulatory agenda of governments, multilaterals and international donors in recent years. In this paper we examine safeguarding tools that have been adopted in various regions to prevent or deter late, partial or non-payment of wages.

**SECTION ONE** of the paper is dedicated to China and its wage payment campaign developed since 2003, its challenges and recent developments. **SECTION TWO** focuses on measures adopted by the European Union (EU) starting with the Posting of Workers Directive of 1997 and studies commissioned since 2008 to assess the effectiveness of legislation extending the liability for wages beyond the immediate employer. **SECTION THREE** addresses North American tools and the new legislation passed in the States of California and Maryland which broadened the liability of the main contractor for wages of workers employed by subcontractors. **SECTION FOUR** explores protection mechanisms found in some Latin American countries, including Brazil, Argentina and Chile.

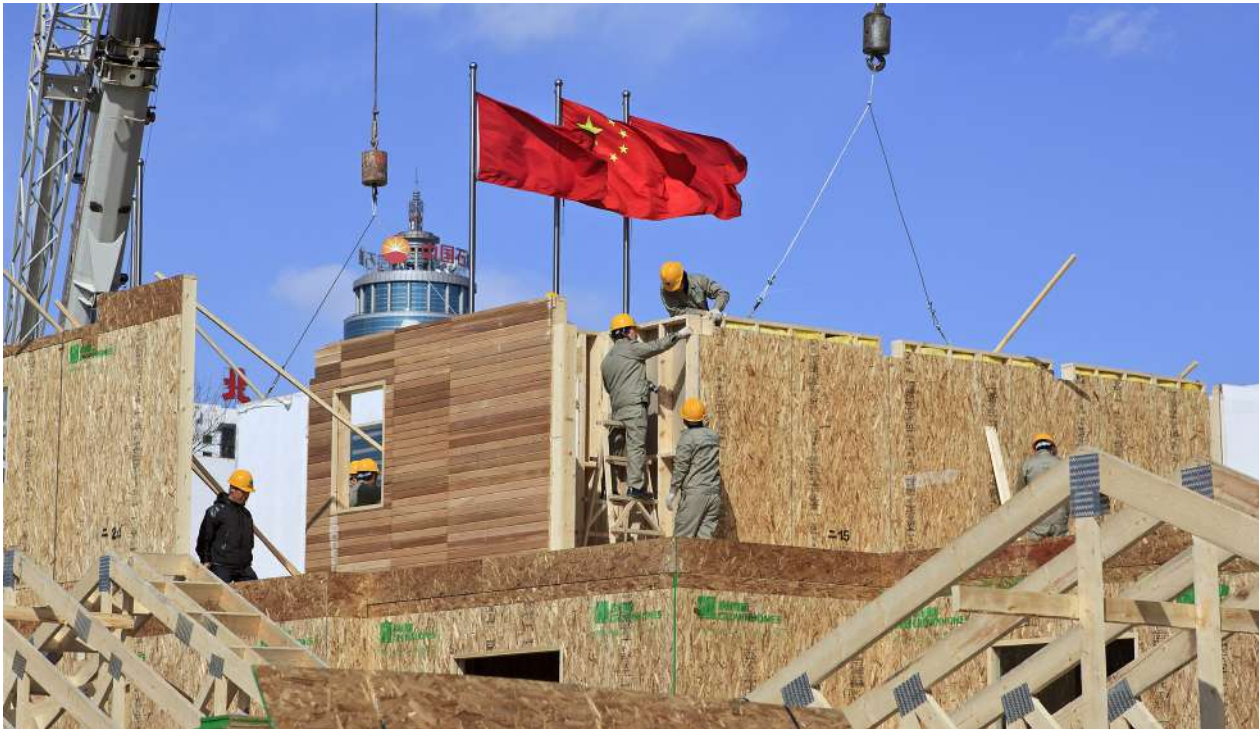
In the **FINAL SECTION** we draw out measures common to all four regions, notably the attempts to extend liability along the subcontracting chain, as well as any specific tools that have been used to promote prompt and full payment of wages and/or compensate workers when wages are delayed. We try to assess the relevance of any of these measures to improve the WPS in member States of the GCC, particularly Qatar where such issues are currently under discussion.

8 See above, note 3.

9 Jureidini, R, Wage protection systems and programs in the GCC, Gulf Labour Markets and Migration, GLMM-RR-No.01/2017, 2017, available at: [www.researchgate.net/publication/321105628\\_Wage\\_Protection\\_Systems\\_and\\_Programmes\\_in\\_the\\_GCC\\_Gulf\\_Labour\\_Markets\\_and\\_Migration\\_Research\\_Report\\_Wage\\_protection\\_systems\\_and\\_programmes\\_in\\_the\\_Gcc\\_Wage\\_Protection\\_Systems\\_and\\_Programmes\\_in\\_the\\_GCC](http://www.researchgate.net/publication/321105628_Wage_Protection_Systems_and_Programmes_in_the_GCC_Gulf_Labour_Markets_and_Migration_Research_Report_Wage_protection_systems_and_programmes_in_the_Gcc_Wage_Protection_Systems_and_Programmes_in_the_GCC)

## 1. CHINA

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**Delay in the payment of workers' wages is a common practice in China. According to a survey carried out in 2013, only 20% of construction workers were paid on a regular monthly basis, and in Beijing the rate can be as little as 5.5%.<sup>1</sup>**

In the Shanghai area, empirical research developed between late 2011 and early 2013 indicated that 53% of the population working in the construction sector received their wages on a yearly basis, 25% received wages at the end of the construction project and only 9% of the employees received their salaries on a monthly basis.<sup>2</sup>

A more recent survey, developed in 2018, indicates that the problem continues, and China remains among the countries with the highest risks of workers' underpayment, with cases of salaries being withheld for over a year.<sup>3</sup>

1 China Labour Bulletin, China's construction workers left behind, March 2014, available at: [www.clb.org.hk/en/content/china%C3%A2%E2%82%AC%E2%84%A2s-construction-workers-left-behind](http://www.clb.org.hk/en/content/china%C3%A2%E2%82%AC%E2%84%A2s-construction-workers-left-behind)

2 Centre for Development Policy and Research, School of Oriental and African Studies, Survey Results Document Exploitative Labour Conditions in China's Construction Sector, 2014, available at: [www.soas.ac.uk/cdpr/publications/dv/file93775.pdf](http://www.soas.ac.uk/cdpr/publications/dv/file93775.pdf)

3 Walk Free Foundation, Global Slavery Index, 2018, available at: [www.globallslaveryindex.org/2018/findings/country-studies/china/](http://www.globallslaveryindex.org/2018/findings/country-studies/china/)

The problem of late payment became a main cause of labour dispute in China in the 1990s and has since escalated as a consequence of the many layers of subcontracting that transfers the payment obligations down the supply chain to small companies. Not rarely, small size employers have low funds to pay wages and can only support payments once the project is completed.<sup>4</sup>

Although a global trend, in China subcontracting was also a matter of public regulation enacted in the early 1980s. That was the case of the State Council document dated 1984, determining that public enterprises should reduce their fixed workforce. Another piece of legislation enacted in the country was the document termed *Separation of Management from Field Operations*, also from 1984, which prevented general contractors from directly employing field workforce and recommended the use of labour subcontractors instead. If it is true that these regulations brought gains of efficiency and productivity to the sector by authorising the outsourcing of manpower, they caused a delink between capital, management and labour, and can explain many of the issues faced in the industry today.<sup>5</sup>

China's rapid economic and urban transformation in the following years brought additional challenges to the labour force. Not only did it create a high demand for cheap labour<sup>6</sup> but it also attracted migrants from rural areas, increasing the number of workers employed by the construction industry. In 2014, 22.3% of migrant workers were allocated in the construction industry, which represented more than 61 million people.<sup>7</sup>

Even with the construction boom in the country and the high rate of return assured to companies, labour standards never matched the industry's shining prospects. Studies carried out in the early 2000s have estimated that half of migrant workers had experienced payment default in China; less optimistic researchers have considered the figure to be close to 70%.<sup>8</sup>

4 Zou M, Regulating the Fissured Workplace: The Notion of the Employer in Chinese Labour Law. *Bulletin of Comparative Labour Relations*, Vol 95, 2017, pp. 183-203.

5 Ngai, P and Lu H, A culture of violence: The labour subcontracting system and collective action by construction workers in Post-Socialist China, *The China Journal*, No. 64, 2010a, pp. 143-158.

6 Ibid.

7 Li J, Legal culture of migrant construction workers in China, The University of British Columbia, 2017, available at: [www.open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0348710/](http://www.open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0348710/)

8 Halegua A, Who will represent China's workers? Lawyers, Legal Aid, and the Enforcement of Labour Rights. US-Asia Law Institute, New York University School of Law, 2016, available at: [www.usali.org/who-will-represent-chinas-workers/](http://www.usali.org/who-will-represent-chinas-workers/)

## THE WAGE CAMPAIGN

To tackle the problem, the Chinese government started a 'Wage Arrears Campaign' in 2003. As explained by commentators, campaigns are a policy tool used in Chinese politics where several measures are adopted over a short period of time to address a certain issue that is considered of great public importance.<sup>9</sup>

In the construction industry, the first reported policy document was a *Circular on Resolving Migrant Worker Wage Arrears Issues in the Construction Industry*, jointly issued by the Ministry of Human Resources and Social Security and the Ministry of Construction in 2003. The Circular requested labour local bureaus to establish an information system with local companies to control the payment of wages to workers and to reinforce the monitoring of labour conditions in their territories. In the same year, the State Council issued the *Circular of the General Office of the State Council on Settlement of Delinquent Construction Project Costs in the Construction Business*, which emphasised the urgent need to solve the issue of migrant wage payment in the construction industry.<sup>10</sup>

The Wage Arrears Campaign continued in the following years and, in 2006, China's State Council issued a comprehensive labour policy document, entitled *Some Opinions of the State Council on Dealing with Migrant Worker Issues*. The document reiterated the importance of migrant work for the construction industry and reaffirmed the government's policy goals of protecting migrant labour rights.<sup>11</sup> Because wage delays continued to occur, one of the measures put forward by the Opinion was the adoption of a wage-guarantee system to protect migrant payments. The purpose of the system was to force employers with a record of wage default to deposit payments on a special wage-account prior to the start of construction. If funds were not enough to cover wages in advance, local authorities should refrain from granting construction permits.<sup>12</sup>

Commentators report that implementation of the new policies was weak and did not secure the effective protection of migrant's labour rights. Although well intentioned, the policy proposals only identified the problem, but did not solve them.<sup>13</sup> Even after the new

9 Becker J, *Social Ties, Resources, and Migrant Labour Contention in Contemporary China: From Peasants to Protesters*, Lexington Books, 2014.

