

Protecting the Wages of Migrant Construction Workers

Part Two: Addressing the problem in
Gulf Cooperation Council countries



Protecting the Wages of Migrant Construction Workers

Part Two: Addressing the problem in
Gulf Cooperation Council countries

Dr Jill Wells, Engineers Against Poverty

December 2018

TABLE OF CONTENTS

Introduction	01
1. The problem	03
2. The Wage Protection System	08
Wage protection in the United Arab Emirates	08
Wage protection scheme in other Gulf Cooperation Council countries	10
Other limitations of the wage protection system	11
3. Tackling late payment in the construction industry	14
Introduction	14
Prompt payment legislation	17
Rapid resolution of payment disputes	19
Protecting payment to subcontractors	22
Project bank accounts	25
Joint liability	27
Summary	30
4. The role of the industry in promoting prompt payment and ensuring that workers are paid on time	32
Introduction	32
Measures that can be taken by clients	33
The role of professional consultants	36
The role of principal contractors	40
Subcontractors and labour suppliers	41
5. Conclusions	43
Bibliography	46

ABBREVIATIONS

DAB	Dispute adjudication board
EU	European Union
FIDIC	International Federation of Consulting Engineers
GCC	Gulf Cooperation Council
ILO	International Labour Organization
PBA	Project bank account
SC	Supreme Committee for Delivery and Legacy
SME	Small- or medium-sized enterprise
TDIC	Tourism Development and Investment Company
UAE	United Arab Emirates
WPS	Wage Protection System

SPECIAL THANKS

This report has greatly benefitted from comments and suggestions from representatives of the construction industry in the region. We would like to extend our grateful thanks to them and to the International Migration Initiative of the Open Society Foundations for funding our research.

INTRODUCTION



In **Part One** of this paper¹ we saw that late or non-payment of wages is one of the major risks facing migrant construction workers in many parts of the world. In **Part Two** we focus on the Gulf Cooperation Council (GCC) and look at alternative (and complementary) possibilities for addressing the issue.

Engineers Against Poverty has been undertaking research in GCC member states for the past few years on ways to improve employment conditions for migrant workers in the construction industry. Our approach to this work has been to consult with government, industry and civil society about the challenges and to identify practical measures to address them. This is not always easy as stakeholders can be reluctant to discuss what are often considered to be highly sensitive issues. Despite this, we have

identified ways to improve cash flow in the industry, reduce insolvency in the supply chain and ensure that wages of construction workers can be paid on time.

The intention of this paper is to stimulate further discussion amongst stakeholders within the region. The paper is divided into four sections.

SECTION 1 restates the problem of late or non-payment of wages in the GCC where the majority of manual labourers working in construction are migrants from south Asia. Wage delay is traced to the change to more flexible forms of employment that has taken place in the region in the past few decades. Clients do not pay on time and extensive subcontracting and outsourcing of labour has increased the distance that interim payments have to travel to reach the immediate employers of the workforce, which are often small firms with limited financial resources that cannot pay wages until they have received payment for the work already completed.

¹ Wells J, Protecting the Wages of Migrant Construction Workers, Engineers Against Poverty, 2016, available at: www.engineersagainstopoverty.org/wp-content/uploads/2018/07/Protecting-the-Wages-of-Migrant-Construction-Workers.pdf.

SECTION 2 provides a brief overview of the Wage Protection System (WPS), an electronic salary transfer system designed to pay wages directly into the bank accounts of workers. The WPS is a genuine local innovation, which was introduced into the United Arab Emirates (UAE) in 2009 in an effort to reduce disputes relating to wages and increase incentives to pay on time. The experiment has since been copied in the five other GCC countries (Bahrain, Kuwait, Oman, Qatar and Saudi Arabia) with varying degree of success. While it may be able to detect when wages have not been paid, wages will only be protected if there is money to pay when employers default and if there is an efficient process for doing so.

While the WPS is a reaction to the problem of wage delay, **SECTION 3** focuses on measures to prevent it. Countries around the globe have been facing similar challenges arising from the movement to more flexible forms of employment. They have adopted some innovative policies to improve cash flow in the industry and protect subcontractors and the workers they employ against late payment. Some of the policies that have been successful elsewhere and could be introduced into the region have been set out in the form of recommendations to GCC Governments in a [white paper](#) prepared by the author for the International Labour Organization.² Section 3 summarises the recommendations in the white paper and explores the likely response from stakeholders in the region.

In the absence of government action, change may come from the industry. **SECTION 4** outlines steps that could be taken by clients, consultants and contractors to promote fair payment practices throughout the subcontracting chain so that wages can be paid on time. The incentives that may drive any of these participants to take action to ensure workers receive the wages due to them are discussed.

SECTION 5 summarises the findings of the research and the key messages that should be directed at decision makers in government and industry and those trying to influence them.

.....

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

1. THE PROBLEM



Problems with late payment of wages have been reported from the six member states of the Gulf Cooperation Council (GCC), namely Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates (UAE). In Qatar 93% of the complaints handled by the Ministry of Labour in 2010 were about wage delay and two thirds of the complainants were construction workers.¹ The Ministry of Manpower in Oman reported to the United Nations in 2010 that employee wage complaints had increased from 10% to 20% yearly and most are from vulnerable groups of blue-collar labourers.² The problem heads the list of workers grievances in Bahrain, even though non-payment of wages is a criminal as well as a civil offence in that country.³ In February 2016 a slump in the construction industry left thousands of workers unpaid in Saudi Arabia.⁴

Prompt payment of wages is critical for migrant workers everywhere, many of whom have paid recruitment fees and/or other costs associated with migration and arrive in

the destination country in debt. Failure to receive their wages on time means that the workers cannot transfer money back to their home country to support their families and to meet debt repayment schedules, so interest mounts up and can cause serious stress, hardship and ill-health.

“Prompt payment of wages is critical for migrant workers everywhere, many of whom arrive in the destination country in debt.”

1 Personal interview by the author with the Human Rights Department in the Qatar Ministry of Interior, 2013.

2 Oman Ministry of Manpower response to questions from the United Nations, 2010.

3 Muscati S, For a Better Life: Migrant worker abuse and the government reform agenda, Human Rights Watch, 2012, available at: www.hrw.org/report/2012/09/30/better-life/migrant-worker-abuse-bahrain-and-government-reform-agenda.

4 Saudi Gazette, “50,000 Binladin workers issued exit visas”, 30 April 2016, available at: www.saudigazette.com.sa/article/153969/50000-Binladin-workers-issued-exit-visas.

Late payment is an especially serious problem for migrant workers in the countries of the GCC. When workers have not been paid their wages, they have few possibilities for redress. Due to the restrictions of the sponsorship system (known as kafala) workers may be limited in

their freedom legally to leave their employer and seek work elsewhere. In some countries they cannot leave the country without an exit permit. 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 sponsorship system, making workers vulnerable to detention and deportation.

***“The past few decades have seen the development of manpower companies which specialise in providing temporary labour for the building trade.*”**

To understand the reasons for late payment of wages it is necessary to look at the global change towards more flexible forms of employment. Attaining flexibility in labour supply is difficult in the countries in the Gulf where the kafala system for the recruitment and employment of foreign workers does not allow workers to move easily between employers. However, the past few decades have seen the development of manpower companies which specialise in providing temporary labour for the building trade. Acting contractually as the employer, these temporary labour agencies are able to sidestep the restrictions imposed by kafala laws and move workers among contractors as needed. Many of these agencies are owned by expatriates, including Indian nationals from Kerala who are often former migrant workers themselves.⁵ 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 which hire out workers to contractors.

Labour supply companies may operate entirely within the law, obtaining visas legitimately, but some may employ workers who have 'absconded' from their previous employer and are thus working illegally.⁶ Others may employ workers who have obtained a residence permit by paying a sponsor who is not able to provide them with a job, under what is known as the 'free visa' system. If labour supply companies are unable to find opportunities to keep their workers constantly employed, it can lead to periods when the workers have no work and no pay. However, if companies continue to pay workers' wages during gaps in contracts to keep teams together, it can lead to insolvency for companies and redundancy

5 Buckley M, "From Kerala to Dubai and back again: Construction migrants and the global economic crisis", *Geoforum*, Vol. 43, No. 2, 2012, pp. 250–259, available at: www.sciencedirect.com/science/article/pii/S0016718511001734.

6 It is illegal in the UAE to employ an absconded worker until s/he has been cleared by the existing employer as well as the Ministry of Labour.

for workers.⁷ These small companies are in fact bearing the cost of a flexible supply of labour in the industry.

The changes in employment relationships have been accompanied by a dramatic increase in the practice of subcontracting. The combination of subcontracting and outsourcing of labour has led to a situation where construction workers and their

employers are increasingly distanced from principal contractors and clients by long supply chains. A schematic presentation of a typical subcontracting chain showing the contractual links (in dark blue) and the employment links (in light blue) between participants is presented in Figure 1.

