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*Exploratory study of
good policies in the protection of*

**CONSTRUCTION WORKERS
IN THE MIDDLE EAST**

ILO White Paper
Dr Jill Wells



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White Paper, February 2018
Dr Jill Wells

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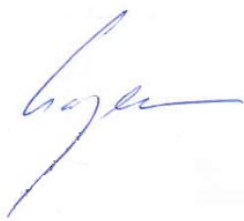
FOREWORD

Construction is one of the key sectors of the labour market in many parts of the Middle East, particularly the countries of the Gulf Cooperation Council, where the building of world-class sporting stadiums, educational institutions, museums and condominiums continues at a rapid pace.

The workers that toil on building these impressive cities are commonly low-skilled migrant workers from Asia and Africa who benefit from opportunities to earn income that offers the chance of improved livelihoods for themselves and their families. However, they also potentially face risks relating to flawed recruitment, late payment of wages, dangerous working and living conditions and may have limited access to effective dispute resolution. Both in the Middle East and other parts of the world, such factors can leave low-skilled construction workers vulnerable to labour exploitation (including forced labour) and impede the efficiency (as well as good reputation) of the construction industry.

The ILO Regional Office for Arab States is committed to contributing new ideas and sharing good practices in the regulation of the construction industry, including lessons learnt from other countries. In recent decades, construction companies' search for greater flexibility in the employment of workers has led to extensive subcontracting and to the outsourcing of labour requirements to labour supply companies. This trend towards subcontracting is not restricted to the Middle East region and has become increasingly common in countries in Europe and Asia, as well as the United States. Thus a number of interesting pilots and experiences can be brought for consideration and possible adaptation in the Middle East.

The ILO thus commissioned this exploratory study of good policies and practices in the protection of construction workers to focus closely on mechanisms ensuring (i) timely payment of wages and (ii) safe and healthy working conditions. We hope it stimulates a lively debate on how reforms can best be pursued.



Frank Hagemann
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EXECUTIVE SUMMARY

The construction sector in the Middle East is dominated by manual laborers who are largely low-skilled migrant workers,² from Asia and Africa. These workers benefit from opportunities to earn income that offers the chance of improved livelihoods for themselves and their families. However, they also potentially face risks relating to flawed recruitment, late payment of wages, dangerous working and living conditions and may have limited access to effective dispute resolution. Both in the Middle East and other parts of the world, such factors can leave low-skilled construction workers vulnerable to labour exploitation (including forced labour) and impede the efficiency, as well as good reputation, of the construction industry.

As a number of studies have recently dealt with the challenge of eliminating recruitment debt,³ this paper will focus on two other key issues facing governments, employers and workers in the Middle East - (i) late or non-payment of wages and (ii) accidents at work that could lead to permanent disability or even death.

This paper explores the changes that have taken place over the past few decades in the way in which workers are employed in the construction industry. Construction contractors' search for greater flexibility in the employment of labour than is allowed under the sponsorship system has led to extensive subcontracting and to the

outsourcing of labour requirements to labour supply companies. On the one hand, these changes have fragmented the relationship between the clients and contractors commissioning the work at the top of the supply chain and the workers who are often at the bottom of the chain. One result of which is that it can take many months for interim payments to reach the immediate employers of the workers, which are then used to pay wages. The changes also mean that construction workers working side by side on a construction site are each employed by one of a multitude of companies, under widely variable terms and conditions, and with limited regulation and oversight. As most of these companies are small, with limited capital and restricted human resource management capacity, recourse to remedy in cases of delayed or non-payment of wages, or injury at work, may be virtually non-existent.

Other countries in the world also have to tackle the problem of this 'flexibilization' in the construction industry and important lessons have been learnt, which are analyzed in the paper and presented for consideration by governments in region, particularly the Gulf sub-region. The introduction of new, innovative approaches to regulating the labour market, not only helps to protect migrant workers from abuse, but also improves the efficiency of the construction industry.

² The term 'migrant worker' is used throughout this paper in accordance with international standards, in particular, Article 2 of the International Convention on the Protection of all Migrant Workers and Members of their Families (1990), which defines a 'migrant worker' as a "person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national". Similar definitions are found in the ILO Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143). It is important to note that many governments in the Arab States prefer to use the term 'temporary foreign contract labourers' or 'temporary expatriate workers'.

³ See for example: ILO (2016a): Ways forward in recruitment of 'low-skilled' migrant workers in the Asia-Arab States corridor, ILO White Paper, International Labour Office, ILO Regional Office for the Arab States, Beirut, 2016 or NYU Stern Centre for Business and Human Rights, 2017. "Making Workers Pay: Recruitment of Migrant Labor Force in Gulf Construction Industry".

In particular, the paper makes a number of key recommendations to governments to consider:

- 01. Improve coverage, implementation and monitoring of the Wage Protection Systems**, including exploring ways to introduce a system of regular checks (to ensure that wages are paid on time and according to amounts stipulated in the contracts); penalizing the principal contractor when the immediate employer is unable to pay due to late receipt of payment for costs already incurred; identifying a source of funds that can be drawn upon to pay unpaid wages if the employer is genuinely unable to pay.
- 02. Introduce prompt payment legislation** requiring all public-sector clients to pay 'tier one' contractors within 30 days of the valuation date, and charging automatic interest on late payment.
- 03. Ban 'pay when paid' clauses in contracts in both the public and private sector** with the right of contractors and subcontractors to suspend performance for non-payment; and require all contractors to pay their subcontractors according to the schedules set out in contracts which, in the case of small subcontractors and labour suppliers should be within 30 days.
- 04. Introduce a process of rapid adjudication** to resolve disputed items in payment applications and facilitate the faster payment of non-disputed items.
- 05. Experiment with Project Bank Accounts (PBAs) to speed payment and protect against insolvency** and explore the possibilities of making payment from a PBA directly to the workers, as pioneered by the city of Seoul in South Korea. (A PBA is a ring-fenced account that is set up at the start of a project as the medium through which payments can be made directly to subcontractors.)
- 06. Develop joint liability schemes whereby clients and principal contractors are jointly liable for protecting subcontractors and workers** against late or non-payment of money owing to them; and legitimize direct payment across the subcontracting tiers, for example from clients to subcontractors and/or contractor to workers employed by a subcontractor in the case of default.
- 07. Introduce legislation that makes the principal contractor and the immediate employer jointly liable for OSH** and consider legislation that places ultimate responsibility on the client for OSH, including the provision of welfare facilities on construction sites and establishment of safety and health committees, with worker representatives.
- 08. Support clients using procurement to leverage improved OSH** and use the OSH Executive Body (see point 9) to share experiences with major clients and contractors and pass on good practice to smaller firms.
- 09. Set up an Executive Body dedicated to improving OSH and to implementing a national OSH policy.** The OSH Executive Body should include a trained inspectorate dedicated to OSH with the authority to inspect all sites through random and unannounced visits and to fine and prosecute the companies held liable (which could include the principal contractor and/or the client as well as the immediate employer). The Executive Body must be qualified to advise and instruct employers on compliance with OSH regulations and to collect and publish data on accidents and near misses, occupational injuries and diseases.
- 10. Ensure freedom of association for migrant workers, as well as worker representation at company level, through collaboration with workers' organizations.** Freedom of association and the right to collective bargaining are essential rights for all workers, including migrant workers. As a minimum and first step, migrant workers should have the right to establish independent workers committees and elect representatives thereby establishing a mechanism for government and companies to engage with workers' representatives on issues related to employment conditions, safety and health, and other labour issues.

ACRONYMS AND ABBREVIATIONS

B2B	Business to Business
BWI	Building and Wood Workers' International
CDM	Construction (Design and Management) Regulation (UK)
CLM	A consortium partner comprising CH2M Hill, Laing O'Rourke and Mace
EC	European Commission
EU	European Union
FIDIC	International Federation of Consulting Engineers
G2B	Government to Business
GCC	Gulf Cooperation Council
IFA	International framework agreement
ILO	International Labour Organization
JV	Joint venture
LOSC	Labour only subcontractor
NHRC	National Human Rights Committee (Qatar)
NSE	Non-standard forms of employment
ODA	Olympic Development Authority (UK)
OSH	Occupational Safety and Health
PBA	Project Bank Account
PPE	Personal Protective Equipment
SME	Small and medium enterprises
sPMS	Subcontract Payment Monitoring System
TEA	Temporary Employment Agencies
UK	United Kingdom
US	United States
WPS	Wage Protection System

INTRODUCTION

The construction industry in countries in the Middle East employs a large number of migrant workers from low-wage economies in Asia to fill the majority of both skilled and low-skilled manual labouring jobs. While providing a valuable source of remittances for the workers' families in countries of origin, recent research has documented the risks that migrant workers take in crossing international borders for work. These risks include the payment of excessive fees to recruitment agents, inadequate or false information on the terms and conditions of employment in the destination country and uncertainty about their legal status.⁴

The risks that workers face in crossing borders are compounded by those they are exposed to during their employment at the country of destination (Buckley et al., 2016). Common risks include pay and benefits being less than expected, illegitimate deductions from wages, inadequate compensation for overtime, late payment of wages and not being paid at all. There is also a possibility of not having work, for example, if (despite its illegality), workers are brought on a 'free visa',⁵ or when the employer is a labour supply company dependent on contracts with contractors or subcontractors to find jobs for the workers. Other risks include long hours of work, difficult working conditions, risk of injury, poor and unsanitary housing and deterioration in physical or mental health.

A number of reforms have recently been introduced to regulate the employment of migrant workers in the construction industry in the region and address some of these risks. However, the employment structure in the construction industry makes regulation difficult and the reforms have been unevenly enforced. Disputes can also severely impact on productivity and threaten success and timely completion of major projects. Among the most common issues is late payment of wages, which can then transform into non-payment. When workers have not been paid their wages, they have few possibilities of redress. Due to the restrictions of the sponsorship systems used in the Middle East, workers may be limited in their freedom to legally leave their employer and seek work elsewhere. In some countries they cannot leave the country without an exit permit, which may result in being unable to return to their country of origin for months, with no income (ILO, 2017a). The system for processing and adjudicating workers' grievances is difficult for migrants to access and to navigate. Many give up and seek to return home, or they seek work that is 'illegal' under the structures of the sponsorship system, making workers vulnerable to detention and deportation (Gardner, 2014).

Further challenges arise in the area of occupational safety and health. Despite limited data, a number of factors point to a high rate of construction accidents in the region. Failures at company level are reinforced by the absence of common standards and regulations and the difficulties faced by governments in adequately enforcing the standards that do exist.

There have been several promising initiatives in the Middle East including the establishment of wage protection systems – a first in the world – which represent an important step forward for ensuring timely and correct payment of wages, as electronic payment allows workers to prove if they have not been paid and therefore should, in principle, enable them to seek compensation where there are appropriate channels for doing so. Steps have also been taken

⁴ These trans-border risks have been addressed in the ILO White Paper 'Ways forward in recruitment of low-skilled migrant workers in the Asia-Arab States corridor' (ILO 2016a), and other recent studies including the New York University Stern Centre for Business and Human Rights' study of recruitment in the construction industry in the Gulf (2017).

⁵ Free visas are work visas where there is a sponsor, but no employment on arrival, and represent an illegal practice in most Arab States. The sponsor named on the visa does not actually employ the worker, and the worker will therefore work for an employer other than that named on their visa – rendering them irregular workers. Migrant workers may or may not be aware of this practice before their departure for the destination country (ILO 2017a).

to strengthen labour inspectorates, by recruiting more staff and providing comprehensive training, as well as initiatives for sharing of good practices around the region, including the annual GCC conference on OSH.

This White Paper, focussing largely on the construction sector in the countries of the Gulf Cooperation Council (GCC), while acknowledging the improvements in the region, aims to present innovative ideas and practices which can further help to overcome some of the challenges currently faced by workers in the construction industry. The paper outlines the ways in which workers are employed in the industry particularly in the GCC countries and other parts of the Middle East and suggests innovative approaches to address two of the main risks that construction workers face: (i) late or non-payment of wages and (ii) accidents at work that could lead to permanent disability or even death. Suggestions are put forward for approaches that have been successfully adopted in other parts of the world and could be introduced in the region to better protect migrant construction workers against these risks. The focus is on policy reform to generate change in the industry.

SECTION 1: OVERVIEW OF EMPLOYMENT CHALLENGES TO BE ADDRESSED

1.1 Changing employment relationships

The regulation of the terms and conditions of employment in the construction industry has become much more difficult globally in recent decades, due to changes in the way in which workers are employed – in particular, the change from direct employment by contractors, to more flexible forms of employment in construction which has been increasing in the last four decades (ILO, 2001).