10 See above, note 9.

11 Ibid.

12 See above, note 7.

13 Chuanyi C and Xiaoli C, "Changing the Policy Paradigm on Chinese Migrant Workers: Towards Balanced Urban and Rural Development", pp. 99-128, in Mendes E and Srighanthan S (eds), *Confronting Discrimination and Inequality in China: Chinese and Canadian Perspectives*, Les Presses de l'Université d'Ottawa, 2009.

measures established by the State Council, construction workers remained in the worst situation in China's modern history.<sup>14</sup>

In 2014, the State Council issued another policy regarding migrant workers, named *Some Opinions of the State Council on Further Improving the Service for Migrant Workers*. It required local governments to take responsibility to resolve the worker's payment issue by creating a wage-deposit system in the construction industry. The system should use a debit card in the name of the worker and funds should be released immediately once delays were claimed by workers. The Opinion also requested local governments to develop a responsibility system where main contractors should be considered responsible for wages of all migrant workers involved in the projects. The Opinion specifically identified the public entities to oversee implementation of the policy, namely: the Ministry of Human Resources and Social Security, the Ministry of Public Security, the Ministry of Housing and Urban Construction, the People's Bank, the High Court, and the All-China Federation of Trade Unions.<sup>15</sup>

Some local governments amended their policies after the State Council 2014 Opinions. That was the case of the province of Guangzhou that issued in 2014 the *Administration on Wage Payment in the Construction Industry in Guangzhou*. The document regulated the wage-deposit system, clarifying that in case of a payment default the competent provincial administrative department should instruct the main contractor's bank to release the wage-deposit in favour of the worker.<sup>16</sup>

Evidence suggests that enforcement continued to be problematic. So much so that another round of legislation by the State Council came into force in January 2016 in an effort to push forward the workers' protection system devised in 2006. The 2016 document, entitled *Opinion to Regulate Migrant Workers' Arrears of Wages*, highlighted the need to identify the responsibilities of all parties involved in the supply chain and that the main contractor should take overall responsibility for the payment of migrant workers' wages. To assure wage payment and to track the chain of responsibilities, the Opinion reiterated the creation of a wage deposit system by local governments. The Opinion also stated that a blacklist system should be established to include non-compliant employers.<sup>17</sup>

14 Ngai P and Lu H, Neoliberalism, Urbanism and the Plight of Construction Workers in China, *World Review of Political Economy*, Vol. 1, 2010b, pp. 127-141.

15 See above, note 7.

16 Ibid.

17 Mayer Brown, Asia Employment Law: Quarterly Review 2015-2016, Issue 14, 2016, available at: [www.mayerbrown.com/-/media/files/perspectives-events/publications/2017/02/asia-employment-law-quarterly-review/files/asia-wide-english/fileattachment/asi\\_empreview2016q4\\_en.pdf](http://www.mayerbrown.com/-/media/files/perspectives-events/publications/2017/02/asia-employment-law-quarterly-review/files/asia-wide-english/fileattachment/asi_empreview2016q4_en.pdf)



To create an incentive for provinces to enforce the Opinion, in May 2017 the State Council developed a national online registry system to track construction workers' hours and salaries. Workers who signed up to the system received a card to clock in and out of construction sites and the records were considered a valid proof to be used in labour disputes. Enforcement was again considered challenging, particularly because the adoption of the registry system was not mandatory and companies could still opt in or out of the system.<sup>18</sup>

In the end of 2018, another electronic platform was launched, this time by the Ministry of Housing and Urban Construction. The system, named the National Construction Workers Management Service Information Platform, is designed to host information on construction workers of housing and urban infrastructure sectors.<sup>19</sup> The platform will include records with names of workers in ongoing projects and information on monthly salary payments. The intention is for the system to be used while provinces create their own management systems. Interconnection and sharing of information between the central database and the provincial systems was expected by June 2019, but remained a work in progress by the time this article was published.

Although an innovative design, which intends to tackle the wage default problem in the construction industry in China, the deposit system remains very embryonic, even though regulation has been laid down at least since 2006. The lack of policy enforcement seems to be at the heart of the problem. It is unclear from the available sources if the lack of implementation of a wage-deposit system by local governments may be grounded in reasons other than poor implementation. Chinese tax regulation, for example, has been mentioned by companies as a potential obstacle in some provinces.<sup>20</sup>

Even after the extensive 'Wage Arrears Campaign', workers' protests for lack of payment continue to occur as employees are normally "*the last to be paid*".<sup>21</sup> According to the China Labour Bulletin published in January 2019, in 2018 the construction sector accounted for 45% of the recorded incidents. Very often, workers are forced to settle for less than owed. In one extreme situation, workers were paid in bricks in exchange for their owed earnings.<sup>22</sup>

18 Sixth Tone, Online Construction Worker Database Seeks to Solve Wage Arrears, 2017, available at: [www.sixthtone.com/news/1000216/online-construction-worker-database-seeks-to-solve-wage-arrears](http://www.sixthtone.com/news/1000216/online-construction-worker-database-seeks-to-solve-wage-arrears)

19 China Daily, "Real name registration system for construction workers", 2018, available at: [www.chinadaily.com.cn/a/201805/16/WS5afb6a43a3103f6866ee8943.html](http://www.chinadaily.com.cn/a/201805/16/WS5afb6a43a3103f6866ee8943.html)

20 See above, note 18.

21 The Economist, "Tis the season for protests over unpaid wages in China - Workers are desperate to collect before Chinese New Year", 2017, available at: [www.economist.com/china/2017/12/14/tis-the-season-for-protests-over-unpaid-wages-in-china](http://www.economist.com/china/2017/12/14/tis-the-season-for-protests-over-unpaid-wages-in-china)

22 BBC, "Chinese staff paid in bricks to top up unpaid wages", 2018, available at: [www.bbc.co.uk/news/blogs-news-from-elsewhere-42779898](http://www.bbc.co.uk/news/blogs-news-from-elsewhere-42779898)

## RECENT DEVELOPMENTS

To solve the lack of enforcement, central government established that provincial governments should take overall responsibility to impose the timely payment of wages to migrant workers, while city and county governments will be in charge of developing specific tasks. The construction sector was established as the prime area of focus<sup>23</sup> and recent measures adopted by authorities include:

- The Ministry of Human Resources and Social Security created a blacklist to include employers that unduly postpone workers' payments.
- The Ministry of Human Resources and Social Security and 29 State Council departments signed a joint memorandum to restrain non-compliant companies from market access, public bidding and finance opportunities.
- The creation of a call hotline 12333 to receive migrant workers' complaints.

Questions that remain unanswered include which company is to be blacklisted (the main contractor or the immediate employer). Restricting access to market for non-complaint companies suggests that it should be the main contractors which are targeted by the regulation, as immediate employers are small companies that do not have direct access to public construction contracts. However, preliminary evidence gathered from companies blacklisted in 2018 and 2019 indicates that Chinese authorities are not differentiating employers when blacklisting them, which can defeat the purpose of seeking liability from upper tiers of the supply chain.<sup>24</sup> The lack of differentiation between contractors and subcontractors is an issue also noted in the design of the Wage Protection System where sanctions are addressed only against the immediate employers.

A second question is how a blacklist system can be reconciled with a regulation that still admits that employers are free to opt in or out of certain provisions.

A continuous follow-up work is necessary to confirm whether the measures adopted in early 2019, in particular the blacklist and the restriction to market, public bids and financing are targeting the main contractors and working as effective deterrents or if additional penalties should be envisioned by the Chinese authorities to assure appropriate enforcement and effectiveness of the system.

23 China Daily, "Govt moves to ensure migrants' wages paid", 2019, available at: [www.chinadaily.com.cn/a/201901/19/WS5c428456a3106c65c34e55d5.html](http://www.chinadaily.com.cn/a/201901/19/WS5c428456a3106c65c34e55d5.html)

24 Although a translated version of the blacklist regulation was not available, media coverage indicates that the only requirement to trigger the blacklisting system is the lack of payment by 'wage defaulters' without consideration of their role and position in the supply chain. See for example: China Daily, "30 companies are added to blacklist for wage cheating", 2019, available at: [www.chinadaily.com.cn/a/201901/04/WS5c2eadbfa31068606745ed4d.html](http://www.chinadaily.com.cn/a/201901/04/WS5c2eadbfa31068606745ed4d.html)

## 2 EUROPEAN UNION

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**Subcontracting of both specialised tasks and labour-intensive tasks has been growing rapidly in the construction industry in the countries of the European Union (EU) since the early 1990s. Labour market intermediaries in the form of temporary work agencies have also grown exponentially since 2000, supplying labour to contractors and acting as links in subcontracting chains as ‘labour only subcontractors’.**

The situation regarding workers’ rights in the construction industry in the EU is further complicated by the fact that the EU is a common market with freedom of movement of labour among the member countries, as well as freedom to provide services across national boundaries. Subcontractors and/or temporary work agencies in one country are free to compete for work as subcontractors or labour suppliers in other countries and to take their own national workforce with them.

Workers sent by their employer to work in another country are known as ‘posted’ workers. In the face of rapid growth of cross border contracting (which has been particularly marked at the lower ends of subcontracting chains) the EU has enacted several directives and regulations concerning cross border workers and the regulation of labour market intermediaries, most notably the Posting of Workers Directive (PWD).<sup>1</sup>

<sup>1</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, available at: [www.eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996L0071](http://www.eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31996L0071)



The cross-border flow of construction workers within the EU has been largely from countries with a lesser level of worker protection and lower incomes than in the countries to which they are supplied. Before the PWD was adopted in 1996, the higher working conditions of the receiving state did not apply to posted workers, which was considered likely to encourage competition between member states on labour costs with undercutting on wages and other benefits.<sup>2</sup> The aim of the PWD was therefore twofold: to protect the social rights of posted workers, but also to protect the local labour force against competition from workers from lower wage economies, a process often referred to as 'social dumping'.

The PWD intends to do this by requiring the receiving state to set up minimum working conditions and core rights for posted workers that could not be undercut or waived. It requires the employment conditions offered to posted workers (with regard to minimum rates of pay, hours or work, paid holidays, etc) to be in line with the minimum conditions established by law or negotiated under generally applicable Collective Labour Agreements (CLAs) in the receiving state.

While the PWD was considered a step forward in terms of worker protection, the legislation suffered from some flaws and loopholes that allowed various kinds of fraud and abuse to flourish. These include abuse of the idea of temporary posting by hiring workers from temporary work agencies (in a foreign country) to permanently replace existing (domestic) workers, as well as the growth of *letter box companies*, *disappearing subcontractors* and *pseudo or bogus self-employment*.<sup>3</sup>

The PWD does not contain any provisions to prevent or sanction such abuses, most of which are closely related to each other.<sup>4</sup> These problems became more and more obvious as the number of posted workers continued to increase, particularly after further enlargement of the EU in 2004, with calls for further legislative action. Eventually the Enforcement Directive 2014/67/EU was introduced with the aim of strengthening the practical

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2 European Commission, Practice Guide, Jurisdiction and applicable law in international disputes between the employee and the employer, 2016, p 6, cited in Heinen A, Muller A and Kessler B, Liability in Subcontracting Chains: National rules and the need for a European framework, European Parliament, 2017, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL\\_STU\(2017\)596798\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf)

3 A letter box company is one that is set up to evade obligations and does not perform any real economic activities; a disappearing subcontractor is the term applied to companies which are set up to hire workers to post to another EU state, fail to pay their workers and disappear or claim bankruptcy; bogus self-employment is when a worker meets the criteria of an employee but is declared self-employed to evade responsibility for payment of social security and minimum rates of pay.

4 For example, a disappearing contractor could be a temporary work agency without a license (a letter box company) falsely declaring its employees to be self-employed. EU source cited in Heinen A, Muller A and Kessler B, Liability in Subcontracting Chains: National rules and the need for a European framework, study for the JURI committee of the European Parliament, Legal and Parliamentary Affairs, Policy Department for Citizens Rights and Constitutional Affairs, 2017, p.41, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL\\_STU\(2017\)596798\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf)

application of the PWD by addressing issues relating to fraud, circumvention of rules and getting better enforcement, cooperation and exchange of information between the member states.