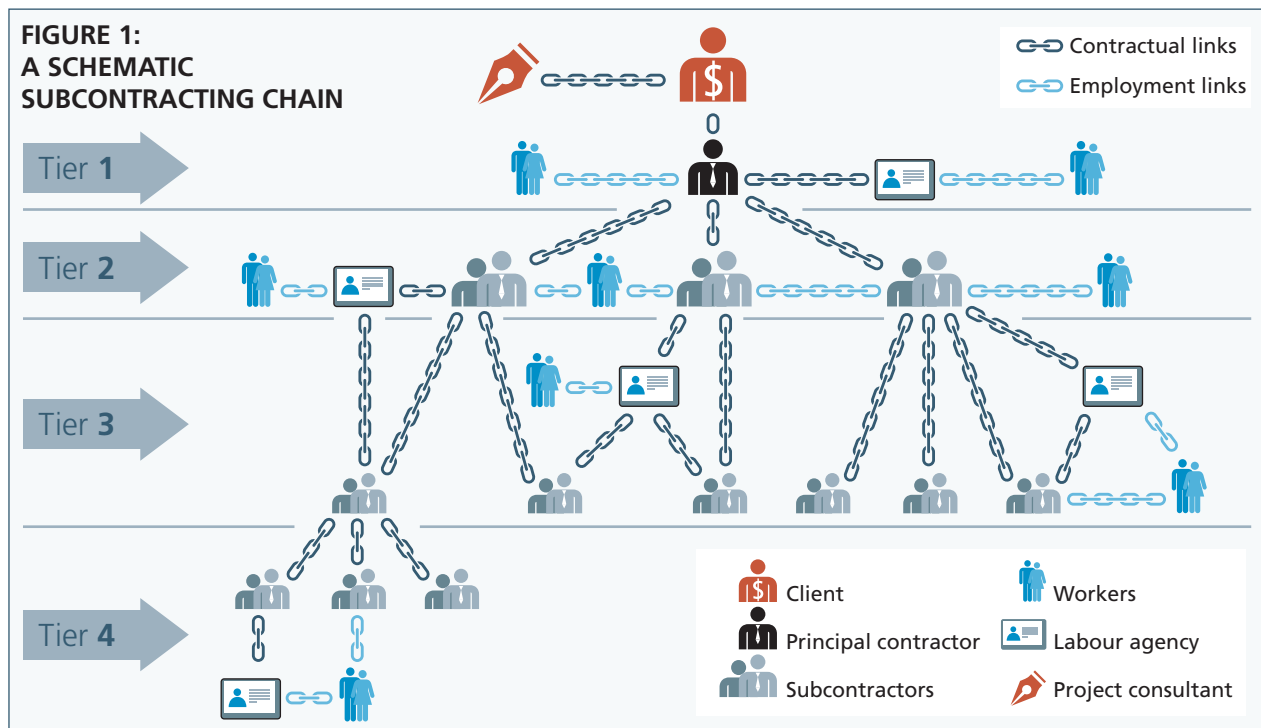
“Subcontracting has increased the distance between clients and workers with serious implications for payment.”

Subcontracting has fractured the relationship and increased the distance between the clients and principal contractors at the top of the chain and the workers, who are often at the bottom, with serious implications for payment. The normal payment practice 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. The principal contractor is then responsible for passing on appropriate sums to all participants along the supply chain. Applications for payment travel up the chain while payment travels down. In the best possible scenario, when there are no disputes, it will take many months for the payment to reach the workers.

However, for a variety of reasons, clients do not pay on time. Delays in payment from the client may lead to the principal contractor self-funding the supply chain for the work to progress, effectively operating as an unsecured creditor waiting for payment. Such cases are rare and it is far more common for principal contractors to hold back payment to their subcontractors. In many situations, contractors are not legally obliged to pay their subcontractors until they have received payment from the client, a practice known as “pay when paid”. This is widely considered unethical but is still commonly incorporated into contracts in the region in the absence of a 30-day payment cycle imposed by law. Even when contractors have received payment, they may still choose to withhold

“Pay when paid” is widely considered unethical but it is still commonly incorporated into contracts in the region.

7 Buckley M, Zendel A, Biggar J, Frederiksen L and Wells J, Migrant Work & Employment in the Construction Sector, International Labour Office, 2016, available at: www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_538487.pdf.



the money that is owing to their subcontractors in order to pay off debts incurred on previous projects or invest in other activities. Subcontractors in turn may 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 Dubai 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.⁸ 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 supply chain. An estimated 150 000 Indian nationals lost their jobs in 2009 and returned to India, often without receiving the payment due to them.

An economic slowdown magnifies the problem, with clients reducing investment and delaying or not paying contractors. The rapid decline in oil prices in 2014 led to

“An economic slowdown magnifies the problem, with clients reducing investment and delaying or not paying contractors.”

8 See above, note 5.

reduced investment in building projects in a number of GCC countries. In early 2016 several contractors working on Government projects in Saudi Arabia reported having difficulty paying wages to their workers.⁹ They included Saudi Bin Laden, the Kingdom's largest construction firm, which had run into cash flow problems at the end of 2015 and suspended payments to tens of thousands of workers. In 2016, it dismissed about 40% of its workforce, many of whom had not been paid for six months. Dismissed workers were given the option of staying in Saudi Arabia until the wages had been paid, which could leave them destitute, or receiving an immediate exit visa and foregoing the money that was owed to them.¹⁰

“These developments have exposed the extent of indebtedness in the industry. While indebtedness leads to late payment, it can also lead to bankruptcy.

The second largest construction firm, Saudi Oger, also faced problems. In March 2016, there were reports that its 38 000 workers had not been paid for four months, that the company was already burdened with debt and that money that might have been used to pay salaries was

being used to fend off pressure from the banks.¹¹ While the Government maintained it was continuing with its contractual payments to the company, the banks were confiscating the money. These developments have exposed the extent of indebtedness in the industry. While indebtedness leads to late payment, it can also lead to bankruptcy. In July 2017 Saudi Oger, owned by the family of Lebanese Prime Minister, Saad al-Hariri, ended operations laying off some 8000 workers, many of whom had not been paid their wages for many months.¹²

At the time of writing many countries in the region are still facing the fallout from the decline in oil prices. Reduced government spending has led to fewer contract awards and projects being redesigned to reduce expenditure. Payments to contractors are being delayed, putting strain on the whole supply chain, pushing subcontractors into liquidation and forcing thousands of lay-offs.¹³ While media attention focuses on the problems facing contractors at the top of the subcontracting chain, conditions at the bottom of the chain are far worse, with reports of workers not being paid for months.

9 Reuters, “Saudi Arabian builders delay payments amid state spending clampdown”, 9 February 2016, available at: www.reuters.com/article/saudi-construction-slump/saudi-arabian-builders-delay-payments-amid-state-spending-clampdown-idUSL8N15N2LU.

10 See above, note 4.

11 Whitaker B, “Labouring in vain: the Gulf’s unpaid workers”, Al-Bab, 29 September 2016, available at: www.al-bab.com/blog/2016/09/labouring-vain-gulfs-unpaid-workers.

12 Nagraj A, “Struggling construction firm Saudi Oger shuts down – report”, Gulf Business, 31 July 2017, available at: www.gulfbusiness.com/struggling-construction-firm-saudi-oger-shuts-report/.

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

2. THE WAGE PROTECTION SYSTEM



WAGE PROTECTION IN THE UNITED ARAB EMIRATES

In an attempt to reduce disputes relating to wages and ensure that employers pay wages on time, the United Arab Emirates (UAE) introduced the Wage Protection System (WPS) by Ministerial Decree in 2009, updated in 2016.^{1,2} The WPS is described as an electronic salary transfer system designed to pay wages directly into the personal accounts of workers. This was a very welcome move as it should enable the workers to prove if they have not been paid and to seek redress if there are means for doing so.

There were plans in the UAE for the WPS to go further in setting up procedures to transfer all records of payment to the Ministry of Human Resources and Emiratisation, so the Ministry could check wages had been paid. It was also expected that the Ministry

“Penalising the immediate employers will not resolve the problem if they are genuinely unable to pay when wages are due.”

1 United Arab Emirates Ministry of Labour, Ministerial Decree No. (788) On Wage Protection, 2009, available at: www.mohre.gov.ae/handlers/download.ashx?YXNzZXQ9NDg5.

2 United Arab Emirates Ministry of Human Resources and Emiratisation, Ministerial Decree No. (739) On Wage Protection, 2016, available at: www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=104217&p_count=2&p_classification=12.02.

would compare the information with the worker's contract of employment to ensure that what was paid was the same as in the contract. To create an incentive to pay on time, sanctions were to be placed on employers which paid late. Penalties for non-compliance were strengthened in 2016 and range from fines, through a ban on new work visas, to downgrading the company and facilitating the workers' move to a different employer. However, penalising the immediate employers will not resolve the problem if they are genuinely unable to pay when wages are due because of delays in receiving payments for work already done.

Recognising the dilemma, the UAE Ministry of Human Resources and Emiratization revealed in its first Worker Welfare Report³ that bank guarantees had been set aside and were being used to pay workers' wages when employers defaulted. From 2001 all companies employing migrant workers in the UAE have had to pay AED 3000 (US\$816) for every worker they hire. In January 2011 the UAE Government also required UAE-based recruiters which provide contract workers to third parties to deposit AED 1 million (US\$270 000) plus AED 2000 (US\$540) per worker into a fund to be used if the employer to which recruiters sent workers fails to pay their wages.⁴ The 2015 Worker Welfare Report revealed that a total of 371 companies had defaulted on obligations to workers since 2009, with the Ministry able to recover AED 40 737 898 (approximately US\$11 million) from guarantees, which was distributed in wages to 16 497 workers. During the same period, a much greater sum (AED 289 577 385) was recovered from employers and distributed to 42 510 workers. We do not know how long it took in either case to recover the money and compensate the workers.

In October 2018, the UAE Government announced that payment of bank guarantees for each worker employed would be replaced by an insurance scheme at a much lower cost to employers. This is an estimated AED 60 (US\$16) per employee a year, compared with a one-off guarantee payment of AED 3000 (US\$816).⁵ The press report suggested the AED 60 paid annually to insure each worker will offer coverage of AED 20 000 (US\$5400) per worker and include their end-of-service benefits, vacation allowance, overtime allowance, unpaid wages, return ticket and cases of work injury. At the same time, it was announced that much of the money accumulated from bank guarantees, reported as AED 22 billion (US\$6 billion), would be returned to employers. The expectation that AED 14 billion (US\$4 billion) of this would be pumped back into the private sector was welcomed by employers.