Flexibility in the employment of labour is considered particularly important by employers in the construction industry due to fluctuating labour requirements. These stem from volatility in construction activity, the widespread use of the contracting system (whereby any contractors' labour requirements change with the portfolio of projects) and the fact that neither construction products nor skills are homogeneous. The average project will require a variety of different skills at different stages of the work, so a flexible work force is desirable. For these reasons, construction has long been characterized in much of the world by the use of the flexible and 'non-standard'⁶ forms of employment, though this is not unique to the construction sector (Buckley et al., 2016).

There are two main forms of flexible arrangements for the supply of labour: casualization and externalization (Bamu & Godfrey, 2009). Casualization involves taking on workers as and when needed and dismissing them when no longer required (known colloquially as 'hire and fire'). Contracts may be for varying lengths of time, which may be as short as a day. Casualization gives workers no security of employment, however it does not change their status as workers, as they are engaged directly through a contract of employment with the contractor.

⁶ There is no official definition of non-standard forms of employment (NSE). A 2016 ILO report, states that NSE encompasses work that falls out of the realm of the "standard employment relationship", understood as work that is full time, indefinite, as well as part of a subordinate and bilateral employment relationship. The report identified four types of non-standard employment (1) temporary employment; (2) part-time work; (3) temporary agency work and other forms of employment involving multiple parties; and (4) disguised employment relationships and dependent self-employment (ILO 2016b).

Attaining flexibility in labour supply through increased casualization is difficult in the countries in the Middle East where the sponsorship system for the recruitment and employment of migrant workers dictates employment contracts for fixed periods of two years and does not allow workers to move easily between employers. Under the *kafala* system, sponsors are generally prohibited from permitting their workers to be employed by anyone else. Restrictions on movement between employers have recently been relaxed in a number of countries. In Bahrain, migrant workers are now legally allowed to change employers after they have completed one year of work with the previous employer (ILO, 2017a).

The alternative to casualization is externalization, which occurs through the outsourcing of labour supply to intermediaries. The contractors sign a commercial contract with an intermediary to provide workers, while the intermediary signs a contract of employment with the workers. Hence there is no direct contractual link between the contractor and the workers. The externalisation of labour may take different forms, with many variations in the division of responsibility for supervision of the work between the contractor (the user of the labour) and the supplier of the labour. At one extreme it may involve placing the workers at the disposal of the contractor who controls and supervises their work. At the other extreme, it could involve engaging an intermediary to supply workers to complete a defined task within a specified period of time for an agreed price, in which case the task of managing and supervising the labour is passed to the intermediary.⁷ In this way contractors can distance themselves from the risks associated with employing workers directly, notably the risk of not being able to keep the workers fully employed.⁸ These risks are passed down to the suppliers of labour, while the risk of not having work is passed to the workers themselves.

A degree of flexibility has been facilitated in the GCC countries since 2000, through labour supply companies. Acting contractually as the employer, labour supply companies have been able to sidestep the restrictions imposed by sponsorship laws and move workers between contractors as needed. The proliferation of such companies providing temporary manual workers has been attributed to severe shortages of construction labour across the skills spectrum in the boom years of 2006 and 2007 (Buckley, 2012). Similar companies supplying workers on a temporary basis now also operate in other GCC countries. Many of these companies are owned by expatriates, including Indian nationals from Kerala who are often former migrant workers themselves (Buckley, 2012). They operate as labour suppliers and/or labour contractors and most are small with limited financial capacity. There are also a few large Temporary Employment Agencies (TEAs) which also hire out workers to contractors.

Labour supply companies may operate entirely within the law, obtaining employment visas legitimately, but some may also employ workers who have 'absconded' from their previous employer and are thus workers in an irregular situation. Others may exploit the sponsorship system by obtaining residence permits for migrant workers for a fee (paid by the migrant worker), while not necessarily being able to provide them with jobs (known as 'trading in visas'). It is particularly hard for governments to regulate in this area despite significant efforts.⁹

⁷ In this context the intermediary is properly called a labour contractor or labour only subcontractor (LOSC).

⁸ They can also avoid the risks associated with housing and feeding the workers, which remains with the legal employer which may be a labour contractor or temporary employment agency.

⁹ For example, the Government of Kuwait is reported to have been trying to clamp down on this kind of abuse and has sent dozens of companies to court but with limited effect (Kuwait Times, 2016).

1.2 The growth of subcontracting

In addition to outsourcing their labour requirements, principal contractors may also outsource whole packages of work to subcontractors. In this way, they can pass the challenge of securing flexibility in the employment of labour to their subcontractors. The variety of trades and skills required in a construction project, particularly building projects, means that the subcontracting of packages of work that require particular expertise (specialized trades) has always been important. However, subcontracting has increased dramatically in many parts of the world in recent years and not just in the specialized trades.

The amount of work subcontracted varies enormously across and within regions, depending on the type of project, availability of subcontractors and business model of the contractor. Data collected by the Business and Human Rights Resource Centre from contractors operating in the Gulf Countries (Business & Human Rights Resource Centre, 2016) reveal significant differences in the extent of subcontracting, as measured by the distribution of workers between main and subcontractors. The data from the only companies responding to the survey is shown in table 1.¹⁰ At one extreme, the construction firm Al Naboodah reported it was employing only 2 per cent of workers through subcontractors. At the other extreme, 80 per cent of Carillion's workforce and 83 per cent of the workers of Multiplex Medgulf were employed through subcontractors. The average for all companies in the table is 40 per cent.

Table 1: Distribution of workers between main and subcontractors in the Gulf Countries, 2015

Main contractor	Workers employed by main contractor	Workers employed by subcontractors	% of workers employed through subcontractors
AL NABOODAH	14,800	350	2
SNC LAVALIN (CANADA)	1,706 + 2,314**	834	17
INTERSERVE (UK)	19,417	2,600	20
QD-SBG	9,000	4,800	35
AL FUTTAIM CARILLION (UAE)	4,927	3,136	39
SIX CONSTRUCT (BELGIUM)	3,000	2,100	41
SALINI IMPREGLIO (ITALY)	2,160	1,735	44
AKTOR (GREECE)	4,635	3,728	45
YAPI MERKEZI (TURKEY)	318 + 2,218*(Joint Venture)	2,512	50
VINCI/QDVC (FRANCE)	4,036	4,413	52
TAV (TURKEY)	2,858 + 4,931*(Joint Venture)	16,040	67
CARILLION (UK)	1,100	5,000	82
MULTIPLY MEDGULF	500	2,534	83

*employed through other business partners, including joint venture (JV) partners;

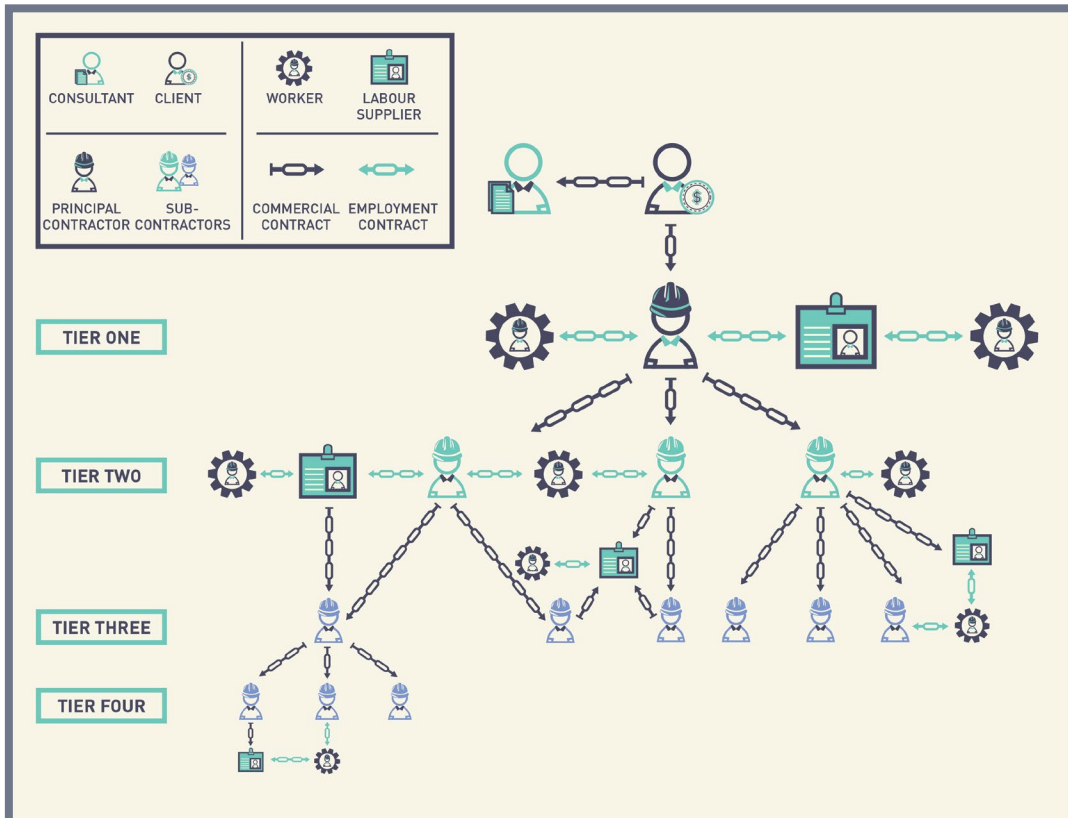
** employed through private employment agencies

Source: Survey by the Business and Human Rights Resource Centre, 2016

¹⁰ The data in Table 1 does not include any information from key principal contractors who failed to respond.

Among respondents to the survey, the largest absolute number of workers employed by a main contractor were working for Al Naboodah. However, employment by the main contractor does not necessarily mean that there is a direct employment relationship between the worker and the contractor, as principal contractors may be employing workers through intermediaries. It is interesting that only SNC Lavalin has provided information on the number of workers employed through intermediaries: a staggering 58 per cent of the workers said to be employed by the main contractor were employed by temporary employment agencies.

Figure 1: A schematic subcontracting chain



Source: *Engineers Against Poverty, 2016*

Table 1 also tells us nothing about the extent to which subcontractors further subcontract packages of work and whether or not they outsource their labour supply. For this information, we need to examine what has come to be known as the 'subcontracting chain'. A simplified version of a hypothetical subcontracting chain is shown in figure 1, indicating both the commercial contracts with other companies and employment contracts that the contractor and subcontractor may have directly with workers. A significant feature is that there may be several construction companies acting as consultants and advisers to the client (shown on the diagram as linked to the client by a horizontal chain). However, these companies are separately commissioned by the client and are not shown to be a part of the contractual chain. Although they may still have some responsibility for overseeing the work of the contractors, they do not usually employ construction workers (i.e. manual labourers).

At the head of the chain is the client, sometimes called the 'employer', who is often also the owner of the building or infrastructure facility to be constructed. The client appoints (generally after a competition) and signs a commercial contract with a contractor who is responsible for carrying out the physical execution of the work. The contractor may outsource parts of the work to other contractors. The first contractor is known as the 'principal contractor' (tier one), and the contractors hired by the principal contractor are known as the subcontractors (tier two). In the GCC countries, the principal contractor is usually a joint venture between a local and an international company.

The subcontractors may further outsource parts of the work to others (tier three subcontractors), who in turn may outsource parts of the work assigned to them to others (tier four subcontractors). Often the tier one contractor has primarily a management function while projects are delivered by second, third and fourth tier subcontractors. Together the principal contractor and all the subcontractors constitute the 'subcontracting chain'. In complex projects, the client may appoint several contractors for separate services, in which case multiple subcontracting chains exist side by side. The client may also nominate one or more subcontractors and contract with them directly, by-passing the principal contractor. The nominated subcontractors may outsource packages of work to other sub-subcontractors, further complicating the subcontracting chain. The extent of the practice of nominating subcontractors in the GCC countries is not known, but anecdotal evidence suggests it is a common feature of construction projects (Skaik & Al-Haji, 2013).

BOX 1: THE EMPLOYMENT IMPLICATIONS OF SUBCONTRACTING

All subcontractors may carry out the work themselves through their own directly employed labour, or they may outsource their labour requirements to labour contractors or temporary employment agencies. The result is that workers on large construction sites will be employed by different employers, many of them small, under widely variable terms and conditions, presenting further problems for regulation. Regulation of employment can be through clauses in contracts between the client and the principal contractor who can be required to pass on the conditions for the employment of labour to the subcontractors.

However, when labour is outsourced there is no direct contractual link between the contractor and the workers and the contractor has no direct authority over the terms and conditions of their employment. This means that there may be real difficulties in monitoring and enforcement, especially at lower levels of the chain, should the principal contractor not have an adequate and robust set of management processes in place.

Some of the implications of this employment structure will become apparent when looking at two of the most pressing risks confronting workers in construction: (i) the risk of not being paid on time and (ii) the risk of an accident at work that could lead to permanent disability or even death.