## **LIABILITY IN SUBCONTRACTING CHAINS IN EU DIRECTIVES**

Difficulties in implementing the PWD led policy makers to search for effective compliance tools, prompting a debate on the issue of *liability* in subcontracting chains.

In 2007 the issue of liability was addressed in a European Commission communication on the posting of workers in the framework of the provision of services<sup>5</sup> and protection for workers in subcontracting process was debated in the European Parliament. In 2009 the parliament called on the EU Commission to develop a legal instrument introducing *joint and several liability*<sup>6</sup> and to launch an impact assessment on the added value and feasibility of such an instrument at EU level.

A series of commissioned studies followed, which have sought to assess whether extending liability for wages (plus social fund contributions and taxes) in subcontracting chains beyond the immediate employer could be an effective measure to protect workers' rights and improve the effectiveness of the PWD.<sup>7</sup>

The PWD did not contain any provisions on liability in subcontracting chains, neither did it explicitly enable member states to implement such rules when transposing the directive into their legal systems. The Enforcement Directive does establish (Article 12) a liability scheme in subcontracting chains for the construction industry. The Directive obliges Member States to introduce subcontracting liability (or other appropriate enforcement measures) in the construction industry as part of a comprehensive approach to better

5 Commission of the European Communities, Posting of workers in the framework of the provision of services - maximising its benefits and potential while guaranteeing the protection of workers, 2007, available at: [www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0304:FIN:en:PDF](http://www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0304:FIN:en:PDF)

6 Liability for wages can be extended to the immediate contractor of a subcontractor (one up in the chain) if a subcontractor fails to pay. This is known as direct - joint and several liability. It may also spread the joint and several liability throughout the chain and be extended to the entire subcontracting chain to embrace the principal contractor (chain liability) or even the client (full chain liability). See Annex A for more details.

7 The first study which focused only on construction, known as the Dublin study, was commissioned by Eurofound and published in 2008: Houwersijl M and Peters S, Liability in Subcontracting Processes in the European Construction Sector, European Foundation for the Improvement of Living and Working Conditions, 2008, available at: [www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef0894en.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef0894en.pdf). This was followed by a second study by two of the same authors in 2012: Jorens Y, Peters S and Houwerzijl M, Study on the protection of workers' rights in subcontracting processes in the European Union, Project DG EMPL/B2-VC/2011/0015, University of Amsterdam, 2012, available at: [www.dare.uva.nl/search?identifier=80520784-0f36-4537-ae15-3986a0e38330](http://www.dare.uva.nl/search?identifier=80520784-0f36-4537-ae15-3986a0e38330). This was followed by a study commissioned at the request of the European Parliament in 2017: Heinen A, Muller A and Kessler B, Liability in Subcontracting Chains: National rules and the need for a European framework, European Parliament, 2017, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL\\_STU\(2017\)596798\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf)

enforcement. Liability is extended in respect of outstanding net remuneration (according to the minimum rates of pay of the host state) and/or contributions due to common funds.

A press release from the European Commission accompanying the launch of the Enforcement Directive<sup>8</sup> sought to explain in the following words why the Directive includes a provision on subcontracting liability:

***“There is evidence that posted workers have been exploited and left without wages or part of the wages they were entitled to. There have also been situations where posted workers were unable to enforce their wage claims against their employer because the company had disappeared or never really existed (...)***

***In the Member States that already have a system of subcontracting liability (Austria, Germany, Spain, Finland, France, Italy, The Netherlands and Belgium) it is considered an effective enforcement tool in combination with state enforcement (...)***

***Subcontracting liability has a preventive and deterrent effect by giving a strong incentive to contractors to choose subcontractors more carefully and to verify that subcontractors comply in full with their obligations under the host country’s rules”.***

However, the liability in the Enforcement Directive is limited to direct (joint and several) liability (one link up in the chain). A study commissioned by the European Parliament to consider whether further legislation is required considers this a very soft touch approach which is easily overcome by inserting a *letter box* company or other forms of bogus subcontractor which declares bankruptcy in case of being held liable.<sup>9</sup> A full chain liability is considered to have a stronger preventive effect than a direct joint and several liability as it is extended to the entire chain including the main contractor and even the investor.<sup>10</sup> In addition to the very limited scope of the liability, the authors note that Article 12 also allows member states to provide a ‘due diligence escape clause’ whose requirements are not strictly defined.

8 European Commission, Posting of workers: EU safeguards against social dumping, 2014, available at: [www.europa.eu/rapid/press-release\\_MEMO-14-344\\_en.htm](http://www.europa.eu/rapid/press-release_MEMO-14-344_en.htm)

9 Heinen A, Muller A and Kessler B, Liability in Subcontracting Chains: National rules and the need for a European framework, European Parliament, 2017, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL\\_STU\(2017\)596798\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf)

10 Jorens Y, Peters S and Houwerzijl M, Study on the protection of workers’ rights in subcontracting processes in the European Union, Project DG EMPL/B2-VC/2011/0015, University of Amsterdam, 2012, available at: [www.dare.uva.nl/search?identifier=80520784-0f36-4537-ae15-3986a0e38330](http://www.dare.uva.nl/search?identifier=80520784-0f36-4537-ae15-3986a0e38330)

The concept of extending liability as a way of enforcing the PWD is highly controversial within the EU, given the natural differences in the interests of labour sending and receiving States.<sup>11</sup> In the preparation of the Enforcement Directive, the concept of more stringent liability up to full chain liability was demanded by some Trade Unions (TUs) and is the preferred option of the EU, but it proved too ambitious as some states (UK and Hungary) were reluctant to implement a liability scheme into their national legal systems. The Enforcement Directive was a compromise in this respect.

As the Enforcement Directive was not introduced until mid-2016 there is no reliable data to assess the effectiveness of the limited level of liability or of the flanking measures. However, there is evidence from a number of studies that have examined the issue in the context of individual nation States in the EU.

## **LIABILITY IN SUBCONTRACTING CHAINS IN EU MEMBER STATES**

The first comprehensive study into the impact of extending liability for wages in subcontracting chains focused on the construction industry.<sup>12</sup> The study was commissioned by the *European Foundation for the Improvement of living and Working Conditions* (Eurofound) from two researchers at Dublin University and subsequently became known as ‘the Dublin study’. It analysed existing legislation on liability for wages (plus social security contributions and taxes) in subcontracting chains in the construction industry in eight EU countries which have introduced such legislation over the years (Austria, Belgium, Finland, France, Germany, Italy, Netherlands and Spain). The aim of the study was to create an overview of the legislation and the way the laws are working in practice.

In all cases except Germany the legislation was introduced in the 1960s, 1970s or 1980s, well before the PWD. The objective of the legislation was to prevent the abuse of employees’ rights as well as to combat illegal work and unfair business competition – in addition to the more indirect aim of ensuring social security schemes and tax payments. In only three countries (Austria, France and Italy) were the rules developed in a cross-border situation in order to prevent social dumping.

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11 See above, note 9 and also Euractiv, “European Parliament votes in favour of the revision on posted workers”, 2018, available at: [www.euractiv.com/section/economy-jobs/news/european-parliament-votes-in-favour-of-the-revision-on-posted-workers](http://www.euractiv.com/section/economy-jobs/news/european-parliament-votes-in-favour-of-the-revision-on-posted-workers). Euractiv explain the revision of Posting Directive which took 27 months to reach agreement, with a clear split between the labour sending (Eastern) countries which refused all limitations on posted workers and the labour receiving (Western) countries which protested the unfair competition of workers from countries where labour costs are lower.

12 Houwersijl M and Peters S, Liability in Subcontracting Processes in the European Construction Sector, European Foundation for the Improvement of Living and Working Conditions, 2008, available at: [www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef0894en.pdf](http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef0894en.pdf)

Variations of *chain liability* were found in five of the countries (Finland, Germany, Italy, the Netherlands and Spain) and *direct (joint and several)* liability in three. Liability for wages and social security contributions extend to the client in Italy (*full chain liability*) as well as in France where the client is liable for protecting subcontractors against an unreliable principal contractor.<sup>13</sup> Clients are also liable in Finland when they are acting as builder.

A second and more detailed study which included the same authors<sup>14</sup> found that seven countries plus Norway have a scheme for *direct (joint and several)* liability related to wages or labour conditions while *chain liability* exists in Germany, Italy and Spain. The most recent study<sup>15</sup> has confirmed this and included the Netherlands among the countries with chain liability.

The liability arrangements of almost all the countries investigated by Houwerzijl and Peters<sup>16</sup> include separate regulations for subcontracting and temporary employment through agencies. In two countries the temporary work provisions are significantly more rigorous than the provisions regarding subcontracting. In all eight countries liability regulations relating to temporary employment apply to the user company which hires the workers if the temporary work agency that supplies the workers does not comply with certain regulations.<sup>17</sup> Extending liability for wages to the user protects the workers against non-payment of wages by the agency if the user has not paid the agency and/or if the agency is a *letter box* company that simply disappears.

To further combat labour fraud several EU member countries have also introduced or strengthened licensing schemes for employment agencies as well as placing some limitations on the use of agency labour.<sup>18, 19</sup> This is a key step that will be further explored in relation to the Gulf Cooperation Council in **SECTION FIVE**.

13 Note that the protection is for subcontractors and not strictly for workers but it will also protect workers of subcontractors.

14 See above, note 10.

15 See above, note 9.

16 See above, note 12.

17 The process of intermediaries supplying labour to contractors takes many different forms (temporary agency work, labour leasing, labour despatch, labour contracting) but always involves a trilateral relationship (worker, agency/employer and user) based on two quite different and separate contracts: an employment contract between the employer and the worker and a service contract between the agency and the company using the labour, with no direct contractual link between the user of the labour and the workers.

18 See above, note 9.

19 While the Temporary Agency Work Directive 2008/104/EC seeks to guarantee that agency workers enjoy the same conditions as workers directly employed in the same business who do the same work, it does not require Member States to take action to license or regulate temporary employment agencies.

## **PREVENTATIVE MEASURES TRIGGERED BY EXTENDING LIABILITY**

The 'Dublin study' is perhaps most interesting for highlighting the preventive measures which may be undertaken by contractors (or clients) to protect themselves against being held liable for the actions of subcontractors. The preventive measures, which may be optional or obligatory are divided into two main categories: (1) measures which aim to check the general reliability of the subcontracting party or temporary work agency, and (2) measures which seek to guarantee the payment of wages, social security and wage tax.

Reliability measures include due diligence on subcontractors and agencies supplying workers, clauses in contracts with subcontractors (or signed agreements) to abide by the rules, and clauses in contracts limiting further outsourcing without prior agreement of the client or principal contractor.

The second category of measures regarding guarantees on wages were found in six of the eight countries. They include regular and effective checks by principal contractors (Germany, France and Spain) to ensure that wages have been paid, for example by requesting copies of bank statements or payslips. In Italy and Spain, the client may also request proof of payment of wages by contractors and subcontractors and to be notified when wages have not been received.