3 United Arab Emirates Ministry of Human Resources and Emiratization, 2015 Worker Welfare Report, 2015, available at: www.business-humanrights.org/sites/default/files/documents/UAE-MOHRE-Worker-Welfare-Report-2015.pdf.

4 Workshop on Recruitment of Workers for Overseas Employment, Dubai, January 18-19, 2011, available at: www.gfmd.org/files/documents/gfmd_swiss11_dubai_full_report.pdf.

5 Zakaria S, "New low-cost insurance for UAE workers", Khaleej Times, 15 October 2018, available at: www.khaleejtimes.com/nation/dubai/New-low-cost-insurance-for-UAE-workers.

However, it is unlikely in the long run to do much to stimulate cash flow in the construction industry, which is a major challenge in the UAE⁶ and a primary cause of bankruptcy and late payment of wages.

WAGE PROTECTION SYSTEM IN OTHER GULF COOPERATION COUNCIL COUNTRIES

The WPS in the UAE has become the model for similar systems since introduced in the other five Gulf Cooperation Council (GCC) countries: Saudi Arabia (2013), Oman (2014), Qatar (2015), Kuwait (2015) and Bahrain (2018). The WPS, if properly implemented in all countries, should apply some pressure on employers to pay wages on time. But it will only protect workers if there is money to

“The WPS will only protect workers if there is money to pay overdue wages when the immediate employer does not have the funds and if there is an efficient process for doing so.”

pay overdue wages when the immediate employer does not have the funds and if there is an efficient process for doing so. Hence it is important to know in each country whether a source of funds similar to the UAE’s bank guarantee, or an insurance scheme, has been identified.

In a detailed 2017 review⁷ of the WPS in four of the six GCC countries which have introduced the system,⁸ Jureidini revealed that legislation is in place (or planned) to sanction the immediate employers when wages are delayed. Workers in all of these countries are now entitled to transfer to a new employer when they have not been paid for two months. While this is a welcome move, it requires employers to find another employer quickly as two months is a long time to be without pay. What is more important is that they are promptly remunerated in cases of default and it is not clear this is happening.

Prompt remuneration is in fact unlikely in the absence of legislation to ensure funds are set aside for this purpose, either through bank guarantees or insurance. In October 2017 Qatar announced the formation of a, “workers’ support and insurance fund, the stated purpose of which is ‘to collect the workers’ dues ordered by dispute resolution committees, before collecting the expenses from the employer’”.⁹ Although the introduction of an insurance

6 Young A and Fairbairn S, “What’s happening in the UAE construction market”, Deloitte GCC Powers of Construction 2017: If it’s fundable it’s feasible, 2018, pp 44–47, available at: www2.deloitte.com/content/dam/Deloitte/xs/Documents/realestate/construction/gccpowersofconstruction/me_construction_gccpoc2017.pdf.

7 Jureidini R, Wage protection systems and programs in the GCC, Gulf Labour Markets and Migration, GLMM-RR-No.01/2017, 2017, available at: www.gulfmigration.org/media/pubs/rp/GLMM_EN_2017_RR01.pdf.

8 Bahrain is excluded because it has not yet started implementation and Kuwait because of insufficient available information.

9 Qatar News Agency, “Cabinet ratifies bill on fund for workers’ support insurance”, Gulf Times, 26 October 2017, available at: www.gulf-times.com/story/568788/Cabinet-ratifies-bill-on-fund-for-workers-support-.

fund is good news, workers should not have to wait until the dispute has been resolved before receiving compensation. At the time of writing, a comparable source of funds has yet to be announced in other GCC countries attempting to implement a WPS.

OTHER LIMITATIONS OF THE WAGE PROTECTION SYSTEM

**“There is no means of
verifying that workers
have been paid for overtime.**

The overview by Jureidini¹⁰ pointed to a number of other serious limitations on the ability of governments to monitor and verify properly that workers are receiving the wages due to them. For example, while it

was always expected that wages paid would be independently and electronically matched against the basic wage stated in the contract agreement, there is no evidence this is being done and there are a number of obstacles to doing so. The introduction of e-contracts in Qatar does offer a possible opportunity for electronic reconciliation, but the system is still being tested.¹¹

Even more serious is the lack of a means for verifying that workers are properly paid for time spent working in excess of statutory working hours. Overtime work is common in many industries (particularly construction) and welcomed by migrant workers due to the low basic wage. Jureidini suggests the problem could be overcome as the Salary Information File, which employers have to lodge with the banks to register wage payments, does include sufficient information to verify overtime payments. For example, it includes basic salary, extra hours worked and net salary paid. This information should be given to workers in the form of a detailed payslip each month but payslips are not always provided. He suggests that, “simple cooperation by the banks would allow the pay details provided to the WPS by the employer to be printed from the ATM along with the withdrawal receipt.”¹²

Another possibility is to encourage help from clients in checking wages. Some major public sector clients have shown a serious concern to ensure that wages are paid on time and as set out in the contract. One such is the Qatar Foundation, where auditors are reported to be checking the salary payments, payslips, timesheets, overtime and deductions from wages, as well as worksite injuries affecting all workers on their projects.¹³ A comparison is made against the original job offer and the contract, with worker interviews if there are

¹⁰ See above, note 7.

¹¹ See above, note 7.

¹² See above, note 7, p15.

¹³ Ibid.

ambiguous elements in the audit. The data collected under the WPS enables this kind of check by interested clients. It could be introduced (if not already practiced) by other public sector clients which have developed and are auditing their own worker welfare standards.¹⁴

“A further limitation of the WPS is unscrupulous employers exploiting the system for their own benefit.”

A further limitation of the WPS is unscrupulous employers exploiting the system for their own benefit. One common method is the employer transferring the agreed wages into the worker's account on the specified date but retaining the worker's

bank card. The employer uses the card to withdraw money from an automated teller machine but returns only part of it to the worker. This practice, which is straightforward theft, appears to be common in UAE and is described in detail in an article in the local press.¹⁵ In response to the press report, the Ministry of Human Resources and Emiratization stated that all companies trying to evade the WPS will be fined and referred to judicial authorities, while workers who feel cheated by their employers could report wage violations to the Ministry. A serious clampdown by the Government on what is a criminal act on the part of employers is clearly needed, together with increased awareness among workers of the importance of retaining their bank cards.

The newspaper report referred to above included a comment from the chair of the Lawyer Business Group, who estimates that nearly half of all small construction firms in UAE circumvent the requirements of the WPS.¹⁶ Many more may be beyond its reach as it is by no means clear that there is yet universal coverage of the WPS. Small firms, where workers are most vulnerable to abuse, are the most difficult to reach.

“It is by no means clear that there is yet universal coverage of the WPS. Small firms, where workers are most vulnerable to abuse, are the most difficult to reach.”

Jureidini¹⁷ concludes that currently the WPS only indicates violations in relation to late or non-payment of wages. While it is true that there is a long way to go to ensure that workers are paid all they are entitled to, the WPS does create a basis for achieving that objective and

14 These include the Supreme Committee for Delivery and Legacy in Qatar and the Tourism Development and Investment Company in Abu Dhabi.

15 Farooqui M and Kumar A, "How companies circumvent government-backed Wage Protection System to cheat workers", Gulf News, 20 October 2018, available at: www.gulfnews.com/uae/government/how-companies-circumvent-government-backed-wage-protection-system-to-cheat-workers-1.2291834.

16 Ali Haddad, head of Haddad & Associates, Ibid.

17 See note 7 above, p13.

the way forward is reasonably clear. The WPS programmes are necessary and have achieved a lot in a short period of time. They have brought the issue of late payment of wages, which is a key aspect of workers' welfare, to the forefront of the political agenda and it is important that efforts continue to extend and improve the system in all GCC countries.

However, the WPS is a reaction to the problem of wage delay rather than a measure to prevent it from happening in the first place. Preventive action requires the introduction of measures to address the root cause of workers not receiving their wages, which is late payment by clients and slow flow of funds down the supply chain. The following section proposes measures that GCC Governments could take to ensure that employers are paid on time for the work they have done and have the funds needed to pay their workers when wages are due. Action to address late payment and improve cash flow is also needed to avert the bigger problem of indebtedness and company collapse, in which case workers may never be paid.

“The WPS is a reaction to the problem of wage delay rather than a measure to prevent it from happening. Preventive action requires the introduction of measures to address the root cause of workers not receiving their wages.”

.....

3. TACKLING LATE PAYMENT IN THE CONSTRUCTION INDUSTRY



INTRODUCTION

Countries around the globe have been facing similar challenges arising from the movement to more flexible forms of employment in the construction industry. This has led to the adoption of innovative policies to improve cash flow in the industry and protect subcontractors against late payment, ensuring they have the funds to pay the workers they employ (directly or indirectly) when wages are due.

The kind of policies that have been successful elsewhere and could potentially be introduced in Gulf Cooperation Council (GCC) states have been set out in a white paper prepared by the author for the Middle East regional office of the International Labour Organization (ILO).¹ This section summarises the policies recommended in the ILO [white paper](#), discusses the motivation for the policies' introduction, outlines some of their limitations and explores the likely response to recommendations from stakeholders in the region.² The objective is to assess what might persuade GCC Governments to introduce

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

2 The white paper (Ibid.) includes changes to the law on occupational health and safety which are not discussed in the current paper.

effective policies that are fairer and better able to protect the wages of construction workers, and to encapsulate this in key messages to agents of change from within and outside the industry.