1.3 Late payment of wages

Wage delay is one of the main causes of workers' complaints (Wells, 2014). For example, in Qatar, 93 per cent of the complaints handled by the Ministry of Labour in 2010 were about delayed wages and two thirds of the complainants were from construction workers (Human Rights Department in the Ministry of Interior, personal interview, 2013).¹¹

Similar problems have been reported in other countries of the GCC. The Ministry of Manpower in Oman reports that worker wage complaints have increased from 10 to 20 per cent yearly and most are from vulnerable groups of low-wage construction workers (UNPSA, 2013). Some private sector owners had failed to pay salaries to their workers for three to six months. The problem of unpaid wages heads the list of workers' grievances in Bahrain where some employers withhold wages for many months, even though non-payment of wages is a criminal as well as a civil offence (Human Rights Watch, 2012).

¹¹ 21 per cent of respondents to a survey of low-income migrant workers in Qatar in 2012 claimed to have received their salaries on time "only sometimes, rarely or never" (Gardner, 2013).

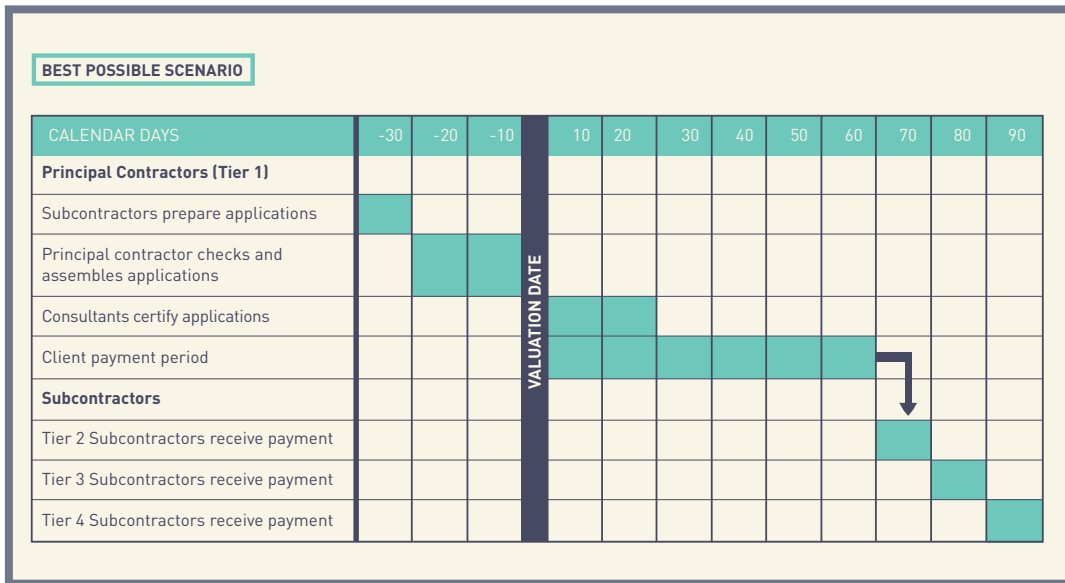
Late payment of wages is a particularly serious problem for migrant workers in the countries of the GCC where, under the sponsorship system, workers cannot easily change their employer even if they are not being paid. It is also critical for workers everywhere who have paid recruitment fees and/or other costs associated with migration and arrive in the destination country in debt (Abella et al., 2016). Failure to receive their wages on time means that the workers cannot transfer wages back to their home country to meet the debt repayment schedule and interest mounts up, causing serious stress for workers and their families.

When workers have not received their wages they can and do withdraw their labour, even in countries where it is unlawful to strike. Construction workers in Bahrain went on strike in March 2015 when they had not been paid their wages for three months (Trade Arabia, 2015). In January 2015, the Kuwait Times reported that hundreds of construction workers building a new hospital stopped work because their employer had not paid them for three months (Trenwith, 2015). In August 2016, 200 construction workers went on strike in Kuwait, claiming they had not been paid for six months (Al Heialy, 2016). A Kuwaiti Government official has suggested that all recent strikes have been caused by non-payment of wages (Omar & Saleh, 2016).

There are a number of reasons why wages may be paid late, but a major factor is the time lag between executing the work and receiving payment. Construction work is typically funded by the participants (contractors, subcontractors, workers and material suppliers) through an advance of capital in the form of bank loans, overdrafts and trade credits. The normal practice on major projects where construction stretches over several years is for the client to make periodic 'interim' payments to the principal contractor for the value of the work done and certified during the previous period. A certain percentage (usually 10 per cent) may be held back by the client as a precaution against the failure of the contractor to fulfil its duties according to the contract and the specification. The principal contractor is then responsible for passing on appropriate sums to all participants along the subcontracting chain. Principal contractors may in turn hold back a percentage of the money owed (known as a retention) against the possibility of the failure of the subcontractor to fulfil its obligations. Hence, contractors at all levels become unsecured creditors waiting for interim payment which is usually at least two months, but often much longer, after the work has been completed (Cheng et al., 2009).

The payment process is technical and complex, but in essence it involves subcontractors compiling their applications for payment for costs incurred for work done during the previous period and submitting them to the subcontractor in the tier above. The principal contractor collects all applications which have to be certified by the consultants acting as the client's professional advisers before being forwarded to the client. Certification takes time as there are often serious disputes over items in the claim. If there are no disagreements and the application has been certified, the client pays the principal contractor within the number of days specified in the contract, which may be 30, 60 or even 90 days from the valuation date. The principal contractor then passes on the appropriate sums. As applications for payment travel up the chain, actual payment has to travel down. In the best possible scenario, when there are no disagreements and every actor in the chain makes prompt payment to the tier below, it can still take several months to reach the furthest points down the subcontracting chain (as suggested in figure 2) (UK Office of Government Commerce, 2007).

Figure 2: Best possible scenario in flow of payment down the subcontracting chain



Source: Engineers Against Poverty

In reality, clients often do not pay on time due to bureaucracy or to disputed items in applications which can cause months of delay. It may also be a deliberate policy on the part of clients to reduce their financing costs by shifting the burden to contractors. Principal contractors may not have large capital assets or credit available to cover payment delays so they in turn may hold back payment to their subcontractors. In many situations, principal contractors are not obliged to pay their subcontractors until they have received payment from the client, a practice known as ‘pay when paid’. Subcontractors in turn are not obliged to pay their subcontractors until they have received payment from the contractor in the tier above. ‘Pay when paid’ is widely considered unethical but is still commonly incorporated into contracts. For example, the widely used International Federation of Consulting Engineers (FIDIC) subcontract states that “the contractor can defer payment to the subcontractor if the amount has not been certified by the engineer, or the amount has been certified by the engineer but not paid by the employer [client]”.¹²

Even when principal contractors have received payment they may choose to withhold the money that it is owing to their subcontractors. Subcontractors in turn may also fail to pass the money on to those further down the chain. Last to be paid, at the furthest points of the chain, are the employers of the workforce, which are often small firms already heavily in debt. When the flow of cash comes to a halt the only option for these firms is to borrow further from the bank or renege on their debt to the workers.

The particularly precarious situation of subcontractors and labour suppliers becomes very apparent when the flow of money dries up dramatically because a client or principal contractor is over-leveraged and cannot pay its debts. This happened in the region in 2009 when a major property developer defaulted on an estimated US\$4 billion of short-term debt with devastating impact on the local property market (Buckley, 2012). Payment stoppages to principal contractors translated directly into wage repression and project cancellations that had a particularly significant impact on workers employed at the bottom of the subcontracting chain. An estimated 150,000 Indian nationals lost their jobs in 2009 and returned to India often without receiving the payment due to them (Buckley, 2012).

Even a slowdown in the economy and in payments from the client can cause problems for

¹² FIDIC recognizes that this ‘pay when paid’ approach may not be consistent with local law and so includes alternative provisions in the Guidance Notes to the Subcontract. The UK for example has prohibited ‘pay when paid’ clauses, as explained in section 2.3.

the workers, including workers who are directly employed by principal contractors. For instance, in early 2016, low oil prices led to reduced economic growth in a number of GCC countries, which impacted on investments in building projects. Many contractors who were relying on short-term funding were reported to be feeling an impact on their working capital and their ability to repay debt and several companies working on government projects reported having difficulty paying wages to their workers (Arnold & Torchia, 2016).

When large companies who operate as principal contractors are heavily in debt and unable to pay their workers, their numerous subcontractors and suppliers are very likely to be in a far worse position. While media attention and Government help has focused on the tens of thousands of workers employed or dismissed by the large companies, those employed in small companies have received little help. Press reports reveal that workers in one such company employing only 500 workers had not been paid for 19 months (Donaghy, 2016).

The economic downturn caused by low oil prices may have exacerbated the issue. Recent developments have exposed the extent and level of indebtedness in the industry. While indebtedness leads to late payment, it can also lead to bankruptcy, in which case the workers may never be paid as there are no compensation funds in place in the GCC countries. Although governments acknowledge the problem, current insolvency laws and administrative systems could be strengthened to deal with this issue. Workers who have the misfortune to find themselves without pay can end up being treated as law-breakers rather than victims (Whitaker, 2016). Those who walk away from their employer, even when they have not been paid, risk being reported to the authorities for 'absconding', in which case they may be arrested and deported.¹³

1.4 Health, safety and welfare of the workers

Construction work is dangerous. Limited data is available, but a number of factors point to a high rate of construction accidents in the region. One such factor is the scale and speed of construction that has accompanied economic growth in recent times, drawing in migrant workers who dominate the construction sector. Subcontracting and outsourcing of labour means that it is common to find construction sites where the workforce comprises a heterogeneous mix of nationalities, working for an equally diverse mix of construction firms, many of them small (Fass et al., 2017). Communication is in a number of languages and most workers will not speak the same language, nor the language spoken by management. Experience elsewhere suggests that workers who do not speak or understand the dominant language used on site are at higher risk of an accident and this is especially so when they have little skill or experience of work in construction (Trajkovski & Loosemore, 2006). There is also evidence that workers employed in small firms, which generally have inadequate access to health and safety advice and make little investment in training, are also at higher risk (James et al., 2007). Underlying all of these factors is often insufficient legislation and regulations on occupational safety and health, and limited mechanisms to enforce existing regulations or collect and publish data on workplace accidents. One exception are regulations prohibiting work during midday hours during summer, introduced in a number of GCC countries and seemingly enforced.

¹³ A major report to the Government in Qatar in fact recommended that workers who have not been paid should automatically be granted a 'No Objection Certificate' to allow them to move to another sponsor (DLA Piper, 2014).

BOX 2: THE RISK OF ACCIDENTS IN CONSTRUCTION

In all parts of the region, the risk of construction workers suffering from an accident at work are considered very high. Analysis of data obtained from one of the countries in the region found that 40 per cent of all work accidents in the country were in the construction industry (Al Humaidi & Tan, 2009). Over the eleven-year period, almost 13,000 construction-related accidents were recorded, leading to 105 deaths and more than 10,000 workers left with permanent disabilities. For the single year 2007 five workers died and 1,614 suffered permanent disability.

When compared with the total number of construction workers during that year (138,000) this represents a fatal accident rate of 3.60 per 100,000 workers (Al Humaidi & Tan, 2009). An earlier study which analysed accident data for 1999 reported 19 deaths in construction when there were 107,000 workers, giving a much higher death rate of 17.75 per 100,000 workers (Al-Tabtabai, 2002). For comparison, the average figure over the past five years in the UK is 2.00 per 100,000 workers (UK Health and Safety Executive, 2016). Death rates clearly vary each year so consistent data is required over a number of years to provide reliable estimates for international comparison. However there is little doubt that these rates are high when compared with international best practice.

In order to be able to suggest interventions that are likely to be effective, it is necessary to understand the type of accidents that may occur as well as the underlying causes. Analysis of accident data shows that the most common types of accidents in the region are falls or being crushed by a falling object (Al-Humaidi & Tan, 2009; Al-Tabtabai, 2002). Together these may account for up to 50 per cent of all accidents, followed by the use or misuse of tools (Al-Humaidi & Tan, 2009). A more recent analysis of 519 incident reports from 15 building sites in Gulf Countries confirms that these are the types of accident that occur most frequently in the region, as well as in the rest of the world (Fass et al., 2017). They are also the types of accidents that cause some of the most serious injuries, including death.

Interviews conducted by the authors of these studies with safety officers highlighted limited worker skills and poor training as a major underlying cause of accidents, followed by lack of experience. There is some evidence that most accidents occur in the summer when the extreme heat is a further factor that is likely to affect the health and wellbeing of the workers (Al-Tabtabai, 2002). Lack of experience, especially of working at height and in the heat and humidity of the GCC countries, is especially significant given that the chronic shortage of construction labour has at times led firms to recruit workers with little or no construction experience (Al-Humaidi & Tan, 2009).