Parties that do not abide by the rules regarding the liability arrangement in place may be sanctioned through three means: back payment obligations,<sup>20</sup> fines<sup>21</sup> and alternative or additional penalties.<sup>22</sup>

Suggestions made by the authors for stricter enforcement include limitations on the number of subcontractors, which they see as an alternative kind of preventive tool. A ban on subcontracting beyond three links in the chain was introduced in Spain in 2007. Law 32/2006 bans subcontracting beyond the third tier and beyond the second tier when the subcontracting tasks involve manual labour.<sup>23</sup> This is in effect a ban on outsourcing of labour.<sup>24</sup>

20 In the case of non-payment of wages during the term of the contract, in all of the countries examined workers are entitled to take legal action against their own employer and, depending on the liability regime in place, jointly against the corresponding contractor. In France, Germany and Italy liability is extended to the client. TUs in all States examined offer legal assistance and support to their members.

21 Fines can be levied against the principal contractor and/or client. In France fines may be accompanied by prison sentences (for example, recourse to illegal or undeclared work is punishable by three years imprisonment and a fine of 45,000 Euros).

22 These include exclusion from future public tender calls (Austria, Italy) and the temporary closure of employment agencies that don't obey the rules (France).

23 See above, note 10.

24 Ibid, p.75 for a fuller explanation of the regulations and for some exceptions to the rule.

In Italy the code of public works also imposes strict limits on subcontracting: it must be authorised by the contracting authority (client), a maximum of 30% of the work can be subcontracted and sub-subcontracting is prohibited. Similar provisions exist in Austria where all participants in the subcontracting chain have to be screened.

## **CONCLUSIONS**

Analysing the effectiveness of liability legislation in securing the objective of protecting workers proved difficult, due to lack of quantifiable data and the indirect nature of the effects.

Member States were found to strike different balances between preventive measures, sanctions and enforcement and effectiveness varies significantly among the States. Despite this, the authors found evidence that it can be effective in internal (domestic) transactions, with chain liability showing more efficacy than direct liability. In all cases, national authorities play a monitoring role and the TUs play multiple roles including help in monitoring and support to workers. The Dublin study identified two main building blocks for an effective liability arrangement:

- Preventive tools which reward the clients or principal contractors with limitations on or exemptions from liability.
- Involvement of the social partners in the development, implementation and application of the arrangements (this was found to be a feature of most of the measures deemed good practice).

However, there are also serious enforcement problems in cross border situations where the liability provisions seem to have little effect due to lack of cross border enforcement mechanisms. The authors plead for strengthening of inspection services and giving them the means to effectively monitor and enforce the PWD. An additional reason why liability is ineffective in a cross-border context is that posted workers are reluctant to pursue their rights because of the fear of not getting further work, as well as the large pay gap between wages in home and host country. In the words of one Italian inspector: *"There is a queue in Romania to come to Italy. Posted workers have no intention to cause trouble to their employer nor to the Italian client"*.<sup>25</sup>

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<sup>25</sup> Ibid, p.156.



Even in a domestic situation, there are arguments both for and against extending liability as a way of protecting workers in subcontracting chains. Some believe that it poses a mechanism of self-regulation between private actors and is less restrictive and more proportionate than alternative systems such as pure state intervention by inspections and standards.<sup>26</sup> However, one of the main criticisms of extending liability is that the State is shifting an inspection and enforcement task to private companies because the State is meeting obstacles in carrying out these tasks. Companies argue that they would meet similar obstacles: *“a principal contractor hardly has the competence or the means to inspect or monitor whether a subcontractor pays the correct wages to his employees”*.<sup>27</sup> The more parties involved in a subcontracting chain the more difficult the task becomes.

In this context it is worth noting the advice given by Houwersijl and Peters<sup>28</sup> to national policy makers considering legislation for effective policy rules:

- Involve the social partners, without which the burden of monitoring and enforcement would fall on the State.
- Keep new regulations simple and accessible.
- Reduce costs linked to bureaucracy, creating administrative burden for users.
- Create preventive tools that reduce the chance of liability, such as registers of reliable contractor/subcontractors and clear definitions of due diligence.
- Combine preventive measures with sanctions and enforcement.

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26 Proposal for a Directive of the European Parliament and of the council on the enforcement of directive 96/71/EC concerning the posting of workers in the framework of the provisions of services COM/2012/0131 final, p.22, cited in Heinen A, Muller A and Kessler B, Liability in Subcontracting Chains: National rules and the need for a European framework, European Parliament, 2017, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL\\_STU\(2017\)596798\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf) .

27 See above, note 10, p.157.

28 See above, note 12.



### 3 UNITED STATES

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**In 2014 David Weil introduced the term ‘fissured workplace’ to describe the fundamental changes in firms’ competitive strategies that have reshaped the organisation of employment in the 21st century.**

According to Weil, the fissured workplace represents both a form of employment (for example, temporary agency employment, independent contracting) and a relationship between different business enterprises (subcontracting, outsourcing, franchising).<sup>1</sup> Large firms have devolved significant risk and responsibility for their workforce to complicated networks of smaller businesses, operating under the rigorous standards of lead companies but facing fierce competitive pressures. The pressures translate into precarious jobs with deteriorating and insecure wages for workers many of whom are employed by labour market intermediaries at the bottom and periphery of complex, multi-layered contractual chains.

<sup>1</sup> Weil D, *The Fissured Workplace: Why work became so bad for so many and what can be done to improve it*, Harvard University Press, 2014.

Recognition of these changes suggests the need to re-examine the notion of the employer in labour law and raises the question of whether liability for the employers' responsibilities should lie outside of the legal entity which formally signed the contract.

Strong opposition from business in the US suggests that the introduction of significant changes in liability through legislation at Federal level, or even more modest changes to definitions of joint employment, is unlikely for the foreseeable future.<sup>2</sup>

However, Weil is writing in the context of all industries and there is evidence of some breakthroughs in construction, where US courts have made several decisions in favour of extending liability beyond the immediate employer. These changes have been brought about by determined efforts to protect the workforce on the part of Federal enforcement agencies.

## **BREAKTHROUGH IN CONSTRUCTION AND THE POWER OF ENFORCEMENT AGENCIES**

A significant example of an enforcement agency that has exerted its power to change the rules on liability is the Occupational Safety and Health Administration (OSHA) of the Department of Labor, which has recognized in its policy statement of 1999 the existence of multi-employers on construction sites in relation to responsibilities for OSHA.<sup>3</sup>

In 2011 the District of Columbia Circuit of Appeals upheld an OSHA inspector's decision to cite Summit Contractors (a general contractor) for its failure to provide adequate protection for workers on one of its sites. The company contested the citation arguing that neither of the two workers it employed directly was exposed to the hazard, but the citation was upheld by the court on the grounds that the company had failed to undertake its role of 'controlling employer', even though none of its own employees had been affected. This ruling confirmed the authority of OSHA to use its multi-employer policy in construction, although this has not yet been tested in other industries.

The pioneering work of OSHA has since been followed by other enforcement agencies. Workers on construction sites receiving federal funds must pay wages that comply with local prevailing wages for the different construction trades and fringe benefits as set out

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2 Ibid, p.212.

3 Occupational Safety and Health Administration, Multi-Employer Citation Policy, Directive No. CPI 2-0.124, 1999, available at: [www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_id=2024&p\\_table=DIRECTIVES](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=2024&p_table=DIRECTIVES). This became incorporated into the Field Inspection Reference Manual used by inspectors.

by law. Following an investigation of Lettice Construction (a major affordable housing contractor) and its sixteen subcontractors on two New York projects that received federal funds, the Wage and Hours Division (WHD) of the US Department of Labor cited the company and its subcontractors for numerous prevailing wage violations. These included failure to pay required overtime, improper classification of employees and underpayment of both wages and fringe benefits. In addition to resolving back payment claims of employees, a consent agreement between the company and the Department of Labor required the company to:

*“ensure its own and its subcontractors future compliance (...) and to guarantee payment for any future violations committed by its subcontractors on federally funded, local, state and federal prevailing projects”.<sup>4</sup>*

The consent agreement actually goes further, requiring the company to hire an approved third-party monitor to undertake regular compliance reviews, to train the company and its subcontractors, create a hotline for workers to report non-compliance, as well as to screen prospective subcontractors to assess their past compliance history. Finally, the agreement subjects the company to debarment for failing to follow the terms. Weil<sup>5</sup> notes the significant effect of this type of agreement with a major company on the network of contractors, with ripple effects on how contractors bid, monitor and screen subcontractors.

In recent rulings both OSHA and WHD have been focusing enforcement efforts on the company at the top of the subcontracting chain, which is seen as having a deterrent effect on other employers who are making compliance decisions. Weil<sup>6</sup> argues that inspections have two purposes: to bring individual workplaces into compliance (e.g. by back wage recovery to correct a wrongdoing) but also to create a deterrent effect on other employers. The small number of inspectors compared with the enormous number of workplaces means the chance of an inspection are minimal and a more strategic focus on deterrence is required to change behavior.

As the forces driving non-compliance in many industries are at higher levels of industry structures, enforcement efforts should focus at the top. In construction this means the

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4 See above, note 1, p.233.

5 Ibid.

6 Ibid.

general contractor at the head of the subcontracting chain which sets the tone and creates overall standards that are to be followed by subcontractors on a building site of any size. It may even be possible to go beyond the individual company when it is an affiliate of a higher-level organisation.

## **CALIFORNIA AND MARYLAND LEGISLATION**

Significant change is also taking place in the US at state level. Several US states have already enacted legislation that makes businesses in certain subcontracted industries responsible for activities of subordinate organisations. For example, New York and California have enacted laws making garment manufacturers responsible for subcontractors' compliance with various workplace statutes.

In California, Labor Code section 2810 which went into effect January 1, 2004 allows construction, farm labour, garment, janitorial and security guard employees to sue a person or entity that contracts with its direct employer for labour or services:

***“where the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state and federal laws and regulations governing the labour or services to be provided.”<sup>7</sup>***

In 2005, Illinois enacted a new law that establishes joint employment responsibility for temporary labour agencies and their clients for violations of the law.

Against this background it is less surprising that two wage protection bills entered into force in 2018 in the States of California and Maryland, designed to ensure that workers in the construction sector are paid on time and in full.

In California, Assembly Bill No. 1701,<sup>8</sup> in force since January 2018, extends liability to the main contractors over the payment of subcontractors' workers. Under the new legislation contractors are now:

***“liable for, any debt owed to a wage claimant or third party on the wage claimant's behalf, incurred by a subcontractor at any tier acting under, by, or for the direct contractor.”***

7 Gates P and Seidenstein S, Labor Code section 2810 protects workers by entitling them to sue the entity that contracted with their employer if their boss doesn't pay wages owed, Weinberg, Roger & Rosenfield, 2019, available at: [www.unioncounsel.net/developments/private\\_sector/archive\\_private/2011/castillo\\_v\\_toll\\_bros\\_inc\\_&\\_labor\\_code\\_section\\_2810.html](http://www.unioncounsel.net/developments/private_sector/archive_private/2011/castillo_v_toll_bros_inc_&_labor_code_section_2810.html)

8 California Assembly Bill No 1701, 2017, available at: [www.leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB1701](http://www.leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1701)

The extension of liability no matter the tier of the supply chain increased the exposure of main contractors for unpaid wages, fringe benefits or other employee contributions. Labour unions in California are considered the driving force behind the new legislation, which allows the Commissioner of Labour and the Unions to file suit on behalf of an unpaid employee(s).<sup>9</sup>

Senate Bill 853 passed by the Maryland General Assembly entered into force in October 2018 and also changed the liability system in place in the local construction industry.<sup>10</sup> According to the new law, a general contractor is now liable to the same extent as the employee's direct employer.