From the outset it is important to note that the problem of late payment in the construction industry needs to be addressed, not just because it is a major cause of delay in paying wages with catastrophic results for the workers (especially migrant workers), but because it is also likely to have far wider repercussions. For example, if late receipt of interim payments results in wage delay, workers are likely to withdraw their labour and strikes and/or go-slows will hinder progress of the work and impact on the ability of the client to deliver the project on time. When workers have not received their wages, they can and do withdraw their labour, even in countries where it is unlawful to strike.³ That Governments in the region are aware of this is clear in their stated reasons for introducing the WPS. In all cases, the first objective was to resolve disputes related to wages, but in at least one case (Oman) it was stated as to, “prevent strikes and work stoppages resulting in loss of employee productivity”.⁴

Late payment will also negatively affect the cash flow of contractors, making them very vulnerable in an industry where profit margins are low and credit is in limited supply. Subcontractors are especially vulnerable to payment delay. They are often small businesses without financial reserves or substantial assets that provide collateral to allow them to

“The impact of late payment can ripple both up and down a project’s supply chain and if it results in a company insolvency, it can also ripple across multiple projects.

3 Construction workers in Bahrain went on strike in March 2015 when they had not been paid their wages for three months (Trade Arabia, “Labourers strike over unpaid wages in Bahrain”, 17 March 2015, available at: www.tradearabia.com/news/EDU_277690.html). In January 2015, hundreds of construction workers building a new hospital in Kuwait stopped work because their employer had not paid them for three months (Trenwith C, “Kuwaiti construction workers win wages dispute”, Construction Week Online, 11 January 2015, available at: www.constructionweekonline.com/article-32100-kuwaiti-construction-workers-win-wages-dispute/). In August 2016, 200 construction workers went on strike in Kuwait, claiming they had not been paid for six months (Arabian Business, “200 ‘Asian’ workers strike in Kuwait over unpaid wages”, 30 August 2016, available at: www.arabianbusiness.com/200-asian-workers-on-strike-in-kuwait-over-unpaid-wages-643956.html). In April 2017 it was reported that workers were arrested and flogged after going on strike for non-payment of wages in Riyadh (Asia News, “Riyadh, strike against non-payment of salaries: immigrants arrested and flogged”, 1 April 2017, available at: www.asianews.it/news-en/Riyadh,-strike-against-non-payment-of-salaries:-immigrants-arrested-and-flogged-39571.html).

4 Oman Ministry of Manpower response to questions from the United Nations, 2010.

borrow, leading to high levels of insolvency.⁵ According to Constructing Excellence, “The impact of late payment can ripple both up and down a project’s supply chain and if it results in a company insolvency, it can also ripple across multiple projects”.⁶ If insolvency of contractors or subcontractors leads to liquidation, there will be significant delay while work is re-tendered, probably at a higher price. At the same time, workers will lose their jobs and are unlikely ever to be paid what is owing to them.⁷

Late payment from clients also means contractors and subcontractors are in fact providing short-term finance for construction projects; finance which is unlikely to be available on favourable terms. Interest payment on loans to bridge the cash-flow gap, in addition to the time and cost spent chasing invoices, are estimated to increase contractors’ costs by as much as 4%. This may be added to tender prices to cover late payment, creating an additional hidden and unaddressed layer of cost to project delivery.⁸

“Late payment has an impact on both time and cost of project delivery. It may also lead to problems with quality. Governments should therefore have a strong interest in addressing the issue.

It may be concluded that late payment has an impact on both time and cost of project delivery. It may also lead to problems with the quality of the finished work as firms struggling to maintain their cash flow cut costs, for example by substituting cheaper materials.⁹ Hence a more effective payment system, one that allows all participants to be paid on time, should bring benefits not only to workers and contractors but also to industry clients.

Governments, as regulators setting the rules of commerce, as well as in their role as major clients of publicly funded construction projects, should therefore have a strong interest in addressing the issue.

- 5 Construction insolvencies accounted for 17% of all corporate bankruptcies in the UK in 2015 and late payment was the most common reason (Asset Based Finance Association, “Construction companies hit hardest by growing waits for payment. Delays increase by 22% in just a year”, ABFA News, 22 August 2016, available at: www.abfa.org.uk/news/124/Construction-companies-hit-hardest-by-growing-waits-for-payment-Delays-increase-by-22pc-in-just-a).
- 6 Constructing Excellence, The Payments Minefield: A Review of Payments within the UK Construction Industry, CE Funding and Finance Group, 2016, available at: www.constructingexcellence.org.uk/wp-content/uploads/2016/07/Payments-Minefield-%E2%80%93-A-review-of-payment-practices-within-the-UK-Construction-industry.pdf.
- 7 The implications were well demonstrated by the collapse of Carillion, a major UK construction company that went into liquidation in January 2018, leaving some 30 000 subcontractors and suppliers with unpaid debts, thousands of workers with unpaid wages, and an enormous bill to the government for retendering contracts.
- 8 Lambert A and Wilkinson P, “Digitising the supply chain”, Constructing Excellence Blog, 2 September 2015, available at: www.constructingexcellence.org.uk/late-payment-a-guest-blog-from-textura-europe/.
- 9 Kenley R, Financing Construction: Cash Flows and Cash Farming, Routledge, 2002, available at: www.taylorfrancis.com/books/9780203467398.

However, while it is argued that all industry stakeholders are likely to benefit in the longer term from the introduction of policies promoting prompt payment, in the short term each policy will impact differently on participants, with some gaining and others losing. In what follows an attempt is made to assess the likely response from stakeholders in the GCC to the introduction of each policy recommended in the ILO white paper,¹⁰ in the context of the probable distribution of benefits and costs in the short term. The policies that are discussed include: legislation to promote prompt payment, banning “pay when paid”, introducing rapid adjudication to resolve payment disputes, experimenting with project bank accounts and assigning joint liability for payment of wages.

PROMPT PAYMENT LEGISLATION

Increased understanding of the adverse impact of late payment on business and the economy has led in many countries to the introduction of legislation to promote prompt payment in the construction industry. While governments may have limited ability to implement change in payment practice in the private sector, there is evidence from the USA and UK that it can be effective when government is the client. For faster payment by government clients the ILO white paper¹¹ proposes that:

Governments in the region should follow the European Union, USA and UK by introducing 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.

There should be strong support for such a move from principal contractors working in the countries of the GCC. A survey conducted in 2015 of chief executive officers of major construction companies across the region¹² found that cash-flow management is a key concern for a majority of construction companies. Delayed payment from the client, coupled with demands for payment by suppliers and subcontractors, is a major source of stress. Three quarters of respondents to the survey indicated that the cash collection cycle on interim payments can take anywhere between 62 and 360 days, with a median of 225 days or 7.5 months. This is a protracted collection period that has put a serious strain on companies’ cash flow.

¹⁰ See above, note 1.

¹¹ Ibid.

¹² Corby C and Juergens S, “Construction C-suite survey, Deloitte GCC Powers of Construction 2015: Construction – The economic barometer for the region, 2015, pp 44–49, available at: www2.deloitte.com/content/dam/Deloitte/uk/Documents/real-estate/deloitte-uk-gcc-powers-of-construction-2015.pdf.

There are many reasons for late payment from clients. A specific problem reported from Qatar is that public sector clients often rely on receiving funds from the Ministry of Economy and Finance. Contracts may not require them to pay until they have in turn received the funds from the Ministry, which can be delayed due to bureaucracy. While interest on late payment is sometimes provided for in public sector contracts, it is often not payable when the reason for late payment is delay in funding from the Ministry to the client.^{13,14}

In extreme cases, late payment can be because clients have run out of money, or because a slow-down in the economy is putting pressure on public finances, which happened in Saudi Arabia in 2016. In 2017 the construction industry in the United Arab Emirates (UAE) was reported to be badly affected by an uncertain economic climate, in particular the drop in the oil price, with a lack of cash and liquidity across the supply chain. Projects were slowing down or being suspended with employers increasingly not paying their contractors for variations, not paying them on time and in some cases not paying them at all.¹⁵ At the same time, with greater competition for fewer contracts, contractors and subcontractors were reducing their margins further to win work, so projects were starting on a tight budget, leaving little room for contingency. All parties were focusing on payment and enforcing their contractual rights, at the expense of the long-term needs of the project.

At the time of writing, a similar situation is reported from countries around the GCC region in a major study by Newbould et al.¹⁶ Reductions in Government spending have been accompanied by tightening liquidity in the private sector, leading to projects being re-scheduled or re-designed to reduce capital expenditure. Payments to contractors are being delayed and claims for variations are not being awarded, squeezing cash flow and leading to a rise in disputes. In these challenging market conditions it is increasingly difficult for GCC Governments to deliver projects efficiently. The authors claim that the industry has reached a tipping point and has to change.

“Government action to set standards for the industry is urgently needed and legislation to promote prompt payment by public sector clients should be a priority.

13 Kilani M, Building and Construction Sector in Qatar, Invest-Export.Brussels, 2014, available at: www.invest-export.brussels/documents/16349/1298834/Building+and+Construction+Sector+in+Qatar+-2014.pdf/b976848e-e0cb-4ac3-a1d9-59064aaa6f8d.

14 Moubaydeen S, Pope J, Tuck J, Walker M and Mackay N, “Construction and Projects in Qatar: overview”, Practical Law, 1 October 2013, available at: [www.uk.practicallaw.thomsonreuters.com/5-519-5882?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](http://www.uk.practicallaw.thomsonreuters.com/5-519-5882?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1).