A further factor among worker-related causes of accidents is the failure of workers to use personal protective equipment (PPE) which, while not the first line of defence, could help to protect workers who lack skills and experience. Where PPE is provided by firms in the region, it is usually limited to steel toe boots, helmet, and goggles, but the utilisation rate of even this limited equipment has been estimated at only around 50 per cent (Fass et al., 2017).

Other immediate worker-related causes can also be traced back to management. For example, proper training of workers in Occupational Safety and Health (OSH) and better supervision of activity on site could prevent a lot of the accidents that take place.

Mechanisms to enhance labour inspection could also be improved, as well as establishing comprehensive legislation specifically on OSH.

Officials have the right to inspect construction sites, but most contractors agree that such inspections rarely take place (Al-Humaidi & Tan, 2009). Inspection is supposed to be by a competent person who can identify existing or potential hazards and take corrective action to eliminate them. Such competent persons are reported to be typically absent from construction sites, being replaced by site engineers who lack safety training, cannot identify potential hazards or are constrained by limited resources¹⁴ in very tightly budgeted projects (Al-Humaidi & Tan, 2009).

The conclusion from these studies is that governments in the region could establish and enforce regulatory frameworks that not only mandate but incentivize firms to implement effective safety measures (Fass et al., 2017). Such a framework would include the adoption of appropriate OSH legislation, which should include clarification of the roles and responsibilities of participants (clients, designers, contractors) at the various stages of the construction process, including the pre-contract stages. Legislation should be accompanied by an effective inspection system to promote and monitor compliance.

However, while enforcement and sanctions are indispensable components of any labour inspection system, they have to be combined with prevention policies aimed at helping employers and workers to better identify potential risks and adopt measures to avoid or mitigate them. In this connection, a particularly important function of the State is the collection and publication of detailed accident reports which should provide essential information on how accidents occur and help in developing strategies for their prevention, including through the promotion of an OSH culture.

¹⁴ The latter is an issue for procurement which will be discussed in section 3.

SECTION 2: PROPOSED WAYS FORWARD AGAINST LATE OR NON-PAYMENT OF WAGES

The challenges created for regulation by the movement to more flexible forms of employment in the construction industry are by no means restricted to countries of the Middle East and are echoed in most other parts of the world, along with an increase in the employment of migrant labour. Many other regions are attempting to adjust to these changes with the introduction of new approaches to regulating the labour market and protecting migrant workers from abuse.

The European Union (EU) is one region which has experienced a rapid increase in recent years in the movement of both construction workers and companies among the Member States. Subcontracting chains now stretch across national borders. When a subcontractor in country A wins a contract in country B, the workers they employ may be 'posted' to the host country for the duration of the contract.¹⁵ Temporary Employment Agencies have also mushroomed in recent years and many of them also post workers to other countries within the EU. In an effort to protect both regular migrant workers and posted workers, the European Commission (EC) has developed a number of new approaches to regulation. These will be assessed, along with measures from other regions, for their relevance to the situation in countries of the Middle East.

This section addresses the issue of protecting workers against late or non-payment of their wages and outlines innovative ideas and proposals which could be adopted by governments in the Middle East to address this issue. The paper looks first at the Wage Protection System (WPS), an innovative approach pioneered by the GCC countries. However, the section explains limitations to the system, namely its failure to cover all workers, and an inability to prevent late payment because the employer him/herself has not been paid by their client, and thus genuinely does not have the funds needed when wages are due.

The section thus proposes a variety of measures that can help address this situation, including:

- Strengthening the WPS and extending coverage to all employers and workers
- Introducing prompt payment legislation
- Payment protection of subcontractors by banning 'pay when paid' clauses in contracts
- Introducing rapid adjudication to resolve disputed items in contractors' claims
- Experimenting with project bank accounts
- Assigning joint liability to clients and contractors for the payment of wages

¹⁵ Posted workers are different from migrant workers in that they remain in the host country only for the duration of the contract and are not expected to integrate into the local labour market.

2.1 The Wage Protection System

Countries in the region are encouraged to continue with efforts to introduce and strengthen the WPS, extend coverage to all employers and their workers, and identify an appropriate source of funds to pay overdue wages when employers are genuinely unable to pay.

The WPS is described as an electronic salary transfer system designed to pay wages directly into the personal accounts of workers. This is a very important step forward for ensuring timely and correct payment of wages, as electronic payment allows workers to prove if they have not been paid and therefore should, in principle, enable them to seek compensation where there are appropriate channels for doing so.

The WPS in the Saudi Arabia was introduced in September 2013 for companies with more than 3,000 workers. It is being gradually extended and is planned to eventually apply to all companies with at least ten workers by 2017. A number of companies are now offering payroll services online, claiming that the generation of electronic WPS files, which have to be uploaded to the e-service portal at the Ministry of Labour, requires customized software that can be very expensive to implement and support. Providing the software, or alternatively paying a company to handle the payroll, could be a major barrier to implementation by the under-capitalized companies that supply labour to the industry.

Oman's WPS came into effect in January 2014 with the objective of providing the information needed to deal quickly with the large number of complaints of non-payment of wages and prevent the situation degenerating into strikes and work stoppages. According to a detailed report published by the United Nations, the system seemed initially to have been highly successful (UNPSA, 2013). One of the many benefits claimed is enabling the Ministry of Manpower to identify any wage delay and provide labour inspectors with accurate data, so that they can resolve the issue quickly before it escalates. It is reported that workers can also file complaints through the Ministry's website if they have not been paid. However, the report was written when the system was being implemented by 7,000 private companies covering around 300,000 workers which is a small number when compared with the estimated 200,000 companies employing almost 2 million migrant workers in the country as a whole. A press report in June 2015 revealed that around half of the migrant workers in Oman were still not receiving their wages through banks (Times of Oman, 2015). In January 2016 one of the companies that offers payroll services to employers released a note saying that "due to various issues faced by Omani companies when trying to comply with the WPS regulations, the Omani Government has not forcefully enforced the compliance with the WPS procedure" (ActivPayroll, 2016b). However, this was expected to change at the beginning of 2016 when the companies that do not pay their salaries in accordance with the requirements of WPS were to be fined or potentially shut down.

Qatar and Kuwait both introduced their WPS in November 2015. Seven months later, in June 2016, Qatar announced that as many as 1.5 million of the 1.7 million migrant workers in the country were already receiving their wages under the WPS (Alagos, 2016). Qatar soon developed sanctions, with companies facing fines, visa restrictions, as well as company managers facing imprisonment if the system is not implemented as per the regulations. Research should be conducted to determine how many fines are imposed and how the employers of the remaining 200,000 workers are able to overcome any difficulties involved in implementing the system. These are most likely to include the agencies supplying labour at the bottom of the subcontracting chain for whom protection is most critical. Improvements in the licensing and regulation of these labour supply companies would appear to be a first step to securing their participation in the WPS.

The WPS, if properly implemented in all of these countries, should apply some pressure on employers to pay wages on time. However, penalizing contractors who are genuinely unable to pay because they have not yet received payment for the work already completed, will not resolve the issue. The WPS will only protect the workers' wages if there is money to pay the wages when employers default and if there is an efficient process for doing so.

Hence, it is important to know in each country whether a source of funds has been identified and is being set aside and drawn upon when needed to pay overdue wages. Wages are not 'protected' unless this is the case.

Penalizing contractors who are genuinely unable to pay their workers' wages also does not address the underlying economic problems in the industry which are the cause of late payment, notably the failure by many participants, from the client down, to honour the payment commitments in their contracts. If late payment is due to contractors higher up the chain withholding funds, the question arises as to who should be penalised.

Some suggestions are put forward in the rest of this section for interventions that have been successful elsewhere in addressing the issue of late payment down the subcontracting chain. This paper also suggests measures that could be introduced to protect project funds against insolvency for the benefit of all participants.

2.2 Prompt payment legislation

Late payment has a serious detrimental impact on the overall economy and on small enterprises in particular. Governments in the region may consider the introduction of legislation to set a standard for payment in Government to Business transactions with automatic penalties in the form of interest on overdue sums.

Late payment in both the public and private sectors is a major problem in many parts of the world. The EU Late Payment Directive (2011) was introduced following increased knowledge of its detrimental impact on the economy. Delayed payment in Business to Business (B2B) and Government to Business (G2B) transactions has an adverse effect on the cash flow of firms, especially when credit is restricted. It can affect the ability of small firms to continue trading and their exit from the market will in turn impact on the economy (Connell, 2014).

BOX 3: EU LATE PAYMENT DIRECTIVE

The objective of the Directive is to tighten EU regulation on late payments in order to strengthen the rights of businesses – in particular small and medium-sized enterprises (SMEs) and subcontractors – to receive payment owed by either public or private debtors. The measure is not specific to construction, but in recognition of the importance of public procurement (much of which is in construction projects) it places stricter requirements on public debtors who are to process their accounts within 30 days from the date of the invoice, compared with 60 days for the private sector. The Directive also introduced penalties for late payment. Debtors have to pay interest at eight percentage points above the rate set by the European Central Bank and reimburse the reasonable recovery costs of the creditor.

The most recent ex-post evaluation of the Late Payment Directive concluded that it has been successful in bringing the issue of late payment to the forefront of the political agenda in Europe (European Commission, 2015). However, while the majority of Member States had transposed the Directive into national law, the author found little evidence that it has had any significant impact to date on payment behaviour. Average payment duration decreased by a small amount between 2011 and 2016 in both G2B and B2B transactions, but significant differences remain across countries. A key factor is the 'national business culture'. States with above average payment delay in G2B transactions also show above average delay in B2B transactions. The southern Member States (Greece, Italy, Portugal, Spain), which have historically had higher average payment duration and delay in both kinds of transaction, are perceived by businesses as countries where late payment is 'standard business behaviour'. In contrast, Nordic countries

(Denmark, Estonia, Finland, Sweden) have a good payment culture motivating companies to comply with contractual payment terms (European Commission, 2015).

The evaluation also found that the actual exercise of the rights conferred by the Directive on creditors is not widespread, due to fear of damaging good business relationships with clients, or in some cases with governments. Almost two thirds of respondents to a survey indicated that they never exercise their rights to claim interest and/or compensation fees for late payment, with SMEs even less likely than large companies to exercise these rights. At present, it is up to the creditor to decide whether to claim interest on late payment. From the supplier's point of view, tolerating late payment against the promise of future business is often a rational choice (European Commission, 2015). The authors recommended that interest on late payment should be paid automatically and not left up to the creditor to claim.

While legislation can have only limited impact on payment practices, particularly in the private sector, it can be effective when the Government is the client. The UK transposition of the EU Directive led to the requirement that all government clients of the construction industry pay principal contractors within 30 days (The Late Payment of Commercial Debts Regulations, 2013; UK Department for Business Innovation & Skills, 2014). A similar provision exists in the United States under the Prompt Payment Act of 1982. Governments in the region could consider following these examples with automatic interest on overdue payments. However, prompt payment to the principal contractor will not necessarily protect workers at the bottom of a long subcontracting chain unless there is also provision to ensure the money is passed on.

2.3 Payment protection for subcontractors by banning 'pay when paid'

To protect payments to subcontractors – and hence the workers they employ – governments are encouraged to introduce legislation banning 'pay when paid' clauses in all contracts in the construction industry in both the public and private sector, and include the right of contractors and subcontractors to suspend performance for non-payment.

Arguably more relevant than the blanket EU Directive that applies to all transactions throughout the economy is legislation that is focused on the construction industry and on ensuring prompt payment to subcontractors. Subcontractors in many countries have been fighting back for many years against an unfair payment system. In recognition of the problem, a number of countries have introduced 'soft implementation measures' such as prompt payment charters. The effectiveness of such voluntary measures may be limited as there is little incentive to pay on time in the absence of sanctions for businesses that do not comply with the code (European Parliament, 2015).

However, the State, through its various agencies, is a major client of the construction industry and therefore has more direct powers of enforcement through its contracts with principal contractors. In the US (as in the EU), payment protection for subcontractors working on construction contracts with the federal Government has received attention in part because subcontractors are often small businesses and it is the declared policy of Congress to protect the interests of small business (Manuel, 2014). Subcontractors are reported to perform 80 per cent of the work on such contracts and they generally do not get paid until after the prime contractor has been paid (Manuel, 2014).

Measures to protect payment of subcontractors were first introduced in the U.S. by the Miller Act of 1935, which was then superseded by the US Prompt Payment Act of 1982 (Manuel, 2014). Under amendments introduced in 1988, every construction contract awarded by a federal agency must contain clauses obligating the client to pay the principal contractor within 30 days. The principal contractor must then pay subcontractors within seven days of receiving payment from the client and pay interest on any payments that are late. Similar payment clauses must be included in all contracts with subcontractors and sub-subcontractors so that the payment and penalty requirements 'flow down' to the various tiers of the chain.