The wording adopted by the new law is also broad enough to cover wage payment default of every subcontractor down the supply chain, as it is stated that liability will attach *"regardless of whether the subcontractor is in a direct contractual relationship with the general contractor"*. Different from California Law, in Maryland contractors' exposure can reach up to three times the amount of the delayed wage, plus reasonable counsel fees and other costs.

Worth noting that the Maryland law included some protection to the main contractor as it allows the contractor to recover from the subcontractor the wages, damage, interest, penalties or attorney's fees incurred as a result of the subcontractor's default. The provision does not apply, however, if the contractor has failed to timely pay the subcontractor.

It is expected that both legislations will cause contractors to develop a better control over payroll records of subcontractors hired down the supply chain<sup>11,12</sup> but it is also claimed to be likely to increase the local costs of construction.<sup>13</sup> Although no data is yet available to show a cost increase incurred by the industry, the expected rise would come to compensate the higher level of liability exposure that contractors may face in future construction projects.

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9 Construction Law Zone, "California and Maryland Have Enacted Legislation Essentially Making the General Contractor the Guarantor for All Wages on the Project – Should Sureties Be Concerned?", 2018, available at: [www.constructionlawzone.com/2018/07/california-and-maryland-have-enacted-legislation-essentially-making-the-general-contractor-the-guarantor-for-all-wages-on-the-project-should-sureties-be-concerned](http://www.constructionlawzone.com/2018/07/california-and-maryland-have-enacted-legislation-essentially-making-the-general-contractor-the-guarantor-for-all-wages-on-the-project-should-sureties-be-concerned)

10 Maryland Senate Bill 835, 2018, available at: [www.mgaleg.maryland.gov/2018RS/bills/sb/sb0853e.pdf](http://www.mgaleg.maryland.gov/2018RS/bills/sb/sb0853e.pdf)

11 Fair Contracting, New Maryland Law Exposes General Contractors and Subcontractors to Greater Wage and Hour Liability (MD), 2018, available at: [www.constructionlawzone.com/2018/07/california-and-maryland-have-enacted-legislation-essentially-making-the-general-contractor-the-guarantor-for-all-wages-on-the-project-should-sureties-be-concerned/](http://www.constructionlawzone.com/2018/07/california-and-maryland-have-enacted-legislation-essentially-making-the-general-contractor-the-guarantor-for-all-wages-on-the-project-should-sureties-be-concerned/)

12 See above, note 8.

13 Constructible, Contractors Liable for Unpaid Wages — Is This a National Trend? 2018, available at: [www.constructible.trimble.com/construction-industry/contractors-liable-for-unpaid-wages-is-this-a-national-trend](http://www.constructible.trimble.com/construction-industry/contractors-liable-for-unpaid-wages-is-this-a-national-trend)

California and Maryland may be paving the way to other States in the US. A bill proposed in the Oregon House of Representatives<sup>14</sup> in early 2018 also makes contractors liable for unpaid wages, including other benefit payment or contribution, of employee of subcontractor at any tier. It is yet to be seen whether other States will follow these examples which currently only apply to the private sector, and if public contracts will be at some point include in the same liability rule.



14 House Bill 4154, 2018, available at: [www.olis.leg.state.or.us/liz/2018R1/Downloads/MeasureDocument/HB4154/Introduced](http://www.olis.leg.state.or.us/liz/2018R1/Downloads/MeasureDocument/HB4154/Introduced)



## 4 LATIN AMERICA

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**The most common protection tool offered to workers in some Latin America countries is the joint liability system between the main contractor and subcontractors, which range from a *chain liability* to a *full chain liability* under certain conditions.**

### BRAZIL

In Brazil, main contractors can be held responsible for the non-compliance of labour obligations of subcontractors. The protection is granted under Article 455 of the Labour Code.<sup>1</sup> The rationale of the provision is to avoid labour frauds that could prevent workers from receiving wages or other labour amounts, as well as holding the main contractor accountable for selecting subcontractors with no financial capacity to honour labour rights of the workforce.<sup>2</sup>

1 Free translation of the provision: “the subcontractor shall be liable for the obligations arising from the contract of employment executed with employees, but employees are entitled to present a claim against the main contractor based on the non-performance of obligations by the subcontractor”. This provision is specific to civil construction contracts. Brazilian Labour Code, 1943, available at: [www.planalto.gov.br/ccivil\\_03/decreto-lei/del5452.htm](http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm).

2 For Brazilian Court precedents that explain the rationale of the provision see: Appeal RR 741.743/2001, 1st Chamber, Justice Lelio Bentes Correa, judged on 10.12.2004; Appeal RR 779.944/2001, 4th Chamber, Justice Ives Gandra, judged on 06.12.2002.

Article 455 does not specify the situation of a wage default, but the payment of wages is comprised within the broad scope of labour obligations that arise out of the employment relation. As in the case of Maryland legislation, Brazilian Law assures the main contractor the right to recover from the subcontractors the amounts paid to employees as a result of subcontractors' default.

The wording of Article 455 raises a legal controversy in relation to the extent of the chain liability. Two interpretations are identified amongst Brazilian scholars and court precedents. One view considers that the main contractor holds a primary liability over the labour obligation (known as "*responsabilidade solidária*" in the legal nomenclature in Brazil), which means that the worker can simultaneously claim labour rights against the main contractor and the subcontractor and they are both responsible for the entirety of the debt.<sup>3</sup> A different approach sustains that the liability of the main contractor is secondary (known as "*responsabilidade subsidiária*"): the main contractor's liability is only triggered after evidence of the subcontractor's lack of financial means to respond for labour debts.<sup>4</sup>

Legal precedents tend to adopt the primary responsibility as a way to grant a broad protection to workers. As pointed out by courts, the spirit and interpretation of the Article 455 should be aligned with the intent of assuring an effective protection to labour credits which is accomplished only via a system of primary liability.<sup>5</sup>

To assure the effectiveness of the protection system and avoid that the legal debate could hinder workers' right, Trade Unions (TUs) have adopted the strategy of including specific wording in Collective Labour Agreements signed with employers in order to clarify the primary responsibility of main contractors. These documents create binding obligations to the signatory employers and by doing so TUs are reducing the risks that a legal discussion could generate adverse decisions by courts.

This strategy has recently become especially relevant after the advent of the Brazilian New Outsourcing Law No. 13.429/2017, which included a provision saying that the liability of the main contracting party is secondary.<sup>6</sup> Although it could be claimed that Law No.

3 Toledo F and Manoel C, Breve apontamento sobre o artigo 455 da CLT. Revista do TRT da 15ª Região, Vol. 19, 2002, pp. 109-112.

4 Albuquerque B, Subcontratación y Precarización del Trabajo – Un estudio comparativo de la norma laboral Brasileña y Española. Ediciones Universidad de Salamanca, 2014.

5 For examples of Brazilian Court precedents recognising the primary liability of the main contractor see: Labour Tribunal 20th Region TRT, Appeal 0000962-06.2015.5.20.0005, Justice Alexandre Manuel Rodrigues Pereira, judged on 28.06.2018. Labour Tribunal 18th Region TRT, Appeal 0010098-84.2018.5.18.0261, Justice Aldon do Vale Alves Taglialegra, judged on 27.11.2018. Labour Tribunal 7th Region TRT, Appeal 0001538-20.2016.5.07.0039, Justice Roseli Mendes Alencar, judged on 21.03.2019).

6 Free translation: "The contracting company is secondarily responsible for the labour obligations related to the period where the services have been provided" (Article 5º-A, § 5º of Law No. 6.019/1974, with the changes included by Law No. 13.429/2017, available at: [www.planalto.gov.br/ccivil\\_03/\\_Ato2015-2018/2017/Lei/L13429.htm](http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2017/Lei/L13429.htm)).



13.429/2017 is a general scope law that does not replace the specific provisions applicable to the construction sector, which remain regulated by Article 455, the likelihood of main contractors raising the privilege of order, and seek that subcontractors are called to fulfil payments first, with grounds in the new outsourcing law, cannot be neglected.

Court rulings rendered in 2019, after the enactment of Law No. 13.429/2017, continued to recognize the primary obligation of main contractor but it remains to be seen how Brazilian Courts will interpret the potential clash between Article 455 and the New Outsourcing Law.

## **FULL CHAIN LIABILITY**

In addition to Article 455, in 2011 the Brazilian Superior Labour Court issued a general binding guideline to fulfil a gap in the legislation in relation to the liability of the owner of the construction project. According to the new interpretation provided by the Superior Labour Court, the contract between the owner of a project and the main contracting party entails no primary or secondary liability of the owner of a project over labour obligations of the main contractor, *except when the owner of the project is a construction or a property development company.*<sup>7</sup>

The guideline creates an additional protective system addressed to the workers of the construction sector, which applies exclusively when the main contractor is a company dedicated to the construction or the development of construction projects and hence also the owner. According to the Superior Court, the interpretation guideline mirrors Article 455 and, by analogy, a similar understanding would be required in relation to the project owner's obligations.

The result of the guideline is a situation of a full chain liability that extends the safety net of the construction workers up to the project owner. Since it is a binding interpretation issued by the highest Labour Court in the country, lower courts are bound to apply the same interpretation.

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<sup>7</sup> Free Translation: "Subcontracting of works. Owner of the civil construction project. Liability – In light of the lack of legal determination, the existence of a work contract between the main contractor and the owner of the project will not create a primary or secondary liability over the labour obligations of the main contractor, except if the owner of the project is a construction or incorporation company" (Orientação Jurisprudencial 191-TST).

Two issues have been identified to compromise the efficacy of the provision. First, court precedents tend to define ‘construction and development of construction projects’ on very narrow terms, which means that activities that are related to construction (for example mechanical assembly of equipment) are not under the protection of the guideline.<sup>8</sup> As stated by Courts, the protection is addressed to civil construction activities only.

The second limitation is the fact that the Superior Court has considered in a recent ruling that the liability of the project owner is secondary, raising the same problem mentioned above in relation to the existence of a ‘privilege of order’ benefiting the project owner.<sup>9</sup> Although not a binding guideline yet, the existence of a precedent from the higher court can influence greatly how lower courts will interpret the same issue.

The lack of specific legal provision coupled with a strict interpretation of ‘construction and development of construction projects’, and the Superior Court’s recent decision granting the ‘privilege of order’ to the project owner may mean that the full chain liability in Brazil is not entirely effective and may create a dichotomy between different categories of workers of the construction sector. Strategy from unions to include specific provisions in collective labour conventions signed with project owners have not been identified, but it could be a relevant avenue to be explored by workers and unions in Brazil.

## **OTHER PROTECTIONS IN BRAZIL**

Apart from the chain liability system, Brazilian legislation includes other forms of workers’ protection. One example is the procedural rule that switches the burden of proof in labour claims so that employers – and not employees – have the procedural onus of evidencing that all labour obligations have been met. The rule serves the purposes of benefiting employees in court, putting all evidentiary weight on the employer. In relation to the proof of wage payment, Article 464 of the Labour Code<sup>10</sup> states the responsibility of the employer to demonstrate the payment of salaries, either by means of a receipt signed by the worker, or by proof of the deposit of the sum in the employee’s bank account.

Another legal protection granted under Brazilian system is found in the bankruptcy legislation. According to Article 83 of Law 11,101/2005,<sup>11</sup> labour-related claims, limited to 150 monthly minimum wages per creditor, as well as occupational health claims submitted by employees take priority over all other claims presented in bankruptcy proceedings.