15 Young A and Fairbairn S, “What’s happening in the UAE construction market”, Deloitte GCC Powers of Construction 2017: If it’s fundable it’s feasible, 2018, pp 44–47, available at: www2.deloitte.com/content/dam/Deloitte/xs/Documents/realestate/construction/gccpowersofconstruction/me_construction_gccpoc2017.pdf.

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

Government action to set standards for the industry is urgently needed and legislation to promote prompt payment by public sector clients should be a priority. This has been successful in the UK, USA and some European Union (EU) countries, with government clients paying principal contractors within 30 days. However, legislation for prompt payment is unlikely to be effective in the private sector and, in the current context, public sector clients are likely to oppose it. A sensible way forward, which would benefit both public and private sector projects, would be to strengthen the method of resolving payment disputes, as explained in the following section.

RAPID RESOLUTION OF PAYMENT DISPUTES

**“Clients and contractors
need to find a way of
paying undisputed items while
the disputed items are subject to
a process of rapid adjudication.**

While there are various underlying reasons for payment delay, they invariably appear as disputes over items in payment applications. Clients and contractors need to find a way of paying undisputed items while the disputed items are subject to a process of rapid adjudication. This is

now international best practice and mandated procedure for both public and private clients under the construction acts in several countries. The ILO white paper¹⁷ therefore recommends that:

To resolve disputed items in payment applications and facilitate the faster payment of non-disputed items governments in the region could follow the UK, Singapore, Malaysia and New South Wales in introducing a procedure for rapid (statutory) adjudication.

Designs are seldom complete when a contract is put out to tender and variations are inevitable. Traditionally projects are planned and designed by consultants which work for the client on a fee basis and prepare the initial design, which is then passed to the contractor to implement. As the design develops, disputes arise as to which party is responsible for the additional costs, with designers and clients maintaining that the changes should have been anticipated by the contractor. There are also variations introduced by the client, which can involve very substantial additional costs and are likely

¹⁷ See above, note 1.

to be open to dispute. Payment disputes can run on for years in the Middle East even after the project is completed. This was a common situation in the UK and a primary reason for the introduction of a procedure for alternative dispute resolution in the form of adjudication.¹⁸

While the UK was the first to introduce statutory adjudication, any dispute arising out of a construction contract in the UK can be referred to the process. However, in Singapore, Malaysia and New South Wales, only payment disputes arising from a particular application for payment can be referred to adjudication. To resolve the pressing issue of the late delivery of interim payments while the project is ongoing, the latter approach is clearly preferable as it is more favourable to the receiving party and can deliver a result in as little as 14 days, as shown in Table 1.¹⁹

TABLE 1. COMPARISON BETWEEN STATUTORY ADJUDICATION AND OTHER MECHANISMS TO RESOLVE DISPUTES¹⁹

Dispute resolution mechanism	Time to reach a decision	Binding decision
Dispute adjudication board	Not less than 140 days	No
Arbitration	Not less than 360 days	Yes
Statutory adjudication (UK)	Within 28 days	Yes, temporarily binding
Statutory adjudication (New South Wales)	Within 14 days	Yes, temporarily binding

There are various reasons to suppose that a process of statutory adjudication is appropriate for introduction into the GCC countries. First, as already noted, there is an endemic situation of interim payments being held up by disputes, which produces crippling effects on the cash flow of contractors and, in a context where “pay when paid” is the norm, also of subcontractors. A study looking into the issue included interviews with eight experts in the UAE construction industry, all but one of whom said progress payment disputes are the chief problem they face. One contractor also noted the impact on subcontractors: “I am

“There are various reasons to suppose that a process of statutory adjudication is appropriate for introduction into the GCC countries.

not answering the subcontractors’ calls because we have a negative cash flow resulting from delayed payment from the client so we are not able to pay the subcontractors monies.”²⁰ The situation would appear to have escalated further since the study was undertaken.

¹⁸ Pressure from subcontractors was the other, as alternative dispute resolution can resolve disputes at all levels of the chain.

¹⁹ Guirges W, “The prospect of introducing statutory adjudication in the UAE construction industry”, The British University in Dubai Digital Repository, 2013, available at: www.bspace.buid.ac.ae/handle/1234/365.

²⁰ Ibid., p. 43.

A second reason is that there are few other options to resolve payment disputes in the industry. The dispute adjudication board (DAB) procedure that can be set up under International Federation of Consulting Engineers (FIDIC) contracts, which are commonly used in the region, is expensive and slow and decisions are not binding. Also, many projects in the region are using the earlier (1987) form of FIDIC contracts where the DAB provision has not been included. Even when using a contract from the FIDIC 1999 suite, the DAB procedure written into clause 20 is often deleted and replaced by an engineer's decision process akin to that provided under the 1987 form.²¹ The alternatives of arbitration and/or litigation are even more costly and slow (as shown in Table 1), and can only take place after project completion, so they are not an effective mechanism that could help a contractor to increase its cash-flow.

The majority of the experts interviewed by Guirges²² had never heard about statutory adjudication and its ability to resolve payment disputes when the project is still on-going. As experience of these models grows it is expected to feed into practice in relation to dispute boards and adjudication on projects in jurisdictions in the Middle East, where such methods have yet to gain real traction.²³ However, there are some ambiguities in and between the various articles in the UAE Civil Transactions Code that would have to be resolved if statutory adjudication was to be introduced. There may also be resistance from the courts in the region, which have traditionally been slow to accept arbitration as displacing their jurisdiction. If adjudication is to succeed, it is critical that the courts back the adjudicators' decisions. This will then reduce the likelihood of the losing side challenging the adjudicators' decisions.

“There may be resistance from the courts in the region, which have been slow to accept arbitration as displacing their jurisdiction.

On a more positive note, the establishment of a specialist Technology and Construction Division of the DIFC Courts in Dubai in September 2017 does open up a potential avenue for enforcement of contract-based adjudication decisions by judges familiar with the system.²⁴ The same source notes that steps towards adjudication have been taken before.

21 While the “engineer” is supposed to be neutral and able to give an objective opinion, further problems arise from the common practice of using the particular conditions in contracts to require the client's prior approval in relation to the discharge of the “engineer's” duties (Corby C and Juergens S, “Construction C-suite survey, Deloitte GCC Powers of Construction 2015: Construction – The economic barometer for the region, 2015, pp 44–49, available at: www.deloitte.com/content/dam/Deloitte/uk/Documents/real-estate/deloitte-uk-gcc-powers-of-construction-2015.pdf).

22 See above, note 19.

23 Construction Blog, 4 June 2014, available at: www.constructionblog.practicallaw.com/the-continued-growth-of-statutory-adjudication-is-good-news-for-a-global-construction-industry/.

24 See above, note 16.

For example, the Qatar International Court and Dispute Resolution Centre prepared a draft scheme to govern the adjudication process some years ago. Although it stalled at the enabling legislation stage, as industry pressures continue to rise there is optimism that such steps will be taken again across the region.

Given the extent of late payment by clients in the region, principal contractors may be expected to support strongly a move to introduce a statutory adjudication process. However, adjudication (like other methods of dispute resolution) is only effective if both parties agree at the outset to abide by the decision of the adjudicator, irrespective of whoever is the winner, and some clients are likely to be reluctant. The key message

for advisers to deliver to GCC Governments and clients is that the introduction of statutory adjudication for faster resolution of disputes over payment would improve cash flow in the industry and reduce the risk of late payment of wages, with the disruptive strikes and work stoppages that inevitably follow. It would therefore benefit all industry participants and the regional economy as a whole.

“The key message for advisers to deliver to GCC Governments and clients is that the introduction of statutory adjudication would improve cash flow and reduce the risk of late payment of wages.

PROTECTING PAYMENT TO SUBCONTRACTORS

Rapid adjudication to resolve payment disputes between clients and contractors, and also between contractors and subcontractors, would improve the flow of payment down the supply chain. However, additional measures may be needed to ensure subcontractors are paid promptly so they can stay solvent and pay their workers on time. The ILO white paper²⁵ proposes that:

Governments follow the UK, New Zealand, Singapore, Malaysia, Ireland and some states in Australia in banning “pay when paid” clauses in contracts, with the right of contractors and subcontractors to suspend performance when payment is delayed.

While the abolition of “pay when paid” has played a major part in curbing payment abuse, there is some evidence from the UK that contractors have tried to undermine the objectives

²⁵ See above, note 1.

of the legislation by including extremely restrictive payment provisions in subcontracts, including payment terms of 60 days or more. For this reason, the ILO white paper²⁶ also recommends that:

Governments should include in prompt payment legislation 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 not exceed 30 days.

The practice of “pay when paid” is widespread in the GCC region. That this is of major concern to the industry is suggested by the attention paid by lawyers in the UAE to ways of getting around it, none of which is satisfactory.²⁷

The most relevant suggestion from the legal profession is that the subcontractor may potentially rely on Article 247 of the UAE Civil Transactions Code, which allows a contractor to suspend performance if not paid. Irrespective of a “pay when paid” clause, it is argued that suspension of works by a subcontractor is a powerful weapon that can strong-arm a contractor to pursue a claim and put pressure on the employer (especially in time-sensitive projects) into paying for work that is not in dispute. There are a number of factors determining whether a subcontractor can exercise its suspension right, including proper notification of the main contractor and successful performance of the subcontractor’s primary obligations. But recognition in the civil code of the right to suspend work for non-payment should be regarded as a positive starting point for introducing legislation banning “pay when paid”.

“Recognition in the civil code of the right to suspend work for non-payment should be regarded as a positive starting point for introducing legislation banning “pay when paid”.