While a great improvement on previous practice, the fourth tier of subcontractors would still have to wait for 30 days for the prime contractor to be paid plus an additional 21 days for the money to flow down. The main bottleneck is waiting for payment from the client before any of the subcontractors and the workers they employ can be paid. This is common practice in many parts of the world and may be embodied in 'pay when paid' clauses in contracts. In the GCC countries, the practice is often referred to as 'back to back', and such clauses are accepted as the norm (Singh, 2015). They work to the advantage of principal contractors but have a serious detrimental effect on a subcontractor's cash flow and hence on the ability to pay wages on time.

Legislation in the UK has taken the more radical step of de-linking payment to subcontractors from payment from the client, by banning 'pay when paid' clauses in contracts. While payment details are normally set out in the various contracts between companies in the supply chain, the UK Housing Grants, Construction and Regeneration Act 1996 (also known as the Construction Act), has the power to override the contract if it does not contain any payment rules or if the terms set out in contracts fail to comply with the Act. When 'pay when paid' is banned, all contractors from principal contractor down, are obliged to pay their subcontractors according to the schedules set out in the contracts, even if payment from the client is delayed. The power of subcontractors to enforce this is enhanced by the right the Act affords participants to suspend performance for non-payment.

From the viewpoint of subcontractors, the abolition of 'pay when paid' in the UK has played a major part in curbing payment abuse. The right to suspend work for non-payment has also been highly effective, with the threat to exercise the right usually being sufficient to release the payment (Bingham, 2008). However, there are concerns that suppliers and subcontractors may be reluctant to employ the tools provided by the Act (for example suspending contractual obligations when payment is late) due to fears of jeopardising long-term relationships with a client. These are similar to the concerns expressed in the review of the EU Prompt Payment Act and relate back to unequal power between participants at different levels in the subcontracting chain. At the time of writing, a review of the Act is being commissioned by the UK Parliament (Sood, 2016).

A similar Act in Ireland follows the UK in banning 'pay when paid' clauses in order to provide a fairer deal for subcontractors. Such clauses have also been banned, or are looked on unfavourably, by the courts in Singapore, New Zealand and some states in Australia (Cheng, 2009). Also in several EU countries, they are essentially null and void as subcontractors can claim payment directly from the client (Jorens et al., 2012). This is also the case when payment is made through Project Bank Accounts (see section 2.5 below).

The advantages and disadvantages of banning 'pay when paid' are set out in table 2. It can be seen that the advantages are significant, while most of the disadvantages may be attributed to challenges in implementation which stem at least in part from unequal power in the subcontracting chain. It is therefore recommended that governments in the Middle East region can and should implement a total ban on 'pay when paid' clauses in contracts. Support in enforcing the ban can come from clients who can make it a condition of tender and subsequently insert clauses in the contract with the principal contractor banning 'pay when paid' and requiring that these clauses are inserted into all contracts down the subcontracting chain. All companies can then be paid according to the terms set out in their contract, which should not exceed 30 days for small subcontractors and companies supplying labour, with the right to suspend work when the payment period is exceeded.¹⁶

¹⁶ A study in November 2015 conducted by students at the British University in Dubai found that the most widely agreed payment term in small scale subcontracts is 60 days.

Table 2: The advantages and disadvantages of banning ‘pay when paid’

Advantages	Disadvantages
Subcontractors are paid on the date payment is due in their contract. Certainty of payment to subcontractors improves cash flow, reduces the need for bank loans and avoids the risk of not being able to pay workers when wages are due	Subcontractors may be reluctant to use the opportunities provided to enforce the legislation, for example by suspending work when payment is overdue
The risk of late receipt of payment from the client is carried by the principal contractor who is likely to have better access to financial resources and hence be better able to shoulder the risk than those lower down the chain	Contractors may undermine the objectives of the legislation by including extremely restrictive payment provisions in subcontracts (for example payment terms of 60 days or more)
The risk that principal contractors may have to finance the project should lead to assessment of client payment practices during tender and higher prices for poor paying clients – thus putting pressure on clients to improve payment practice	Principal contractors are strongly opposed as they have to carry the risk of financing the project and will charge for this in the tender price (could also be seen as an advantage if it puts pressure on clients to improve payment practice)

2.4 Rapid adjudication to resolve disputed items in contractors’ claims

Governments may also wish to consider the introduction of a process of rapid adjudication to resolve the problem of disputed items in contractors’ claims and facilitate the faster payment by clients of non-disputed items.

Banning ‘pay when paid’ has always been opposed by principal contractors as it exposes them to the risk of having to finance the construction project if there are long delays in receiving payment from the client. Since 2013 public sector clients in the UK have been required to pay all invoices within 30 days but this does not apply to the private sector where prompt payment is much more difficult to enforce (Jorens et al., 2012). The UK Construction Act, which covers all construction contracts in both the public and private sector, therefore introduces additional measures to offer some protection for principal contractors against late payment from the client. The Act introduces a process of rapid adjudication to ensure that disputed items in payment claims, which are often the major cause of interim payment delay, are swiftly resolved. Resort to a process of rapid adjudication facilitates the payment of undisputed items while the disputed items are being discussed and agreed. This approach has since been copied by Ireland, Singapore and Australia.

The overwhelming response from the industry, ten years after the Construction Act came into force, was positive (Bingham, 2008). It is claimed that the industry has managed to defy the experts over the appropriate use of adjudication. Rather than being used as a ‘quick fix’ method of interim resolution of small payment disputes during the life of the project, it has actually been used to resolve disputes that are highly complex. Adjudicators have improved their skills in the process and adjudication has become a key means of settling disputes in the construction industry.

BOX 4: THE UK HOUSING GRANTS, CONSTRUCTION AND REGENERATION ACT 1996

The Housing Grants, Construction and Regeneration Act 1996 (also known as the Construction Act), had two major objectives: to ensure that payments are made promptly throughout the supply chain and that disputes are resolved swiftly. The Act applies to all contracts in the public or private sector including consultants' contracts. Provisions of the Act include:

- The right to be paid in interim, periodic or stage payments
- The right to be informed of the amount due, amounts to be withheld and the grounds for withholding payment in a notice of withholding
- The right to adjudication of disputed items
- The right to suspend performance for non-payment
- Disallowing 'pay when paid' clauses

The Act was amended in 2011 to improve clarity and close some loopholes within its provision. The most significant changes were (i) the abolition of conditional payment clauses such as 'pay when certified' and (ii) the introduction of new rights for a contractor who suspends performance for non-payment, allowing the suspension of any or all of contractual obligations (rather than the whole of the work) as well as to claim costs and expenses incurred and extension of time resulting from the suspension.

Sources:

"Housing Grants, Construction and Regeneration Act HGRA", Designing Buildings Wiki (online), 2017.

"The Construction Act and its amendment – payment issues", Out-Law (online), 2011.

While the UK was the first to attempt to regulate the payment process in the construction industry through the banning of pay when paid and introduction of statutory (as opposed to contractual) adjudication, it was quickly followed by other countries. New South Wales in Australia introduced its Building and Construction Industry Act in 1999, followed closely by other Australian states/territories. Singapore issued its own Act in 2004, New Zealand and Malaysia in 2012 and Ireland in 2013. Key features common to all of these Acts are as follows:

- The contractor has a right to progress payments: a default payment regime is imported into the contract if one is not agreed
- Pay when paid clauses are unenforceable
- There is a right to adjudication regarding payment disputes
- The decision of the adjudicator is binding on an interim basis and will (generally) be enforced by the courts
- There is an additional right of an unpaid party to suspend works

However, there are also substantial differences in the type of contracts covered by the Acts, the most significant of which is in relation to the adjudication process itself. Here there is a clear split between the UK and New Zealand where any dispute arising out of a construction contract may be referred to adjudication and NSW, Singapore and Malaysia where only a payment dispute, specifically related to a particular application for payment, can be so referred.¹⁷

¹⁷ See: https://www.eversheds-sutherland.com/documents/services/construction/04020%20-%20Construction%20Article%20-%20December_V7.pdf

2.5 Project Bank Accounts (PBAs)

Governments may wish to consider the introduction of project bank accounts to speed payment to subcontractors and offer some protection against the possibility of insolvency in the subcontracting chain.

A further innovation to speed payment to the subcontracting chain is to make payments through a Project Bank Account. A Project Bank Account (PBA) is a ring-fenced account that is set up at the start of a project as the medium through which payments are made. The client pays funds into the account each time that payment is due. Payments are then made from the account directly and simultaneously to the principal contractor and to major subcontractors. Normally all such transactions would require two signatures, that of the client and the main contractor, but it is also possible when there is a high level of trust between client and contractor for the main contractor to be the sole trustee and the sole body authorising payment to the supply chain.

However, a PBA is not a contractor's account, rather it is a ring-fenced account that is set up in trust for the whole supply chain (UK Office of Government Commerce [Annex C], 2007). While the primary objective of setting up a PBA may be to speed up the flow of money and ensure that the contractor and supply chain receive all the money that is due to them in as short a time as possible, the trust status of the account provides an additional advantage in that it prevents a receiver from seizing the proceeds of the account if a contractor goes into receivership.

The UK Government determined in 2009 that all public bodies would adopt PBAs on future contracts, unless there were compelling reasons not to do so. In 2012, a target was set to deliver £4 billion worth of construction projects using PBAs over the following three years, with Highways England¹⁸ pioneering the approach. A review of ongoing projects in April 2015 found the payment cycle down to tier three contractors was to be completed in 19 days after the assessment date, which compares very favourably with previous experience. Feedback from the supply chain was also very positive with subcontractors reporting that payments, once certified, were always in line with the agreed schedule, allowing them to pass on the positive benefits to those further down the chain (Biddell, 2015).

Despite some challenges,¹⁹ the UK Government clearly regards the innovation as a success and proposes an increase in its use in the public sector (UK Government Cabinet Office and Infrastructure and Projects Authority, 2016). From 2016, PBAs will also be a mandatory requirement on large Scottish Government construction contracts. A summary of the anticipated advantages and disadvantages of their introduction into Scotland is presented in table 3.

Table 3: The advantages and disadvantages of project bank accounts

Advantages	Disadvantages
Reduced risk of non-payment if insolvency occurs in the chain as money in the account is ring-fenced against third party creditors	Protection from insolvency is limited to the funds in the account at any one time, which is not likely to be the whole cost of the project
Speedier payment to subcontractors	Does not necessarily preclude payment disputes which can still arise and delay payment

¹⁸ Highways England is a publicly owned corporation created in April 2015 that is responsible for managing the strategic road network in England. It supersedes the Highways Agency which was an executive agency of the Department of Transport.

¹⁹ These include some opposition from principal contractors, as well as claims that setting up PBAs places a heavy administrative burden on all concerned.

Advantages	Disadvantages
Greater transparency of cash flow to the supply chain, which reduces the ability of the contractor to use the money for purposes other than paying its subcontractors	All money is held independently of the client or principal contractor which reduces their control over the funds (could also be seen as an advantage)
Shorter payment periods and less time following up on payment	Initial establishment and operation involves a cost, which may mean it is viewed as only worthwhile on large projects
Greater collaboration and innovation among the parties	Small subcontractors and labour suppliers may not be protected

Source: Burness, Paul: "Project Bank Accounts – grasping the thistle", *Scottish Construction Now* (online), 2016.

PBAs can also be found in other countries as governments are beginning to recognize the importance of parties to construction contracts having access to electronic bank accounts where money is held in trust for the contractual supply chain. By being set up as trusts, the funds in the accounts can be protected from the potential liquidation or receivership of contractors in the chain (Cucos, 2014). However, while the key motivation for setting up such accounts is usually to protect payments to subcontractors, which is an essential step in protecting workers against payment delay, it does not necessarily protect all of the workers. Funds are only paid into the account in stages so the insolvency risk is limited to the money held in the account at any one time and to those participating in the scheme, which does not include small subcontractors or labour suppliers. A small note in the appendix to the UK Office of Government Commerce guide pointed out "some subcontractors, particularly labour only teams and other small organisations on weekly or fortnightly wage structures are unlikely to be embraced within the PBA structure" (UK Office of Government Commerce, 2007).

A significant exception is that of the city of Seoul in the Republic of Korea which has set up a PBA with the primary objective of protecting the wages of the construction workers. There has been a very serious problem of unpaid wages for construction workers in the Republic of Korea, as revealed in a survey by the Ministry of Labour that found 18,000 construction workers failed to receive their wages in 2011 (OECD, 2014). In the Republic of Korea, as in much of the rest of the world, the money to pay the wages of construction workers must pass through the general contractor and the subcontractors. The Seoul Metropolitan Government decided that a new payment system was needed that was fair and would prevent the appropriation of project funds on their way to the final recipients.