8 See for example Superior Labour Court TST, 2nd Chamber, Appeal 10318-57.2017.5.03.0157, Justice Delaide Miranda Arantes, judged on 17.10.2018.

9 Superior Labour Court TST, Appeal 190-53.2015.5.03.0090, Justice. João Oreste Dalazen, judged on 11.05.2017.

10 Brazilian Labour Code, 1943, available at: [www.planalto.gov.br/ccivil\\_03/decreto-lei/del5452.htm](http://www.planalto.gov.br/ccivil_03/decreto-lei/del5452.htm)

11 Brazilian Bankruptcy Law, 2005, available at: [www.planalto.gov.br/ccivil\\_03/\\_Ato2004-2006/2005/Lei/L11101.htm](http://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2005/Lei/L11101.htm)

In Brazil, labour protection can be recognised by courts. It is a common practice, for example, for labour courts to extend the liability over labour obligations to companies that belong to the same corporate group, so that the entire group respond for labour claims. Even if the requirements for lifting the corporate veil in civil and commercial matters are not met, labour courts tend to adopt a more flexible approach in favour of workers, in order to secure the payment of labour obligations.

The issue of late payment of wages is also addressed by Brazilian courts. According to a consolidated binding position of the Brazilian Superior Labour Court (*Sumula 381*), monetary correction is due by the employer if wages are delayed. The Labour Superior Court has recognised, although on a specific case, that the repeated default in the payment of wages by employers can give raise to the payment of moral damages to employees (Superior Labour Court, Appeal No. 4009020135220108, Judge: Aloysio Corrêa da Veiga, judged on 10.08.2014).

Changes can be expected in Brazil in relation to the issue of late payment as Senate Bill No. 134 of 2015,<sup>12</sup> currently under parliament discussion, seeks to increase the penalties on employers in case of wage default. The Bill intends to impose a 5% fine in case of late payment, with an additional 1% interest rate per day of delay until the effective date of payment. If approved, this will mean that the chain of contractors will be subject to these additional penalties.

Finally, it should be mentioned that Brazil passed a labour reform in November 2017 which changed several aspects of labour relations. One of changes was the introduction of a clocking system that is now mandatory in companies with more than ten employees. Working hour records will include the time of entry, exit and breaks taken by the workforce and may be manual, mechanical or electronic. It will serve as another way to record labour compliance by employers in the country.

## **ARGENTINA**

In Argentina, Article 30 of the Labour Contract Law (Law No. 20.744)<sup>13</sup> determines that the main contractor should demand subcontractors to comply with labour and social security regulations. The provision also states that the main contractor should request its subcontractors for proof of payment of workers' wages, as well as copy of the monthly payment of social security obligations and information on insurance coverage for work

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<sup>12</sup> Brazilian Senate Bill No. 134, 2015, available at: [www25.senado.leg.br/web/atividade/materias/-/materia/120197](http://www25.senado.leg.br/web/atividade/materias/-/materia/120197)

<sup>13</sup> Argentina Labour Law, 1976, available at: [www.servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/25552/texact.htm](http://www.servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/25552/texact.htm)

risks. Failure to comply with these requirements creates a joint liability system between the main contractor and the subcontractors in relation to the rights of the employees.

It is a different protection system from Brazil: in Argentina the main contractor's joint liability is fixed on an exceptional basis and it is triggered only if the main contractor fails to do its appropriate due diligence of its subcontractors. The rationale of provision is that the main contractor responds just to the extent of his own negligence and lack of care. By failing to request proof of labour compliance or additional labour documentation, the main contractor makes himself liable for any non-compliance of obligations incurred by subcontractors.

It is an atypical system of chain liability where liability seems to be conditional to the (good) behaviour of the main contractor in performing due diligence activities, instead of the (bad) behaviour of the subcontractor in breaching labour obligations.

A shift towards a more restrictive chain liability system is noted in the Labour Reform Draft Bill in discussion in the country, which intends to eliminate the system of joint liability in two circumstances. First, if contractors demonstrate to have carried out adequate compliance controls over the subcontractors, confirming the approach mentioned before of releasing the main contractor when due diligence is carried out. Second, if the liability relates to complementary activities of construction, such as cleaning, security and assembly of facilities or machinery, which is similar to the position advocated by the Brazilian Superior Court to limit the joint liability to civil construction proper activities. If these amendments are approved by Congress, the Laws in Argentina will be less protective towards the construction workers.

## **CHILE**

Articles 183-A to 183-E of the Chilean Labour Code regulate the work in a subcontracting system, establishing that the main contractor as well as the project owner will be jointly and severally liable for labour and social security obligations that are breached by their subcontractors. Such liability is limited to the time or period during which the employees or workers provided services under subcontracting to the project owner or the main contractor.<sup>14</sup>

<sup>14</sup> Free translation: "Article 183-B. The project owner will be jointly and severally liable for the labor and social security obligations of the main contractor in favor of their workers, including the possible legal indemnities that correspond to the termination of the employment relationship. Such responsibility shall be limited to the time or period during which the employee or workers rendered services under subcontracting to the project owner. In the same terms, the main contractor will be jointly and severally liable for the obligations that affect its subcontractors, in favor of their workers. The project owner will be liable for the same obligations that affect the subcontractors, when the responsibility referred to in the following paragraph could not be enforced. The worker, in filing the lawsuit against his direct employer, may do so against all those who can respond to their rights, in accordance with the rules of this provision. In cases of construction of buildings for a fixed price, these responsibilities will not proceed when the person in charge of the work is a natural person". Chile Labour Law, 2011, available at: [www.wipolex.wipo.int/en/text/246618](http://www.wipolex.wipo.int/en/text/246618)

It is a full liability system that intends to offer complete protection to workers, but some nuances should be highlighted. If the project owner requests information regarding the fulfilment of obligations by the main contractor, then the liability of the project owner becomes secondary to the main contractor, with similar consequences discussed above in relation to the Brazilian system: the main contractor will be the first obliged to pay the labour amounts and only if he fails to respond then the project owner will be called to do so.<sup>15</sup> According to the legal provisions, the same dynamic applies to the relationship between main contractor and subcontractors.<sup>16</sup>

The intention of the system is to strike a balance between the protection of workers and the due diligence of the project owner and the main contractors, creating a system of full [secondary or primary] liability system depending on whether the right to information and oversight are carefully exerted.

The Chilean regulation also states the general obligation of the project owner to adopt all necessary measures to effectively protect the health and safety of all workers on site, which includes the creation of a management system and an appropriate regulation to coordinate activities on site, with pecuniary penalties prescribed in the Law of Labour Accident (Article 66 of Law 16,744) in case of non-compliance.



15 Otero G, Echeverría M, López M, Cabezón J, Labour and Employment Compliance in Chile, Kluwer Law International BV, The Netherlands, 2014.

16 Free translation: "Article 183-D. If the project owner exerts the right to be informed and the right of retention referred to in the first and third paragraphs of the previous article, the liability will be secondary in relation to those labor and social security obligations that affect contractors and subcontractors in favor of the workers of these, including the possible legal compensations for termination of the employment agreement. Such responsibility shall be limited to the time or period during which the contractor or subcontractor's employees provided subcontracted services to the project owner. Equal responsibility will assume the main contractor regarding the obligations that affect their subcontractors, in favor of the workers of these".

## 5 SUMMARY AND CONCLUSIONS



	CHINA	EU	US
Extending liability for wages	<p>Not yet implemented, but State Council intended local governments to develop a system where the main contractors would be liable for the wages of all workers.</p>	<p>Chain liability exists in Germany, Italy, Spain and The Netherlands and may be full chain in Italy, France and Finland if the client is a builder.</p> <p>Many EU states hold the users of labour liable for wages of agency workers.</p> <p>The EU Enforcement Directive establishes direct liability (one link up in the chain).</p>	<p>Decision of the District of Columbia in 2011 recognizing OSHA as a 'controlling employer' on site.</p> <p>Chain liability introduced in two US states in 2018 (California and Maryland).</p>
Other measures	<p>Wage deposit system; National online registry to track workers hours and salaries; Clocking in system; Blacklist of employers who postpone wages; Restrictions to non-compliant companies from market access, public bidding and finance opportunities; Hotline for workers to report non-payment.</p>	<p>To combat labour fraud several EU member countries have also introduced or strengthened licensing schemes for employment agencies as well as placing some limitations on the use of agency labour.</p> <p>Checks and verifications are obligatory in some states (as in Spain, Italy, Austria) creating a strong deterrent effect.</p>	<p>Oregon House of Representatives to follow the same position of California and Maryland.</p> <p>Wage and Hours Division of the Department of Labour citing a major contractor and 16 subcontractors jointly liable for wage violations.</p>



**What have we learned from examining these systems designed to protect wages in the construction industry?**

At one level, the review has confirmed that the business model adopted with the change to more flexible employment encourages strong competition on wages at all levels, but particularly at the lower levels of subcontracting chains. Cut throat competition almost inevitably leads to cheating, ‘wage theft’ and ‘labour fraud’. The victims are vulnerable workers who hardly know who their real employer is. Systems to protect wages and other benefits are increasingly important and steps to strengthen and improve these systems are on-going. This a fast-moving field of study.

The underlying thread connecting the measures proposed and/or introduced to protect construction workers in the regions examined in sections 1-4 is *extending liability for wages beyond the immediate employer in subcontracting chains*. This is the direction in which legislation seems to be moving in all regions considered. It dates back to the second half of the twentieth century in some countries in Europe but is continuously evolving. The latest developments are assigning liability for wages to main contractors in China (2016, 2018) and legislation introducing chain liability in several states of the US in 2018.

	BRAZIL	ARGENTINA	CHILE
Extending liability for wages	Chain liability as a general rule and a full chain liability system if the project owner is a builder.	A typical system of chain liability where liability arises only if the main contractor fails to request subcontractors for proof of payment of wages.	Full liability system, but liability of the project owner vis-à-vis the main contractor and the liability of the main contractor vis-à-vis the subcontractors is downgraded to secondary if information regarding payment of wages is requested.
Other measures	Burden of proof on employer; Labour obligation extended to all companies of the same group; Plan to introduce fines in case of late payment; Clocking system.	Plan to make the liability system more favourable to the main contractors, excluding liability if the main contractor demonstrates to have carried out adequate controls of subcontractors and if liability relates to construction complementary activities.	Project owner should adopt all necessary measures to effectively protect the health and safety of all workers on site.

Currently, *chain liability* exists in at least four countries in Europe, three countries in South America, and two US states, with liability extended to the client (in certain circumstances) in Italy, France, Finland, Brazil and Chile.

Eight states in the EU have also introduced joint liability on the part of the users of labour when workers are supplied by intermediaries in the form of temporary employment agencies. This move has generally been accompanied by the licensing and regulation of the agencies.

## **THE RATIONALE FOR EXTENDING LIABILITY**

The most obvious motivation for making contractors liable for the action of their subcontractors is that workers have an alternative company to revert to if they have not been paid. However, the rationale for extending liability in subcontracting chains goes far beyond this.

The threat of being potentially held liable requires contractors to take greater responsibility for the workforce employed by subcontractors. They may decide to take workers back inside their organisation and employ them directly. But if they still choose to outsource, they will need to do so with greater scrutiny in the selection and monitoring of subcontractors. Hence if strictly enforced it can have a preventive and deterrent effect against labour fraud on the part of subcontractors.