26 Ibid.

27 This and the following paragraphs are based on two articles by lawyers (Ibrahim A, “Subcontracting under UAE law”, Fenwick Elliott International Quarterly, No. 14, 2015, available at: www.fenwickelliott.com/research-insight/newsletters/international-quarterly/subcontracting-under-uae-law; Singh K, “Pay-when-Paid Clauses in the UAE: Is there a way around for a Subcontractor”, Al Tamimi & Co., 2015, available at: www.tamimi.com/law-update-articles/pay-when-paid-clauses-in-the-uae-is-there-a-way-around-for-a-subcontractor/).

It is also worth noting that the Employment Practices Policy (EPP) of the Tourism Development and Investment Company (TDIC) in Abu Dhabi includes the following clause (21.1) under the heading 'Non Payment of Wages':

All payments made by the client to the contractor with the project shall be applied first to discharge any wages payable to employees or meeting the statutory or other payments for the benefit of employees. Notwithstanding the foregoing, the contractor's obligations and responsibilities to pay wages to employees and to meet the aforesaid statutory payments by the contractor, shall not be conditional upon and/or dependent on the receipt of payment from the client or any other party, nor shall such obligations and responsibilities cease or be discharged in the event of pay dispute between the parties.²⁸

A similar point is made in the minimum standards of workers' welfare prepared for the Expo 2020 programme office in Dubai, which states, "Payment to workers will not be conditional upon the receipt of payment from the client or any other party".²⁹

However, opposition to the introduction of legislation banning "pay when paid" would be expected from principal contractors. If the legislation was enforced, principal contractors would no longer be able to hold on to funds to support their own cash flow at the expense of subcontractors. They would also face the risk of having to finance the project when payment from the client is delayed. The introduction of statutory adjudication (as practiced in New South Wales, Singapore and Malaysia) to resolve payment disputes quickly may be an essential pre-requisite to enforcing a ban on "pay when paid". It could also help to make it more acceptable to contractors if it can be demonstrated to be an effective way of getting faster payment from the client, which contractors see as their main challenge.

It is not clear whether clients would support legislation banning "pay when paid". In this context, the key message that advisers should be relaying to their clients is that banning "pay when paid" would bring many benefits, as set out in Table 2. It would lower the risk of subcontractor insolvency and the need for retendering, with the inevitable impact on the time and cost of project delivery. It would also reduce the risk of late or non-payment of wages and the industrial unrest and bad publicity that will inevitably

***“Banning “pay when paid” would lower the risk of subcontractor insolvency and the need for retendering, with the inevitable impact on the time and cost of project delivery.*”**

28 Tourism Development and Investment Company, Employment Practices Policy, August 2015, available at: www.tdic.ae/ECollateral/TDIC%20Documents/EPP%20Policy.pdf.

29 Bureau Expo Dubai 2020, Assurance Minimum Standards: Worker Welfare 05007-STD-P990000-WW-000001 Revision 3, 2017, section 3.5, w.

TABLE 2. THE ADVANTAGES AND LIMITATIONS OF BANNING “PAY WHEN PAID”³⁰

ADVANTAGES	LIMITATIONS
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, for fear of jeopardising relationships with their clients.
The risk of late receipt of payment from the client is carried by the principal contractor, which is likely to have better access to financial resources and hence be better able to shoulder the risk than those lower down the subcontracting 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 contractors assessing clients’ payment practice with higher tender prices for poor-paying clients, putting pressure on clients to improve payment practice.	

follow. However, clients who regularly pay late will have difficulty enforcing the ban. They will also lose out in the longer term if principal contractors have to finance the project as they will charge for this through higher tender prices.

PROJECT BANK ACCOUNTS

A project bank account (PBA) is a ring-fenced account held in trust for the contractual supply chain and the medium through which payments can be made directly to subcontractors. To protect subcontractors (and the workers they employ) against late payment, as well as against the risk of insolvency in the supply chain, the UK introduced PBAs and in 2009 determined that all public bodies adopt them on future contracts unless there were compelling reasons not to do so. The city of Seoul in the Republic of Korea has also developed a system involving a PBA with the capacity to pay wages directly into the bank accounts of construction workers.³¹ The ILO white paper³² recommends that:

Governments experiment with PBAs and explore the possibility of making payment from a PBA directly to the workers’ accounts as pioneered by the city of Seoul in South Korea.

³⁰ Adapted from note 1 above.

³¹ The Korean system is known as the Subcontract Payment Monitoring System.

³² See above, note 1.

While PBAs could be introduced into GCC countries to speed payment to subcontractors, 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. Protection is also limited to those participating in the scheme, which is usually only contractors down to tier 3 and does not include small subcontractors or labour suppliers, so not all workers are protected.

In Seoul, on the other hand, workers are always paid first, irrespective of whether the other participants in the project receive their cash. Much can be learned from the example of Seoul, which is setting a new standard for international best practice in the payment of wages. However, it is important to understand there is a key difference in the way that construction costs are set out in contracts. In the Republic of Korea, costs are separated into materials, equipment and labour, and this facilitates the apportionment of funds between the various participants (general contractor, subcontractor, supplier and construction workers) with direct payment into each participant's account. This is not the case in the GCC region, where labour costs are not usually separated, which would appear to be an obstacle to the adoption of the Seoul model.

It is also worth noting that principal contractors in Seoul (as well as some in the UK) have been strongly opposed to the introduction of PBAs as it means that they are unable to hold on to money owing to subcontractors. In some cases the money is diverted to support other parts of the principal contractor's operations. There is no reason to expect that the majority of contractors operating in the GCC would look on PBAs more favourably. Opposition is also likely to come from clients as the initial establishment and operation of a PBA involves a cost which clients may be unwilling to bear, even though it is likely to be balanced by subsequent savings. A further and potentially more significant factor is that making payment through a PBA is a more transparent process and this would put pressure on clients to pay promptly. It therefore seems unlikely that PBAs are going to be widely adopted voluntarily in the region in the foreseeable future, except perhaps on very large and high profile projects.

However, if (as some predict) there is an increasing reliance on new sources of funding in the region, PBAs may be introduced by financiers as they understand it is necessary to protect payment to the supply chain to ensure successful project delivery.³³ The key message to be delivered to GCC Governments and clients is that PBAs can be an effective way to increase

“Project bank accounts can be an effective way to increase transparency and fairness in payment procedures and protect subcontractors and the workers they employ against late payment and the risk of insolvency.”

³³ See above, note 16.

transparency and fairness in payment procedures and protect subcontractors (and the workers they employ) against late payment and the risk of insolvency. Payment through a PBA will ensure that payments to contractors will be used only on the project and create the right conditions for projects to be delivered on time.

JOINT LIABILITY

The rapid spread of subcontracting and labour outsourcing in the European construction industry since 1980 has been accompanied by greater movement of both subcontractors and labour across countries in the EU. To offer further protection to workers employed by subcontractors against late payment and/or insolvency in the supply chain, the ILO white paper³⁴ proposes that GCC Governments could follow many EU countries in:

Developing joint liability schemes whereby principal contractors and/or clients share responsibility with the immediate employer for protecting subcontractors and workers against late or non-payment of money owing to them.

Imposing limitations on the extent of subcontracting and labour outsourcing.

Liability of the main contractor for the wages of workers employed through subcontractors or agencies is now embedded in law or regulations in seven EU countries plus Norway.³⁵ The logic of joint liability is that the lead enterprise at the top of the supply chain decides how to structure its operations and is responsible for the outcomes. Principal contractors can do all of the work themselves and employ workers directly, or they can subcontract parts of the work, which diffuses costs, risk and legal liability down the subcontracting chain. Either way they have a responsibility and a strong interest in ensuring that all workers, including those employed by subcontractors, receive their wages on time because wage delay is likely to lead to work stoppages, and this will have an impact on the performance and reputation of the main contractor.

The issue of taking responsibility for wages when subcontractors default was raised by the author with principal contractors in Qatar in 2013.³⁶ Several contractors said they have never practised “pay when paid”, that they do check subcontractors are paying wages

³⁴ See above, note 1.

³⁵ Houwerzijl M, Jorens Y, Peters S and Gillis D, Study on the protection of workers' rights in subcontracting processes in the European Union, Ghent University, 2012, available at: www.biblio.ugent.be/publication/8572315.

³⁶ Wells J, Improving employment standards in construction in Qatar, Engineers Against Poverty, 2014, available at: www.engineersagainstopoverty.org/wp-content/uploads/2018/07/EAP_Qatar_Report_Web_Version_RGB_Revised_20131125110200.pdf.

on time and intervene when there was a problem. Several had paid wages to workers employed by subcontractors when the latter failed to do so. These are contractors which understand that late payment of wages will affect their ability to deliver projects on time, while also damaging their reputation.

Legislation to extend liability for the payment of wages to the principal contractor would oblige others to follow and create a more level playing field. Such action would also reinforce a ban on “pay when paid” and require contractors to make the kind of checks on wages that are common in many European countries. Fining principal contractors under the WPS when wages are delayed would help to ensure the objective of the policy is realised.

“Legislation to extend liability for the payment of wages to the principal contractor would create a more level playing field.”

Extending liability to clients may be more difficult to gain acceptance in GCC countries. A number of EU countries have elements of joint liability for wages or labour conditions involving the client.³⁷ These requirements are most common in public works projects and are usually accompanied by rigorous pre-screening of subcontractors and/or limitations on subcontracting and outsourcing of labour.³⁸ While it might be assumed that clients in the GCC region would not want to follow this path, there is evidence that some major clients are aware of the danger to workers of pushing risks down the supply chain, and are taking steps to screen subcontractors and limit the extent of subcontracting and labour outsourcing.