The Subcontract Payment Monitoring System (sPMS) is profiled in box 5.²⁰ The system in the Republic of Korea is similar to that in the UK but a key difference is that construction costs in the Republic of Korea are separated into materials, equipment and labour costs and this facilitates the apportionment of funds and enables direct payment to many more of the participants in the supply chain.

As in the UK, there was strong resistance to the introduction of the system from general contractors. A city ordinance that requires the use of sPMS on all contracts with the city and imposes penalties for non-compliance led to an expansion in use. The use of the system is likely to spread further through the passing of similar ordinances by the 25 districts that comprise the Seoul Metropolitan Government, as well as a law requiring all government entities which are clients of the construction industry at national level to use a payment system similar to sPMS.

²⁰ The subcontractor payment system is a part of a broader anti-corruption initiative known as the Clean Construction System as summarized by the OECD: "Anti-Corruption Clean Construction System", *Observatory of Public Sector Innovation/OECD* (online), n.d. This section of the paper is based on the concept note prepared for an international workshop for Public Construction Transparency organized by the United Nations Development Programme (UNDP) Seoul Policy Centre in December 2015.

However, the resistance from main contractors at the national level is strong. The success of the system in Seoul may be exceptional and is attributed to the personality of the Mayor and strong pressure from the trade unions (James Roh, personal communication, n.d.).

BOX 5: SUBCONTRACTOR PAYMENT SYSTEM OF THE SEOUL METROPOLITAN GOVERNMENT

The Subcontract Payment Monitoring System (sPMS) is a system whereby all project funds are paid through a special project bank account which is ring-fenced and set up by the general contractor. The procedure is as follows:

- A subcontractor makes a request to the general contractor for the payment of each item of equipment, material and labour costs
- Once all requests are approved they are submitted to the client, the Seoul Metropolitan Government
- After checking, the client approves the payment, requests item by item for the general contractor, subcontractor, equipment and material suppliers and the workers
- The client makes payment of the full amount to the general contractor's sPMS account
- The general contractor, subcontractors, equipment and material supplier and labour providers can only withdraw amounts designated and approved by sPMS

The direct payment of wages to workers is required by a regulation called 'construction labour wage separate payment confirmation' and the client has to check that each worker is paid. Payment from the client to the main contractor should be made within seven working days from receipt of the invoice. Major subcontractors should receive payment two days later and workers (who are paid monthly) should be paid within a further two days.

The system relies on the cooperation of the banks as well as a software development company which had previously developed a patented 'Software Payment Verification System' and agreed to further develop the system to suit Seoul Metropolitan Government requirements. The work was completed in November 2012 and an application filed for a second patent.

Source: UNDP (n.d.)

2.6 Joint liability of clients and principal contractors for payment

Governments may wish to consider making clients and principal contractors jointly liable for ensuring that both subcontractors and workers receive the payments that are due to them. This would legitimize direct payment across the links in the subcontracting chain, from client to subcontractors or principal contractor to workers.

One of the problems with subcontracting is that there is often no direct contractual link between participants. From a legal perspective, the chain of liability is indirect, so a subcontractor may be linked to the principal contractor and the client only through a series of contracts between the tiers in the subcontracting chain (Wong & Cheah, 2004). If the subcontractor has not been paid, it has no recourse against the principal contractor or against the client but only against the contractor in the tier above. If there is insolvency in the chain, the subcontractor may never get paid. Recognition that the current payment system is failing to protect subcontractors and the workers they employ against late payment, as well as against the risk of insolvency in the subcontracting chain, has led to a search for alternatives.

While PBAs will offer some protection to subcontractors included in the scheme, an alternative possibility is direct payment from the client to the subcontractors.²¹ There have been objections to direct payment from lawyers as it may be regarded as treating the subcontractor as a preferred creditor and could violate insolvency laws which require all creditors to be treated equally (Klein, 2014). Even when insolvency is not an issue, there has been strong resistance to any change in payment methods from the main contractors who fear that they may lose control of the project and particularly of the funds. Direct payment from the client to subcontractors has traditionally only been accepted when the subcontractor is nominated by the client.²²

However, there are signs that this may be changing in some regions. In 2014, the revised EU Public Procurement Directive gave Member States the option of requiring contracting authorities to pay subcontractors directly, whether or not subcontractors request it and irrespective of insolvency of the main contractor (European Parliament, 2014). Provision for direct payment from the contracting authority to subcontractors already existed in a number of EU countries (European Parliament, 2015). In some EU countries, subcontractors already had the right to claim payment directly from the client if they had not been paid by the principal contractor. This is most common in the context of public works and in a context where subcontracting has prior approval of the client (Jorens, et al., 2012).

For example, in France the subcontractors and the method of their payment must be approved by the client before any agreement with the main contractor is finalized (Jorens, et al., 2012; Gasne et al., 2016). The client and the principal contractor are then jointly liable for payment to the subcontractors who can claim directly against the client if the contractor fails to pay (Gasne et al., 2016). Similar legislation in Poland protects the subcontractors in case of non-payment by the contractors above them in the supply chain.

A number of other European countries have elements of joint liability between client and principal contractor for wages or labour conditions. In Spain as well as in Italy, the client is entitled to request proof of payment of wages by contractors and subcontractors and notification when wages have not been received (Houwerzijl & Peters, 2008). In Spain, it is also common practice for the principal contractor to carry out regular and effective checks, for example by requesting copies of payslips or bank transfer documents (Houwerzijl & Peters, 2008). In Germany and France, principal contractors have to make obligatory checks and reports, while in Belgium the principal contractor is obliged to pay the wages of workers of subcontractors if the latter fails to do so (Jorens et al., 2012). In Italy and Austria, there is an obligation on clients to ensure there are sufficient funds in the contract to cover wages at sectoral collectively bargained rates. In Norway, the client can request documentary evidence of the terms on which workers are employed by subcontractors. In Greece, the client is obliged to pay wages if the principal contractor fails to do so (Jorens et al., 2012).

These elements of joint liability generally exist alongside restrictions on subcontracting. For example, in Italy the code on public works places strict limits on subcontracting: it must be authorized by the contracting authority (client) and only a maximum of 30 per cent of the work for which the contract was awarded can be subcontracted to a third party. Further subcontracting is not permitted. Similar provisions exist in Austria where all participants in the subcontracting chain have to be screened. Spain has gone even further in banning subcontracting beyond the fourth tier through a law on subcontracting which came into force in 2007 (Vargas, 2006). There is also a ban on subcontractors further subcontracting activities which involve manual labour – which is, in essence, a limit on the outsourcing of labour.

Countries in the Middle East may not wish to place similar blanket restrictions on subcontracting, given that this is the way in which flexibility in the employment of labour is

²¹ This is only after claims have been approved by the main contractor and certified by relevant professionals.

²² A nominated subcontractor is one that is chosen and engaged directly by the client in which case payment can also be direct, bypassing the main contractor.

achieved in the region. However, these examples show the increasing role and responsibility being taken on by the client. Where the result of excessive outsourcing means that workers are actually working without payment, responsible clients may be willing to place limits on the extent of subcontracting. They may also ban labour outsourcing and insist that workers are employed directly by contractors and subcontractors. Recently Qatar Rail stipulated that 80 per cent of workers employed on its projects must be directly employed by the contractor or the main subcontractor. Direct employment shortens the supply chain, reducing the opportunities for corrupt intermediaries to exploit vulnerable workers. It is also claimed to be driving up the quality of work (Crates, 2006). Clients are more likely to take these steps if held jointly liable with the principal contractor for ensuring all aspects of the welfare of workers employed on their projects and in particular that workers receive the wages that are due.

Joint liability for ensuring that wages are paid should also make principal contractors more diligent when screening subcontractors, while at the same time providing them with the legitimacy they need to intervene by paying subcontractors' workers directly when it is brought to their attention that they have not been paid. Contractors often maintain that they have no control over the employment contract between a subcontractor or labour supplier and the workers and that they have no right to intervene over wages. However, they do have a right and a need to know if wages are not being paid as this is likely to lead to work stoppages with serious impact upon their ability to deliver the project on time.²³ In a response to the recent survey conducted by the Business and Human Rights Resource Centre, Multiplex Medgulf reported that it has intervened in the past to ensure workers are adequately compensated when a subcontractor failed to pay wages, most recently within the last 12 months (Buckley, 2012). It has also handled subcontractor's residency permit renewals. Qatari company QDVC also reports cases where, as a main contractor, they have directly paid the salaries of subcontractors' workers, when the subcontractor failed to do so.

There is a rationale for apportioning legal responsibility in subcontracting chains so that it tracks the way power is distributed in the chain (Gordon, 2015). At the head of the chain the client has ultimate power, so responsibility must ultimately reside with the client, followed by the principal contractor.

2.7 Summary of suggested ways forward to protect timely payment of wages

Table 4 presents a summary of the policies put forward in the paper that governments may wish to consider to address the problem of late or non-payment of wages. Against each policy option the objectives and motivation for the introduction of the policy are noted, as well as notable successes and challenges.

It should be noted that the options are not exclusive of other types of action. For example, while options 5 and 6 both offer some degree of protection of workers' wages against insolvency of a company in the subcontracting chain, there may still be a need for further measures to ensure that wages take precedence over other claims in cases of insolvency. The ILO Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173) and Recommendation (No. 180) address two ways of protecting workers' claims. The first is by a privilege resulting from their employment so that they are paid out of the assets of an insolvent employer before non-privileged creditors. The second is through a wage guarantee scheme, whereby all employers share the risk by contributing to a fund which is used to settle workers' claims when a contractor is insolvent. It is generally agreed that wage guarantee schemes offer better protection for workers than the traditional privilege

²³ The issue was raised with principal contractors in Qatar in 2014 where one contractor said that his company had once paid workers employed by a subcontractor and another said he would do so if it was affecting the progress of the work (Wells, 2014).

system under which each employer is accountable only to the extent of its own assets and only to those workers it directly employs (ILO, 2003). At the time of writing, no country in the Middle East has established such a scheme.

Table 4: Comparison of policies to protect workers against late or non-payment of wages

Measures		Speeds payment	Protects against insolvency	Successes	Challenges	Motivation for introduction
1	Wage Protection System	No	No	Workers employed by participating companies can prove when they have not been paid	Limited coverage and no provision to ensure employers have the funds when wages are due	To ensure worker welfare and limit workers' incentive to strike (thus limiting delays to work)
2	Prompt Payment Legislation (EU Directive)	Yes	No	Bringing the issue of late payment to the forefront of the political agenda in the EU	Creditors reluctant to take advantage of the opportunities for fear of jeopardising client relationships	Better knowledge of the adverse impact of late payment on SMEs and the economy
3	Ban 'pay when paid' (Construction Acts in UK and Ireland)	Yes	No	Protects subcontractors against late payment by clients. Played a major part in curbing payment abuse in the UK	Some firms still unaware of the Act, and others reluctant to take advantage due to fears of jeopardising client relationships	A fairer payment system for subcontractors and SMEs
4	Introduce rapid adjudication (Construction Acts in UK and Ireland)	Yes	No	Very successful in UK in speeding payment, giving certainty of date of payment and explanation for withholding funds	Resources required to ensure that rapid adjudication is possible	To resolve disputed items in payment applications so as to speed payment to contractors and subcontractors
5	a) Project Bank Account (UK)	Yes	Yes	Speedy payment to subcontractors in tier 3, with benefits to lower levels. Trust status provides some protection against insolvency	To date mainly used in the public sector and on large projects as it takes time to set up the system. It is also still strongly opposed by some contractors	To speed the flow and certainty of payments to subcontractors, and to protect project funds against receivers

Measures		Speeds payment	Protects against insolvency	Successes	Challenges	Motivation for introduction
	b) sPMS (Seoul)	Yes	Yes	The system allows direct payment to workers from a protected account held in trust for the whole chain	Strong resistance from general contractors. The system needed enforcement by client ordinance and stiff penalties for non-compliance	To address the problem of unpaid wages and ensure prompt payment of wages to workers
6	Joint liability: Direct payment from client to subcontractor (EU)	Yes	Yes	Joint liability of the client and principal contractor for wages with direct payment to subcontractors	Most common in the context of public works	To protect workers' right to fair wages in subcontracting processes

SECTION 3: PROPOSED WAYS FORWARD TO PROTECT SAFETY, HEALTH AND WELFARE OF WORKERS

More effective interventions to protect workers against the risk of an accident at work are urgently needed. Accidents do not have to happen and a wealth of knowledge has been accumulated around the world showing how to prevent them. However, effective prevention requires coordinated action by a large number of participants and this has become much more difficult with increasing fragmentation of employment in the industry.