There is some evidence from studies of nation states in Europe, as well as in Brazil, Chile and Argentina, that extending liability does in fact provide a strong incentive to contractors to choose their subcontractors more carefully. They can do this by strengthening due diligence procedures and reliability checks. There is also evidence of contractors taking steps to verify that subcontractors are complying with their obligations.

Reliability checks and verifications may be voluntary, but they may also be obligatory. In Argentina there is an incentive to comply as liability is only triggered if contractors fail to follow obligatory requirements, which include obtaining proof that wages have been paid and other obligations met by subcontractors. The legislation in Chile also creates an incentive for the execution of checks and verifications as liability is downgraded from primary to secondary if due diligence is carried out.

In Brazil, the rationale put forward for extending liability includes ensuring that subcontractors have the financial capacity to honour the labour rights of the workforce. A similar concern with finance is apparent in 2004 legislation in California where liability is extended beyond the direct employer in circumstances where the contractor knows



that the contract contains insufficient funds to allow the subcontractor to comply with all local, state or federal laws relating to the workforce.

Joint and several liability was introduced at EU level in the Enforcement Directive in order to address underpayment or non-payment of wages to 'posted' workers who could not enforce their wage claims because the immediate employer had disappeared (a problem also noted in the Gulf Cooperation Council [GCC]). In the Enforcement Directive of 2014, the liability is only *direct* liability (one up in the chain) whose effect can easily be overcome by a contractor (which may have been set up by a *letter box* company) simply disappearing, probably to re-appear in another guise at a later date. In countries where liability is extended to the main contractor (*chain liability*) the deterrent effect is much stronger, and the objective of safeguarding wages is more likely to be achieved.

The deterrent effect may also be more effective if there are restrictions on the extent of subcontracting (as in Spain, Italy, Austria), where reliability checks and verifications are obligatory or when incentives are embedded in the legislation so as to align contractors' and project owners' conduct towards performing appropriate due diligence checks.

Strong advocates for extending liability to main contractors and project owners may push the rationale beyond its deterrent effect by suggesting that it poses a mechanism of self-regulation between private actors and is less restrictive and more proportionate than alternative systems such as pure state intervention by inspections and standards.<sup>1</sup> However, it is clearly not a panacea. There is still a need for monitoring by the State and strong sanctions, including fines, imprisonment or debarment from tendering for further public contracts.

An alternative view (and one of the main criticisms of extending liability) is that the State is shifting an inspection and enforcement task to private companies because the State is meeting obstacles in carrying out these tasks. Companies argue that they would meet similar obstacles with claims that "*a principal contractor hardly has the competence or means to inspect or monitor whether a subcontractor pays the correct wages to its employees*".<sup>2</sup> The more parties involved the more difficult the task becomes.

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1 Proposal for a Directive of the European Parliament and of the council on the enforcement of directive 96/71/EC concerning the posting of workers in the framework of the provisions of services COM/2012/0131 final, cited in Heinen A, Muller A and Kessler B, Liability in Subcontracting Chains: National rules and the need for a European framework, European Parliament, 2017, p.22, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL\\_STU\(2017\)596798\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf)

2 Jorens Y, Peters S and Houwerzijl M, Study on the protection of workers' rights in subcontracting processes in the European Union, Project DG EMPL/B2-VC/2011/0015, University of Amsterdam, 2012, p.157, available at: [www.dare.uva.nl/search?identifier=80520784-0f36-4537-ae15-3986a0e38330](http://www.dare.uva.nl/search?identifier=80520784-0f36-4537-ae15-3986a0e38330)

While these are valid arguments, companies around the world are now accepting this responsibility and sharing the burden of monitoring. This may be because they also have a lot to gain from a well-paid and compliant workforce.

## **THE RELEVANCE OF JOINT LIABILITY TO THE GULF COOPERATION COUNCIL**

Introducing joint liability has proved almost everywhere to be highly controversial. Our research has even demonstrated a certain backlash against an absolute joint liability system. That is the case of Argentina with the Labour Reform Draft Bill and Brazil and Chile where a system of secondary liability creates a more moderate and nuanced approach.

Where the extension of liability has been effective there has been support from Trade Unions (TUs), both in monitoring and helping workers to make claims. TUs have been instrumental everywhere in pushing for liability legislation. Whether or not they are successful depends very much on the balance of power between labour and business, which remains a strongly tense relationship.

An example which illustrates the point comes from the US, where subcontracting was introduced by contractors in part to reduce the leverage of the TUs in the construction industry. Strong opposition from business has so far prevented introduction of such legislation at Federal level. However, actions by enforcement agencies have made some gains and recent developments at state level suggest the balance may be changing.

In the countries of the Gulf – where TUs hardly exist and support for business is strong – it seems very unlikely that legislation to extend liability for wages to the main contractor would be introduced by the State. It may also be argued that the existence of the Wage Protection System (WPS) reduces the need for further action. However, some comparisons may be drawn with China.

China is a strong authoritarian State that is embarrassed by the escalating problem of workers not receiving their wages and has decided to take action to address the issue. It has been introducing measures similar to the WPS such as the creation of a wage-guarantee system from which to reimburse the workers when wages have not been paid, a registry at central and state level to host information on construction workers and monitor labour compliance, and strong sanctions against offenders, including a black-list system and bans to public bidding. Difficulties in implementation have led the State to consider it necessary to also push liability for wages back to the main contractor. This may be to create incentives on the part of contractors to recruit labour suppliers more carefully, but it seems more likely to be an attempt to involve the general contractors in the colossal task of monitoring that wages have been paid.

GCC governments are also embarrassed by adverse publicity about wage delay and the increasing number of wage disputes which are clogging up the labour courts. They also need assistance from main contractors (as well as clients) with the task of monitoring wages and enforcing compliance with the WPS. A strong case can be made for extending liability for wages to main contractors, which should provide a similar deterrent effect as has been found elsewhere if followed up with sanctions on the main contractor when wages have not been paid. Even a nuanced system of secondary joint liability as found in Brazil and Chile, or sequential liability as found in the EU,<sup>3</sup> may create the incentives for contractors and project owners to employ appropriate due diligence checks of subcontractors.

Given the poor performance of many subcontractors in the region, it is possible that extending liability to main contractors may prompt some to choose to take back the workforce into their own organisation, rather than engaging with subcontractors and labour suppliers to try to raise standards. Evidence has recently come to light that some companies in the region are still employing almost all workers directly, subcontracting very little and making little use of labour suppliers.<sup>4</sup> Extending liability to the main contractor might persuade others to do likewise, creating a positive 'social contagion effect'. As it is much easier to monitor when workers are directly employed, in this way the burden of monitoring would be much reduced as well as being shared.

## **ALTERNATIVES TO EXTENDING LIABILITY**

If passing legislation to extend liability to main contractors is considered a step too far, it seems sensible to ask whether it is practicable to go a part of the way, for example by placing legally enforceable obligations on contractors, backed up by sanctions, in a step by step approach.

Currently the WPS addresses sanctions only against the immediate employer whereas the forces driving non-compliance may be at higher levels of industry structures. Enforcement efforts should therefore focus at the top. In construction this means the general contractor at the head of the subcontracting chain which sets the tone and creates overall standards that are to be followed by subcontractors on a building site of any size. It may even be possible to go beyond the individual company when it is an affiliate of a higher-level organisation from the same economic group, as seen in the US and Brazil.

<sup>3</sup> See Appendix A for more details on the concepts.

<sup>4</sup> Business and Human Rights Resource Centre, *On Shaky Grounds: Migrant workers' rights in Qatar and UAE construction*, 2018, available at: [www.business-humanrights.org/sites/default/files/BHRRRC-Shaky-Ground-Construction-Briefing-v1.1.pdf](http://www.business-humanrights.org/sites/default/files/BHRRRC-Shaky-Ground-Construction-Briefing-v1.1.pdf). This has provided some initial insights into the extent of subcontracting and labour outsourcing in Qatar and the UAE. The data assembled in response to a survey in 2018 by the 15 contractors which replied to the question on the composition of their workforce is presented in Annex B to this paper. It reveals wide variation in the extent of subcontracting among the companies, as well as in their dependence on labour suppliers. In part this may be due to different stages of their projects at the time of the survey, but it also suggests very different business models.

A relatively easy first step would be to make it obligatory that main contractors check that all workers on a site which they control are covered by the WPS. Such a move would help to extend coverage and could be enforced by sanctions against the main contractor if a wage dispute arises and the employer is not enrolled in the WPS.

Two thirds of construction workers interviewed in a recent study in Qatar complained of not having received adequate payment for overtime, with most complaining that they had to work a substantial number of hours more than stated in the contract, very often without any financial compensation.<sup>5</sup> To help ensure that workers have been properly compensated for overtime, GCC governments could also require main contractors to introduce a mandatory clocking system, such as has recently been introduced in Brazil and China, to provide an accurate record of workers' hours and overtime.<sup>6</sup> The details must be included in workers' payslips which should be compulsory. Sanctions for failure to comply with this requirement could include debarment from further government contracts or other market restrictions.

In special circumstances it might be possible to go further. For example, a measure that could be considered to accompany the introduction of a minimum wage would be placing an obligation, subject to monetary penalties, *on all contractors* to ensure sufficient funds in the contract with a subcontractor to pay wages at the minimum rate.<sup>7</sup> If strictly enforced this would in effect be extending liability (albeit only *direct* liability) by the back door.

## **THE SPECIAL CASE OF LABOUR SUPPLIERS**

Recent evidence suggests that an average of 20% of construction workers in UAE and Qatar may be employed at any one time by labour suppliers.<sup>8</sup> In some companies the figure may be up to one third and this is almost certainly an underestimate. The fourth annual workers welfare report of the Supreme Committee for Delivery and Legacy (SC)<sup>9</sup> in Qatar (2019) reveals that 50% of its entire workforce covering all its sites are currently employed by 'Other Contracting Parties' (OCPs), the majority of which are assumed to be labour suppliers.

5 Fargues, P, Shah N and Brouwer I, Working and living conditions of low income migrant workers in the hospitality and construction sectors in Qatar, Research Report No. 01/2019, Gulf Labour Markets and Migration, 2019, available at: [http://gulfmigration.org/media/pubs/rp/GLMM\\_EN\\_2019\\_RR02.pdf](http://gulfmigration.org/media/pubs/rp/GLMM_EN_2019_RR02.pdf)

6 A clocking system for construction workers has also been introduced as part of the subcontractor payment system of the Seoul Metropolitan Government in the Republic of Korea, as detailed in Wells J, Exploratory study of good policies in the protection of construction workers in the Middle East, International Labour Organisation, Regional Office for Arab States, 2018, available here: [https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms\\_618158.pdf](https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_618158.pdf)

7 It could also be required to obtain proof that wages have been paid by the subcontractor at the minimum rate, although the WPS should provide this.

8 See note 4 and the data shown in Annex B.

9 Supreme Committee for Delivery and Legacy, Fourth Annual Progress Report, 2018- 2019.

Labour suppliers fulfil an important role in providing workers to contractors on a temporary basis, but if they fail to find sufficient contracts to keep their workers fully occupied it can lead to difficulties for them. As the labour supplier is the legal employer, the workers should be paid regardless of whether there is work for them to do or not, but many labour suppliers are small or very small companies with little financial capacity and they may struggle to find the cash to pay wages in slack periods.