For example, the Supreme Committee for Delivery and Legacy (SC)³⁹ in Qatar requires prior approval of subcontractors in its agreement with main contractors, and main contractors must obtain prior approval from the SC for the appointment of any other subcontracting parties of all tiers.⁴⁰ The SC is also instituting pre-mobilisation approval of

37 For example, in France the client and the principal contractor are jointly liable for payment to the subcontractors if a contractor fails to pay (Gasne S, Barbier C and Duprey A, “Construction and projects in France: overview”, Practical Law, 1 December 2016, available at: [www.uk.practicallaw.thomsonreuters.com/8-502-1461?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](http://www.uk.practicallaw.thomsonreuters.com/8-502-1461?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)). In Greece the client is obliged to pay wages if the contractor fails to do so and in Spain and in Italy the client can request proof that wages have been paid (Houwerzijl M and Peters S, “Liability in subcontracting process in the European construction sector”, European Foundation for the Improvement of Living and Working Conditions, EF/08/94/EN, 2008, available at: www.eurofound.europa.eu/publications/report/2008/labour-market/liability-in-subcontracting-processes-in-the-european-construction-sector; See above, note 35).

38 For example a law which came into force in Spain in 2007 imposes a ban on subcontracting beyond the fourth tier, as well as on subcontracting of activities involving manual labour (Vargas O, Gonzalez J and Rodriguez F, Undeclared Labour in the Construction Industry: Country report - Spain, European Institute for Construction Labour Research, 2006, available at: www.clr-news.org/wp-content/uploads/2017/11/Spain-03-OK.pdf). The public works code in Italy also places strict limits on subcontracting.

39 The client body responsible for construction of infrastructure required for the 2022 World Cup in Qatar.

subcontractors and refusing entry to SC sites to subcontractors with a significant record of non-compliances with worker welfare standards. These steps suggest that a major client is willing to accept responsibility for ensuring the welfare of workers at lower levels of the supply chain. More directly relevant to the issue of wages, the SC is aiming to restrict the tiers of contractors to only three, the principal contractors and immediate subcontractors, which together employ most of the workers, and a third tier comprised of labour suppliers.⁴¹ Shortening the subcontracting chain will reduce the distance that payment has to travel to reach the immediate employers of the workforce and give the client greater control over payment practices.

Confirmation that some clients are beginning to take responsibility for wages seriously can be seen in the efforts taken by the Qatar Foundation to use the information provided by the WPS to check that workers on their projects are receiving the wages owed to them. It can also be seen in the Employment Policy and Practice (EPP) of the TDIC which notes in clause 21.3 that, “if the contractor fails to pay wages or other obligations, the client can withhold money owing to the contractor and pay wages and other benefits to employees out of the withheld funds.”⁴²

Clients are more likely to follow the path taken by SC, Qatar Foundation and TDIC if held jointly liable with the principal contractor for ensuring all aspects of the welfare of workers employed on their projects. That it is happening (albeit among some very high-profile clients) without the threat of legal liability indicates there are other pressures on clients, which could come from adverse publicity from activists or from realisation of the benefits for project outcomes from restricting the extent of subcontracting. It also suggests that there might be room for GCC governments to introduce appropriate legislation that extends liability as far as the client.⁴³

“Clients are more likely to follow the path taken by SC, Qatar Foundation and TDIC if held jointly liable with the principal contractor for ensuring all aspects of the welfare of workers employed on their projects.”

40 Supreme Committee for Delivery and Legacy, Workers’ Welfare Standards: Bulleting 1 to Edition 2, February 2018, available at: www.sc.qa/sites/default/files/docs/Bulletin_to_WW_standards.pdf.

41 Impactt, Annual External Compliance Report of the Supreme Committee For Delivery & Legacy’s Workers’ Welfare Standards, 2017, available at: www.impacttlimited.com/wp-content/uploads/2017/01/SC-Annual-Report-Issue-3.2.pdf.

42 See above, note 28.

43 There is a precedent in the region in that the Civil Code in Lebanon also gives all workers employed on a project the right to bring a direct action against the client, although only for sums that have not yet been paid to the principal contractor (personal communication with Leila Azouri).

SUMMARY

The policy recommendations proposed in the ILO white paper⁴⁴ to address late payment are summarised in Table 3, together with the motivation for the introduction of each policy in the country of origin, some limitations of the policy and an assessment of which parties may lose from its introduction in the short term.

TABLE 3: COMPARISON OF POLICY RECOMMENDATIONS					
	MEASURES	MOTIVATION FOR INTRODUCTION	ACHIEVEMENTS	LIMITATIONS	WHO MAY OPPOSE IN THE SHORT TERM
1	Prompt payment legislation with interest on late payment	Better knowledge of the adverse impact of late payment on small- or medium-sized enterprises (SME), ⁴⁵ the industry and the economy	Significant success when government is payer in some countries	Only effective in public sector and will not protect subcontractors' workers	Public sector clients, if effectively enforced
2	Banning "pay when paid" with the right to stop work if not paid	A fairer payment system for SMEs and subcontractors	Played a major part in curbing payment abuse in countries where it was introduced	Can be undermined unless payment terms are specified: and by reluctance of subcontractors to exercise their right to withdraw	Principal contractors
3	Statutory adjudication to resolve payment disputes	To speed payment to all participants and protect weaker parties	Very successful in resolving payment disputes, giving certainty	Adjudication in the UK has become broader and more complex in its application than anticipated, increasing cost	All parties may gain and should support
4	Project bank accounts (UK)	To speed flow of payments to subcontractors and protect funds if companies collapse	Speeds payment to tier 3 contractors with benefits to lower tiers	Benefits only to tier 3 contractors so may not protect weakest	Some principal contractors and clients
4	Project bank accounts (Seoul)	To ensure prompt payment of wages to workers and protect project funds	All workers paid directly and promptly	May be difficult to adapt to GCC countries	Principal contractors
5	Joint liability (EU)	To protect workers' rights to fair wages and some protection against insolvency	Very successful in some EU countries	Most common in public works with restrictions on subcontracting	Resistance from some principal contractors and clients

⁴⁴ See above, note 1.

⁴⁵ The term SME is usually understood to mean small- or medium-sized enterprises, but the EU defines it as "micro small and medium sized enterprises". In the current context it is meant to refer to enterprises that have limited power and may be in need of protection and/or support.

It can be seen that the main motivations for the introduction of policies that address late payment in the construction industry are:

- The realisation that late payment can lead to insolvency, with an adverse impact on workers, businesses and the economy.
- The protection of subcontractors (many of which are SMEs) against an unfair payment system.
- To ensure prompt payment of wages and protect workers' right to fair wages.

All of these objectives are relevant to the context in the GCC region, where late payment is endemic, subcontractors are young and inexperienced companies with limited financial reserves, and there is a major problem of wage delay. The introduction of such policies would offer some protection to workers against late or non-payment of wages and against redundancy in the event that their employers become insolvent, while improving the chance of project delivery.

.....

4. THE ROLE OF THE INDUSTRY IN PROMOTING PROMPT PAYMENT AND ENSURING THAT WORKERS ARE PAID ON TIME



INTRODUCTION

Most of the measures outlined in Section 3 to address the problem of late payment in the Gulf Cooperation Council (GCC) region's construction industry require action by the respective Governments, in the form of legislation or administrative decrees. However, the industry's clients, consultants, contractors and financial institutions supporting them also have a role to play in promoting prompt payment and in ensuring that wages are paid on time. The industry can put pressure on Governments to introduce any or all of the measures outlined in the Section 3. But in the absence of Government action, there are some measures the industry can take itself.

This section looks first at the steps clients can take to set a framework for prompt payment and ensure wages are paid on time for all workers involved in the delivery of a construction project. This is followed by an explanation of the role of professional consultants in the construction industry, both as advisers to clients and acting for the client in various capacities. The final section focuses on measures that can be taken by contractors and subcontractors. The incentives that might drive any of these participants to take action to protect the wages of construction workers are discussed.

MEASURES THAT CAN BE TAKEN BY CLIENTS

The client as head of the supply chain can wield enormous influence over the welfare of workers. Clients can do this at each stage of the project cycle by:

- Choosing companies with which to engage (consultants and contractors).
- Specifying expectations in invitations to tender and setting out terms and conditions in contracts.
- Inspections and enforcement (clients often have their own inspectors and the right to walk onto a construction site at any time).

In the absence of national legislation banning “pay when paid” clients can make it a condition of tender that all contractors pay their subcontractors according to the schedules set out in the contracts (which should not exceed 30 days), even if payment from the client is delayed. This can then be included in the terms of the contract between the client and the principal contractor, together with a requirement that the principal contractor monitors compliance throughout the subcontracting chain. However, these contractual requirements can be very difficult to enforce in the face of serious delay in receipt of payment from a client. The view from the industry is that a 30-day payment cycle is also unlikely to be enforceable, given the number of variations and quality related issues, without a process of rapid adjudication operating in parallel.

“The client as head of the supply chain can wield enormous influence over the welfare of workers.”

In this context, clients who realise the benefits from statutory adjudication can put pressure on GCC Governments to introduce it. They can also pressure Governments to ban “pay when paid”. If unsuccessful, they can still try only to work with contractors which pay their subcontractors on time. They can do this by checking the payment records of contractors and subcontractors and excluding poor payers from tender lists. They can require that principal contractors make similar checks on the payment records of subcontractors and agencies supplying workers, and only work with legitimate and responsible companies.