This section draws on international experience to propose measures that governments in the Middle East could take to protect the construction workforce against the risk of accidents and ill health resulting from their work. Proposed ways forward to protect safety, health and welfare of the workers are:

- Assigning joint liability for occupational safety and health
- Using procurement to leverage improved OSH practice
- Policy formulation, regulation and enforcement

3.1 Joint liability for Occupational Safety and Health

Governments in the region are encouraged to consider introducing legislation that, at the very least, makes the principal contractor and the immediate employer jointly liable for OSH. They may also consider legislation (such as the UK Construction (Design and Management Regulation) that places ultimate responsibility on the client for the protection of all workers on construction sites against the risk of accidents.

Changes in the structure of the construction industry in recent decades, notably a substantial increase in the practice of subcontracting and outsourcing of labour requirements, has led to the presence of many employers on construction sites, creating difficulties in developing appropriate regulatory systems for OSH. In many parts of the world (including the Middle East), the immediate employer of the workers is held solely responsible for the workers' health and safety, but this is illogical when the company is working on a site alongside numerous other companies whose activities will have an impact on the workers. There is clearly a need for coordination of activities and some form of joint responsibility.

BOX 6: ILO SAFETY AND HEALTH IN CONSTRUCTION CONVENTION, 1988 (NO. 167)

The ILO Safety and Health in Construction Convention, 1988 (No. 167) makes the principal contractor responsible for coordinating the prescribed safety and health measures and for ensuring compliance with such measures. When the principal contractor is not at the site the company should nominate another person to assume these responsibilities. Each employer working on the site remains responsible for the application of the prescribed measures in respect of the workers placed under their authority, but all employers or self-employed workers on site at the same time have the duty to cooperate (ILO, 1988).

Joint liability of principal contractor and subcontractor is clearly a minimum requirement of OSH legislation. A comprehensive report commissioned by the Government of Qatar from DLA Piper strongly recommended imposing joint and several civil and criminal liability for health and safety

breaches on principal contractors and their subcontractors, stating “failure to enforce health and safety standards on site should result in vicarious liability for the lead contractor as well as direct liability for subcontractors breaching health and safety standards” (DLA Piper, 2014). The authors also recommended that there should be criminal sanctions for repeat offenders.

However, while apportioning blame and imposing penalties on offenders who break the law clearly has an important role to play, it may do little on its own to raise the standard of OSH. Key clients in the region recognize the need to raise standards and understand that this will take time and also require a market-led approach, as suggested in section 3.2 below (Key adviser to Ashghal [Public Works Authority Qatar], personal interview, n.d.). What is urgently needed is comprehensive OSH legislation that sets out clearly the duties and responsibilities of all participants in a construction project in simple and clear language. In the US and Europe, the importance of considering the health and safety of workers when the project is still being designed has been increasingly understood. It is now widely recognized that best practice in OSH starts in the pre-contract stage where projects are planned and designed and before the contractor is appointed. This means that primary responsibility must rest with the client.

Clients are in fact taking on increasing roles and responsibilities for OSH in Western Europe, where a series of EU Directives has generated legislation clarifying the responsibility of actors in the subcontracting chain other than the immediate employer. In a number of Member States – Belgium, Austria, Italy, Spain, Greece, Bulgaria – this involves obligations on the client. In Sweden, the client is directly responsible for the health and safety of all workers on a construction site, including those employed by subcontractors and temporary work agencies (Jorens et al., 2012).

In the UK, the Construction (Design and Management) Regulations (2015) are considered to represent global best practice in defining construction project health and safety responsibilities, especially for clients and designers (Institution of Occupational Safety and Health (UK), 2010). The Regulations impose a range of duties on construction clients. As the head of the subcontracting chain, clients must provide leadership and focus, even when they are less familiar with the details of good health and safety practice than their principal contractors. It is the duty of clients to ensure the provision of minimum welfare facilities on construction sites (washing, changing, sanitary and resting facilities and fresh drinking water) and that these are maintained and reviewed throughout the project. Clients must appoint principal designers and principal contractors and must use only competent personnel. Most importantly, they must ensure that the contractors awarded the contract are competent in OSH management and that there are sufficient resources in the contract (including time) to ensure the highest possible standards (Construction (Design and Management) Regulations, 2015).

Designers and contractors must not accept an appointment to commence work on a project unless they have the necessary skills, knowledge and experience and unless they are satisfied that the client is aware of their duties. Designers must work to avoid risks to health and safety, or at least to minimize them. Information about the risks that cannot be designed out must be included in a pre-construction phase health and safety information document which is passed on to the principal contractor. The principal contractor is then responsible for preparing and implementing a construction phase plan, coordinating all activities of the various contractors involved, and ensuring cooperation among all relevant parties. The principal contractor also has duties to consult and engage with the workers, providing them with information and training. Contractors can only employ persons to work on a construction site if they have, or are in the process of acquiring, the necessary skills, knowledge, training and experience to carry out the tasks without damaging the health and safety of any other person working on the site.

There are many other promising features in the UK Construction (Design and Management) Regulation regulations. Of particular significance is that making the client ultimately responsible for OSH gives the client a key role in improving OSH practice. Placing responsibility on the client to only appoint competent designers and contractors – as well as to ensure that there are sufficient funds in contracts to deliver good OSH standards – also highlights the key role of procurement.

Furthermore, OSH compliance can be improved through the establishment of safety and health committees with representatives of workers being part of these committees. This helps to ensure that OSH issues experienced by workers can be quickly picked up and communicated directly to the contractor (and if no action is taken, potentially to the client).

3.2 Using procurement to leverage improved OSH practice

Major clients in the region are already using procurement to leverage better OSH performance. Governments should support this approach, share experiences with clients and contractors and pass on best practice to smaller firms.

Scholars and practitioners are also increasingly realizing that procurement can be a powerful tool in securing improved OSH performance from contractors (James et al., 2007; Walters, 2012). There are several stages in the procurement process. Some of the ways in which the power of the client as procurer can be used to leverage better OSH performance at each stage have been set out in a guide by the author and are summarized below (Wells & Hawkins, n.d.).

At prequalification stage, common requirements for the appointment of contractors should include evidence of the adoption and use of certified OSH management systems, that the contractor has a core of regular workers trained in health and safety, and provides OSH induction for new workers and regular training for all. Contractors considered eligible to tender should be required to submit with their offer a site-specific safety plan (including where appropriate a fall protection plan), an outline of the procedures to ensure that OSH requirements will also be implemented and monitored by subcontractors, and a system and format for recording and reporting accidents, incidents and near misses.

BOX 7: PRICING HEALTH AND SAFETY

Making adequate provision for OSH costs money, which may contribute to clients moving away from always accepting the lowest priced tender. As a way around this dilemma and so that there is no misunderstanding of what is expected, items that are necessary to meet the client's requirements and which can be separately priced could be listed as prime items in the bill of quantities (or other pricing mechanism used). The kind of items that could be separately priced include appointment of safety officers, training for workers and supervisors, provision of personal protective equipment, medical examinations and first aid and emergency facilities. It is also possible to take the cost of these items out of competition by pre-pricing them. This was the approach adopted in Hong Kong in 1996 under the 'pay for safety' scheme. The maximum payment for all safety items was set at approximately 2 per cent of the estimated value of the contract on small projects and 1 per cent on large projects. Items that are not delivered are not paid for (Singh et al., 2009).

Although the price paid for safety items can seem high to some clients, they are more likely to accept the cost if they are held ultimately responsible for OSH. The Hong Kong 'pay for safety' scheme estimated the cost to be less than that associated with lost time due to accidents. In the longer term, it should be offset by lower tender prices as contractors and clients experience savings associated with better OSH. The main sources of savings are reduced insurance premiums, less disruption to work schedules, and higher labour productivity as workers have improved skills and feel more secure. Benefits accruing to clients and financiers include lower credit risk, less likelihood of work stoppages and diminished risk to their reputation (Wells & Hawkins, n.d.).

Just as the market power of clients can be used through the procurement process to secure improved OSH on construction projects, it is also important to realize that contractors are also procurers (buyers) of the services of subcontractors. The same procurement procedures can be employed in the appointment of subcontractors to ensure that they also have the necessary competence. While the market power of procurers in subcontracting chains is most often used to get the cheapest possible price, which may undermine the ability of subcontractors to protect their workers' health and safety, it is also possible for contractors to use this power to leverage improvements in OSH. Leverage comes from the realisation that subcontractors may have little choice but to follow the requirements if they wish to continue the business relationship. Interventionist clients can help to bring this about.

An example is presented in box 8 below to show how a major client, through its requirements as the procurer, was able to exert a positive influence on the health and safety practices of downstream contractors. These influences were strongly interventionist and featured not only the presence of demanding health and safety requirements in contracts but other interventions such as certification schemes and training initiatives aimed at providing support to enable subcontractors to meet the higher standards required (Walters et al., 2012).

However, the example is not unique. A further example of intervention by a major client to improve OSH can be found in A/S Oresund, the client for the Danish land-works section of the Oresund fixed link project connecting Denmark and Sweden (EU-OSHA, 2000). The project comprises eighteen kilometres of dual track railway and nine kilometres of four lane motorway. Tender procedures included contractors submitting a detailed plan for OSH which accounted for between five and fifteen per cent in the tender evaluation. Once construction was underway, the client appointed four full time OSH coordinators to carry out inspections, lead the regular safety meetings and in general guide the contractors in OSH related questions. Independent consultants certified as auditors were appointed to carry out OSH audits once or twice a year, with main contractors responsible for passing on requirements to the subcontractors and making sure they complied. Contractors were also required to report all accidents and near misses, even those that were not legally required to be reported to the Danish Working Environment Authority. The final evaluation found that every third worker had gained OSH knowledge and changed their working habits during the project. The experience gained from being a proactive client has carried over to other public construction work in Denmark (ILO, 2006).

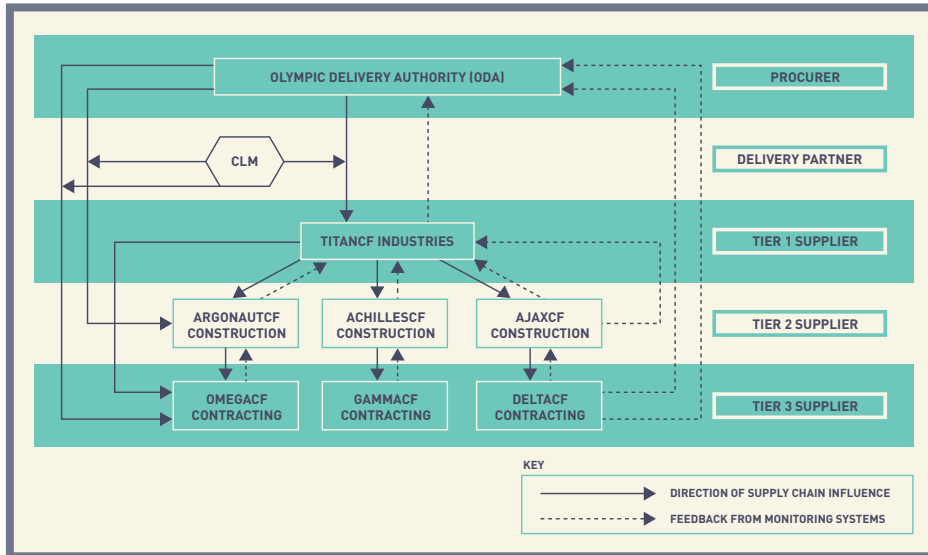
It may be concluded that clients can play a very key role, not only in promoting improved OSH but also in monitoring and auditing outcomes and providing relevant data on the nature and causes of accidents. These examples are particularly relevant to the situation in the Middle East where there are experienced and competent clients some of whom are already working in this way, particularly in the oil and gas industry. The region is also host to many international firms assuming the role of principal contractor, who have in the past shown their willingness to work together to improve OSH in the region. Using procurement to leverage improved competence among the subcontractors who have limited understanding of OSH should be a key goal.

BOX 8: HEALTH AND SAFETY UNDER THE OLYMPIC DEVELOPMENT AUTHORITY (UK)

The Olympic Development Authority (ODA) was the client for the stadia and other buildings in the Olympic park, the venue for the 2012 London Olympic Games. Figure 3 is a schematic representation of the subcontracting chain for delivering the constructed facilities, with the ODA at the head of the chain and CLM (a consortium partner comprising CH2M Hill, Laing O'Rourke and Mace) as the delivery partner charged with ensuring compliance from the principal contractors (tier 1) on the client's behalf. Tier 1 contractors in their turn were charged with ensuring compliance with their contractors and subcontractors with regard to OSH

requirements, hence there was a double assurance built into the arrangements for monitoring compliance (as indicated by the dotted lines in the diagram). The client's monitoring procedures enabled it to reach down into the supply chain and provide a double check on compliance from contractors at the lower levels.