In addition, there is a practical side that labour suppliers may be unable to pay wages to their employees until they have received payment from the contractor to which they supplied workers. Yet these small companies are often exploited by their clients who pay late, or sometimes don't pay at all for the use of the additional labour. Extending liability for wages to the users of the labour (which may be main contractors or subcontractors) would therefore seem to be a high priority.

However, alternative measures may also be appropriate. The Supreme Committee in Qatar has attempted to reduce the tiers of subcontracting and restrict the use of labour suppliers in the lower tiers, in order to reduce the size and spread of the supply chain, which it sees as the key to managing the implementation of its workers welfare standards<sup>10</sup>. This is a valid response (in line with that of Spain) although it has not been entirely successful. While it has almost succeeded in eliminating OCPs from tier three of the subcontracting chain, with 50% of the workforce still employed by OCPs it is still very far from eliminating them entirely, which was the original aim.

An alternative to either restricting the use of labour suppliers or to making the users liable for wages would be to ensure that companies supplying labour to contractors or subcontractors (which are in effect employment agencies)<sup>11</sup> have a license and also that they comply with certain obligations. A key obligation would be that agencies have sufficient funds to pay wages to workers in the event that there are gaps in contracts with users.

Many individual EU countries have recently introduced registration or licensing schemes for employment agencies, as well as some limitations on the use of agency labour. In order to acquire a license, businesses usually have to meet strict financial requirements to guarantee that employees' claims against the employer will always be satisfied. In some cases, they must also have a permanent office, a provision introduced to fight against letterbox companies. Employment agencies face stiff penalties for violations of the law and these may also be extended to the user company. Such measures could be introduced in the GCC.

<sup>10</sup> Ibid.

<sup>11</sup> The situation in the GCC countries relating to the licensing of employment agencies is unclear as the laws that exist seem mainly to apply to recruitment agencies. For example, we are not aware whether the idea of an employment agency exists in the GCC.

Licensing and registering of labour suppliers as employment agencies and extending the penalties that the agencies are liable for when wages are paid late to the user company, would seem to be an essential intermediate option to either restricting their use or extending liability for wages to the users of the labour. If accompanied by sanctions on agencies operating without a license and user companies ignoring their obligations to pay on time, it would also open the door to blacklisting of unreliable companies.

To sum up, based on the analysis of different systems of wage protection identified in our research, measures to improve the effectiveness of the WPS could include:

- The adoption of a system of chain liability which can provide a strong deterrent effect to late, partial or non-payment of wages to construction workers. The threat of being held liable should incentivise main contractors and project owners to only subcontract with reliable subcontractors and to take further steps to check that all workers on their projects receive the wages due to them on time.
- Even a nuanced system of secondary joint liability as found in Brazil and Chile, or sequential liability as proposed to the EU, can create incentives for contractors and project owners to employ appropriate due diligence checks of subcontractors or to refrain from subcontracting if reliable subcontractors are not available.
- As late or non-payment of wages is most likely to occur when employers are labour suppliers without the funds to pay wages until they have been paid by the user company, extending liability for wages to the users of the labour (which may be main contractor or subcontractors) would seem to be a priority.
- Licensing and registering of labour suppliers as employment agencies, and extending the penalties for wage violations that the agencies are liable for to the user company may be an alternative. This would be an intermediate step to raise the bar on the quality and reliability of the agencies' work and the users' responsibilities.
- If extending liability to main contractors is considered too radical and a step-by-step approach considered more appropriate, establishing a legally enforceable obligation on main contractors to check that all workers on a site which they control are enrolled in the WPS would seem an easy first step.
- A second step might be an obligation on main contractors to introduce a clocking system on major sites to provide an accurate record of workers' hours and overtime. These details must be included on payslips which should be compulsory for all workers.



- A measure that could be timed to accompany the introduction of minimum wages (as anticipated in some GCC countries) would be placing a legally enforceable obligation, subject to monetary penalties, on all contractors to ensure that contracts with subcontractors contain sufficient funds for wages to be paid by the subcontractor at the minimum rate.
- Extending liability and/or obligations, in whatever form, has to be accompanied by strong sanctions against those who fail to comply. Directing penalties against the top of the chain where compliant decisions are taken (as demonstrated in Brazil and US) can send a strong signal to others. Debarment from government contracts is the strongest signal that can be used against main contractors.

We believe that the introduction of these measures, which combine preventive tools with sanctions, could reduce the incidence of late or non-payment of wages and the number of wages disputes in the GCC countries, while also providing a useful guide for other countries facing similar labour issues.

However, an effective method of checking and providing redress for workers who have not been paid will still be needed. Setting up a wage fund to reimburse workers if immediate employers do not have the funds to pay (or refuse to pay) is an essential requirement of any WPS, but it is not yet clear that all GCC states have set up such a fund.

Even where a wage fund does exist, time is of the essence in reimbursing workers who may not have been paid for months and have no reserves to support themselves through a lengthy procedure. To further improve the WPS, GCC states should therefore follow China's intention (although not yet fully implemented) which has decreed that workers should be remunerated immediately from the deposited funds when wages have not been paid. Taking the employer to court to recover the sums paid, or to impose fines, should occur only after the workers have been reimbursed.

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## ANNEXES

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### ANNEX A: LIABILITY CONCEPTS

#### **Joint and several liability:**

*"If a subcontractor does not fulfil his obligations regarding wages, taxes or social funds payments to its employees or the Inland Revenue, the contractor of the subcontractor can be held liable for the entire debt of the subcontractor. Therefore, employee and the Inland Revenue have an additional guarantor/debtor to rely on, regardless of responsibility or fault. The contractor and subcontractor are left to sort out their respective proportions of liability and payment between themselves. This liability regime is also called direct joint and several liability"<sup>1</sup>*

#### **Chain Liability:**

*"Chain liability spreads the joint and several liability throughout the chain or a large part of it. As result, liability applies to the principal contractor. It has to be kept in mind however, that the principal contractor is not necessarily also the investor or client. If a national legal system does apply liability to an investor/client as well, the study therefore uses the term 'full chain liability', in order to make clear, that all links of the subcontracting chain may be held liable".<sup>2</sup>*

#### **Sequential liability:**

*"all links in the subcontracting chain may be held liable for unpaid wages, until the main client is liable. Certain conditions have to be met before the employee is entitled to move on to the next link in the chain".<sup>3</sup>*

#### **Primary liability:**

the worker can simultaneously claim labour rights against the subcontractor and the main contractor, and they are both responsible for the entirety of the labour debt.

#### **Secondary liability:**

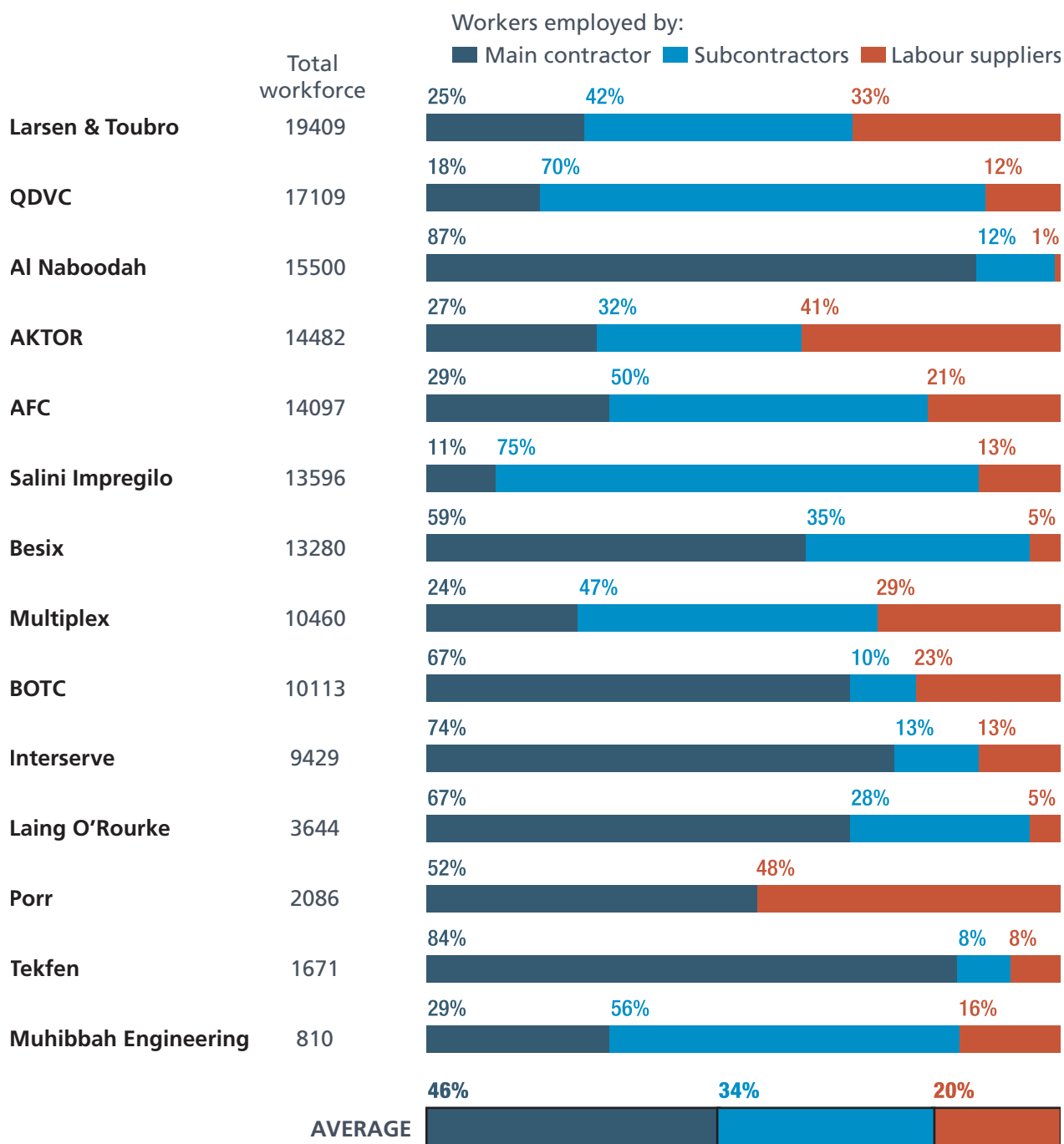
the subcontractor will be the first obliged to pay the labour amounts due to the worker and only if the subcontractor fails to do so and there is evidence of lack of patrimony to respond to the obligations the main contractor will be called to fulfil the subcontractors' obligations.

1 Liability in Subcontracting Chains: National Rules and the Need for a European Framework, 2017, p. 21, available at: [www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL\\_STU\(2017\)596798\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596798/IPOL_STU(2017)596798_EN.pdf)

2 Ibid, pp. 21-22.

3 Ibid, p. 9.

## ANNEX B: COMPANY WORKFORCE COMPOSITION



Source: Business and Human Rights Resource Centre<sup>4</sup>

4 Business and Human Rights Resource Centre, On Shaky Grounds: Migrant workers' rights in Qatar and UAE construction, 2018. available at: [www.business-humanrights.org/sites/default/files/BHRC-Shaky-Ground-Construction-Briefing-v1.1.pdf](http://www.business-humanrights.org/sites/default/files/BHRC-Shaky-Ground-Construction-Briefing-v1.1.pdf)

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**Protecting the Wages of  
Migrant Construction Workers**

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