Figure 3: Schematic representation of subcontracting chain for delivery of Olympic park (UK)



During the procurement process for tier 1 contractors, ODA made clear the standards it expected through requirements at pre-tender and tender stage. Tier 1 contractors used the same rigorous vetting procedures in the procurement of their own subcontractors and ODA insisted that only contractors capable of meeting the standard should be appointed. Once appointed all contractors were under contractual obligation to implement these requirements in their own work and demand the same of their subcontractors. The subcontractors were in turn required to demand these standards of their own subcontractors and so on down the chain. Monitoring of delivery of the standard was conducted by the organisation in the tier above with further monitoring by the ODA and its delivery partner CLM. Contractors at all levels were periodically inspected and audited by CLM to validate and verify self-monitoring.

While the intervention of the client was most obvious in setting standards and monitoring compliance, the ODA also intervened to support improved OSH performance among contractors who might otherwise not have the capacity to operate at this level. Interventions to bring contractors up to the required standard included compulsory and regular training, health checks and the organising of campaigns targeting various issues. In addition, staff from tier 1 companies were frequently 'seconded' to lower rank organisations to help with supervision and OSH.

The success of the intervention was attributed to a number of factors, notably the high profile of the project, the magnitude of the reputational risks of accidents for the companies involved, and the power and technical and organisational capacity of the ODA at the head of the chain.

Source: Walters, D., Wadsworth, e., Sampson, H. and James, P, 2012

3.3 Policy formulation, regulation and enforcement

Governments in the region could consider establishing comprehensive OSH legislation and policies along the lines suggested in 3.1, supported by appropriate laws and regulations and mechanisms for ensuring compliance, including a strengthened labour inspectorate.

This paper has argued that protecting the occupational safety and health of the workforce requires shared responsibilities among participants. Major clients and principal contractors have particularly important roles to play as they have the authority and the knowledge to work together to improve standards. However, this does not mean that there is no role for governments. Governments in the region should review OSH legislation and policies, and consider strengthening both to clarify the responsibilities of the participants in the construction industry (along the lines suggested in section 3.1). A national system or framework for OSH can then help to ensure that the policy is implemented (ILO, 2006). The system should include the establishment of an executive body dedicated to improving OSH through preventive measures, including the collection and publication of data on occupational injuries and diseases.

Mechanisms are also required for ensuring compliance with the policy and these should include a system of inspection. Most countries in the Middle East region currently have some form of labour inspectorate but at times, it is used to check on the immigration status of workers and not on the conditions of work and the facilities available for the workers on construction sites (ILO, 2017a). This practice – where it exists – does not conform with the ILO Labour Inspection Convention, 1947 (No. 81), which most countries in the Middle East have ratified.²⁴ A government inspectorate dedicated to OSH is needed to target major clients and contractors to ensure that they are fulfilling their duties as set out in the policy, while providing more rigorous inspection on small sites where less experienced contractors are working alone. An OSH inspectorate must have the authority to inspect all sites through random and unannounced visits. It must also be qualified to assess risks, advise and instruct employers on compliance with OSH regulations. While ILO Conventions prioritize action aimed at preventing occupational accidents and diseases (ILO, 2017b), labour inspectors should also be authorized to impose sanctions where these are merited in order to deter future violations. OSH policy reform should focus on prosecuting and fining the companies that are held legally liable for protecting the OSH of the workforce, which should be the principal contractor and possibly also the client, as well as the immediate employer. The ability to prosecute and impose significant fines on companies can have a big influence on business and can provide a powerful incentive for them to take preventive action by investing in OSH.

To carry out its role effectively the capacity of existing inspectorates will need to be significantly strengthened and staff well-trained. Kuwait undertook capacity building training of its inspectors, as well as implementing an awareness raising campaign through civil society organizations, which produced posters and infographics related to OSH in five languages. Other countries in the region (in response to the ILO General Survey (2017) on OSH instruments in construction, mines and agriculture) also expressed an interest in receiving technical support to training of labour inspectors on OSH, as well as support to raise public awareness on OSH issues, including the Governments of Oman and Qatar (ILO, 2017b).

²⁴ Including Bahrain, Jordan, Kuwait, Lebanon, Qatar and KSA.

3.4 Freedom of association and worker representation

Freedom of association and the right to collective bargaining are essential rights for all workers, including migrant workers. As a minimum and first step, migrant workers should have the right to establish independent workers' committees and elect representatives thereby establishing a mechanism for government and companies to engage with workers' representatives on issues related to employment conditions, safety and health, and other labour issues.

Freedom of association for all workers including migrant workers, in accordance with the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), is a key mechanism to ensure that workers' rights can be protected and promoted. Thus, workers should have the right to join or establish independent trade unions.

Where this is not legally possible, governments can permit and promote independent worker committees at company or sectoral level where workers are able to freely elect their own representatives, and ensure that such workers' committees are consulted in the development of employment policy, particularly related to employment conditions, safety and health, and other labour issues.

Governments can also do more to foster the development of agreements that concretely enhance migrants' access to bargaining and negotiation powers, whether this is through local tripartite agreements on labour rights in construction between employers, the state and trade unions, international framework agreements between national contractors and workers (see box 9 below) or other schemes (Buckley et al 2016).

BOX 9: INTERNATIONAL FRAMEWORK AGREEMENTS WITH GLOBAL UNION FEDERATIONS

International framework agreements (IFA) – also known as global framework agreements – are tools negotiated between multinational enterprises and the relevant global union federation with the goal of establishing continuous communication between the parties and ensuring that enterprises provide the same labour standards in all the countries in which they operate (ILO 2015). What differentiates these agreements from corporate social responsibility initiatives is that they are based on negotiations between companies and international worker representatives, are compliant with ILO core Conventions, and generally have an in-built monitoring process.

In the construction sector, the global union Building and Wood Workers' International (BWI) has concluded 21 IFAs with multinational companies. The agreements are modelled on the BWI Model Agreement, which contains a clause ensuring that 'local and national union representatives of BWI affiliated unions are provided with information, access to workers and rights of inspection necessary to effectively monitor compliance with [the] agreement' (BWI 2010).

SECTION 4: SUMMARY AND RECOMMENDATIONS

This paper has explored the changes that have taken place over the past few decades in the way in which workers are employed in the construction industry. The search by contractors for greater flexibility in the employment of labour than is possible under the sponsorship system has led to the outsourcing of labour requirements to labour supply companies which have grown in the region. Acting contractually as the employer, they are able to sidestep the restrictions imposed by sponsorship laws and move workers around among contractors as needed.

Subcontracting of packages of work has also increased as contractors pass the challenges associated with employing workers to their subcontractors, who may also outsource their labour requirements to labour supply companies. The result is that workers on large construction sites will be employed by a mix of firms, many of them small, under widely variable terms and conditions, often in long subcontracting chains.

This employment structure has greatly increased the distance between the principal contractor and the workers and is a principal cause of two of the main risks confronting migrant workers in the GCC countries. At the same time, the employment of workers through subcontractors and intermediaries creates significant challenges for governments who are attempting to introduce measures to regulate the terms and conditions of employment and address the risks.

The challenges created by the movement to a more flexible employment structure are not restricted to the countries of the Middle East. Governments in many other regions are attempting to adjust to the changes in employment relationships with the introduction of new approaches to regulating the labour market and protecting migrant workers from abuse. Drawing on experience from around the world, table 5 summarizes the proposals put forward in this paper that governments in the region may wish to consider to protect migrant construction workers against the risk of late or non-payment of wages and to protect their health, safety and welfare.

Table 5: Summary of recommendations to protect migrant construction workers

Issue		Recommendations
1	Wage Protection System	<p>Governments in the region are encouraged to:</p> <ul style="list-style-type: none"> • Ensure introduction and robust implementation and monitoring of the WPS, and extend coverage to all employers and their workers. • Ensure there is a system of regular checking that wages are paid on time and that the wages paid are as stipulated in the contracts. • Consider penalizing the principal contractor when the immediate employer is unable to pay due to late receipt of payment for costs already incurred. • Identify a source of funds that can be drawn upon to pay unpaid wages if the employer is genuinely unable to pay. • Publish data on cases of non-payment and follow-up action. • For repeat or serious offenders release the workers and facilitate the move to another sponsor.
2	Prompt Payment Legislation	<p>To focus attention on the importance of prompt payment, governments may consider to:</p> <ul style="list-style-type: none"> • Introduce legislation requiring all public-sector clients to pay tier 1 contractors within 30 days of the valuation date. • Include a requirement that interest is made compulsory and automatic on late payment.

Issue		Recommendations
3	Prompt payment protection for subcontractors	<p>To protect payment to subcontractors (and indirectly to their workers) governments could include in prompt payment legislation (see also point 2):</p> <ul style="list-style-type: none"> • A ban on 'pay when paid' clauses in contracts in both the public and private sector. • The right to suspend performance for non-payment. • A requirement that all contractors pay their subcontractors according to the schedules set out in contracts which, in the case of small subcontractors and labour suppliers should be within 30 days.
4	Introduce rapid adjudication to resolve disputed items in claims and speed payment	<p>Governments may also wish to consider:</p> <ul style="list-style-type: none"> • Introducing a process of rapid adjudication of disputed items in payment applications to facilitate the faster payment of non-disputed items (now considered international best practice).
5	Project Bank Accounts (PBAs) to speed payment and protect against insolvency	<p>Consideration may also be given to:</p> <ul style="list-style-type: none"> • Introducing PBAs on public sector projects to speed payment to the top tiers of subcontractors and provide some protection against insolvency (but may not protect lower tiers and labour suppliers). • Exploring the possibilities of making payment from a PBA directly to the workers as pioneered by the city of Seoul.
6	Joint liability of client and principal contractor for payments	<p>Governments may wish to explore the benefits of:</p> <ul style="list-style-type: none"> • Introducing joint liability schemes whereby clients and principal contractors are jointly liable for protecting subcontractors and workers against late or non-payment of money owing to them. • Legitimizing direct payment across the subcontracting tiers, for example from clients to subcontractors and/or contractor to workers employed by a subcontractor in the case of default. • Imposing limitations on the extent of subcontracting and labour outsourcing.
7	Joint liability for Occupational Safety and Health (OSH)	<p>Governments should:</p> <ul style="list-style-type: none"> • Introduce legislation that makes the principal contractor and the immediate employer jointly liable for OSH. • Consider legislation that places ultimate responsibility on the client for OSH, including the provision of welfare facilities on construction sites.
8	Using procurement to leverage improved OSH	<p>Major clients in the region are already using procurement to leverage better OSH performance. Governments could:</p> <ul style="list-style-type: none"> • Support this approach and use its OSH Executive Body (see point 9) to share experiences with major clients and contractors and pass on good practices to smaller firms. • Publish guidance notes on ways to ensure sufficient funds in contracts to protect the health and safety of the workers, including taking the cost of key items of health and safety out of competition.

Issue		Recommendations
9	Policy formulation, regulation and enforcement	<p>Governments could consider options to:</p> <ul style="list-style-type: none"> • Establish comprehensive OSH policies along the lines suggested in point 7 and set up an Executive Body dedicated to improving OSH and to implementing the policy. The OSH Executive Body should include an inspectorate dedicated to OSH with the authority to inspect all sites through random and unannounced visits and to fine and prosecute the companies held liable (which should include the principal contractor and/or the client as well as the immediate employer). • Ensure that the OSH Executive Body is qualified to assess risks, advise and instruct employers on compliance with OSH regulations and to collect and publish data on accidents and near misses, occupational injuries and diseases.
10	Freedom of association and worker representation	<p>Governments should:</p> <ul style="list-style-type: none"> • Ensure freedom of association for migrant workers. • Allow and promote worker representation at company level including through collaboration with workers' organizations.

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SUMMARY

Construction is one of the key sectors of the labour market in many parts of the Middle East, particularly the countries of the Gulf Cooperation Council, where the building of world-class sporting stadiums, educational institutions, museums and condominiums continues at a rapid pace.

The workers that toil on building these impressive cities are commonly low-skilled migrant workers from Asia and Africa who benefit from opportunities to earn income that offers the chance of improved livelihoods for themselves and their families. However, they also potentially face risks relating to flawed recruitment, late payment of wages, dangerous working and living conditions and may have limited access to effective dispute resolution. Both in the Middle East and other parts of the world, such factors can leave low-skilled construction workers vulnerable to labour exploitation (including forced labour) and impede the efficiency (as well as good reputation) of the construction industry.

This paper outlines the changing trends in the construction industry which have led to extensive subcontracting and to the outsourcing of labour requirements to labour supply companies.

The paper presents an exploratory study of relevant good policies and practices in the protection of construction workers, including from the region, as well as Europe, Asia and the United States, focusing closely on mechanisms ensuring (i) timely payment of wages and (ii) safe and healthy working conditions.

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