Alternatively (and more effectively) clients can require prior approval of subcontractors before signing contracts with the principal contractor and before the appointment of any other subcontracting partner, as is now expected in contracts with Qatar's Supreme Committee for Delivery and Legacy (SC).¹ This gives the SC the means to limit the extent of subcontracting and labour outsourcing, which is its aim. A shorter subcontracting chain and elimination of labour suppliers means more direct control over employment and welfare issues, reduces the burden of auditing and makes it easier to check that wages are paid.

“At the very least, clients can and should build into contracts with principal contractors the requirement that all workers employed on a project be paid through the banks in accordance with the Wage Protection System operating in the country.

At the very least, clients can and should build into contracts with principal contractors the requirement that all workers employed on a project be paid through the banks in accordance with the Wage Protection System (WPS) operating in the country. Major clients that have set their own workers' welfare standards, and are auditing contractors and subcontractors to check compliance, could also follow the Qatar Foundation in using the data provided by the WPS to check that all workers on their projects are being paid on time and in line with what is in their contracts.²

The question arises as to why clients would want to invest time and effort in such action and how the incentives to take such action could be enhanced. An obvious reason in the GCC states for taking action against late payment is that clients are not immune to criticism about the mistreatment of workers from international labour rights activists. This is evident in the steps taken by major clients in Qatar and the United Arab Emirates (UAE) to improve the welfare of the workers by developing and auditing their own labour standards. It is also likely to be a major factor in the introduction of the WPS in Qatar and other countries of the GCC.

“Clients are not immune to criticism about the mistreatment of workers from international labour rights activists.

1 Supreme Committee for Delivery and Legacy, Workers' Welfare Standards: Bulletin 1 to Edition 2, February 2018, available at: www.sc.qa/sites/default/files/docs/Bulletin_to_WW_standards.pdf/.

2 Jureidini R, Wage protection systems and programs in the GCC, Gulf Labour Markets and Migration, GLMM-RR-No.01/2017, 2017, available at: www.gulfmigration.org/media/pubs/rp/GLMM_EN_2017_RR01.pdf.

However, an even stronger reason must be ‘enlightened self-interest’; the knowledge that late payment can affect the time, cost and potentially even the quality of projects. Clients may want to ensure the rapid resolution of payment disputes and prompt payment throughout the subcontracting chain to avoid the risk of subcontractor insolvency and late payment of wages, with

the disruptive strikes and work stoppages that inevitably occur, causing significant delay to project completion.³ There are also significant financial benefits to clients from paying promptly and adopting measures that can speed the flow of funds to the supply chain. Prompt payment down the subcontracting chain would reduce the financing costs incurred by subcontractors, which include the costs of interest payments on loans from the banks that are needed to pay wages and other costs incurred in work completed before payment is received, as well as the administrative costs involved in chasing payments. The savings resulting from prompt payment can be passed on to clients in the form of lower prices on subsequent tenders.

“There are also significant financial benefits to clients from paying promptly and adopting measures that can speed the flow of funds to the supply chain.”

International funders are well aware of the benefits of prompt payment on the delivery of projects. If, as predicted, external sources of finance will be seen in major projects in the GCC region in the foreseeable future, financiers are likely to drive many changes in payment practices to ensure projects are delivered on time.⁴ There have also been examples of local banks demanding fairer contract administration practices, notably the chief executive officer of Mashreq Bank based in Dubai who is quoted as saying, “We expect every client and government once in an agreement with a contractor to honour their commitment. It is not good that paymasters withhold money. Contractors not getting paid can trigger a big chain of defaults which is not acceptable.”⁵

In the absence of such pressure from funders, the incentives for more clients to take action can be strengthened by getting the right advice and support from consultants, particularly those advising on procurement and finance.

3 Construction workers have recently been on strike over non-payment of wages in Bahrain (2015), Kuwait (2015, 2016) and Saudi Arabia (2017).

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

5 Ibid., p. 30.

THE ROLE OF PROFESSIONAL CONSULTANTS

The construction industry is traditionally divided into companies that undertake construction work (contractors) and companies employed to provide professional services during planning, preparation and delivery of a project (consultants). With new types of contract, such as 'design and build', some of the services traditionally provided by consultants may be packaged and delivered by contractors, so the division is frequently blurred. This is especially so in heavy engineering, where contractors are commonly engaged by the client to carry out detailed engineering design, procure all materials and equipment and construct the facility.⁶ However, some of the best-known international names in construction have chosen to distance themselves from actually delivering the construction work, preferring to act as consultants in pre-construction stages and project managers during construction.

Figure 2 is a schematic presentation of a typical construction subcontracting chain, showing the contractual links (in dark blue) and employment links (in light blue) between participants. Consultants are shown with direct links to the client through commercial contracts. Individuals or companies engaged as consultants have no financial or commercial interest in the project but are engaged on the basis of a fee, which is usually negotiated. They also have no direct contractual links with the contractors, do not generally engage in construction work or employ lower-wage manual labourers. This may serve as an excuse for absolving themselves from all responsibility when workers are abused.⁷

However, professional consultants in their various capacities, together with lawyers, provide advice and support to clients at all stages of project implementation. They can therefore have a huge impact on the terms on which manual labourers are employed and on the conditions under which they work and live. The following are some of the more specific ways in which they can exert their influence over issues related to payment.

- If engaged to provide advice and support to a client on an appropriate procurement strategy, consultants can help the client specify its expectations of contractors during the invitation to tender, and ensure the expectations are carried through into the contract.⁸ They can advise the client on the dangers of automatically accepting the

6 The type of contract is known as engineering, procurement and construction.

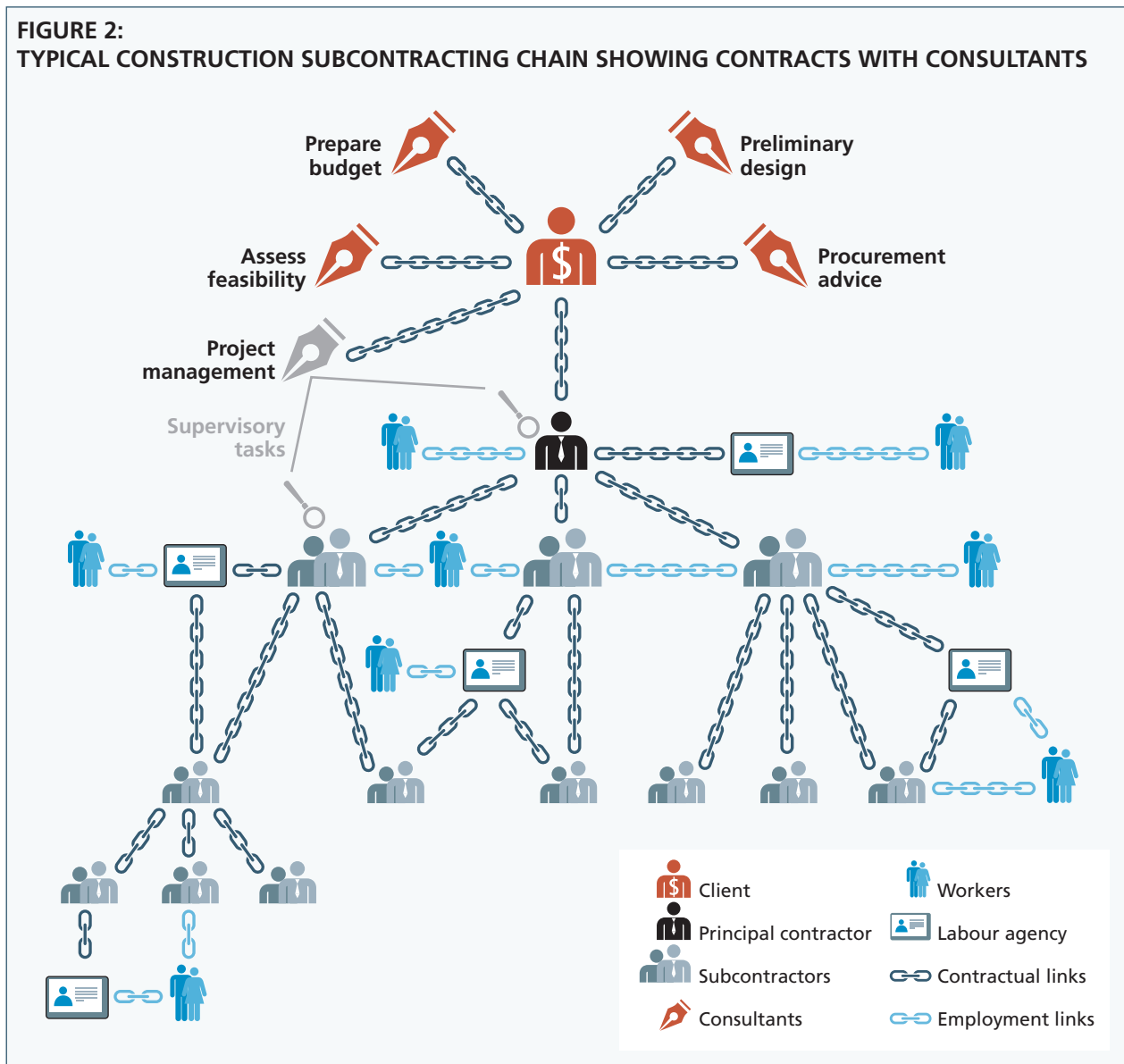
7 Well known architect, Zaha Hadid maintained in 2015 that she had no responsibility for the workers on construction projects she designed. This was contested by others but it remains the case that few architects publicly address the issue of working and living conditions for workers on their projects (Ray D, "What can architects do about workers' rights in the Gulf?", Icon, 26 March 2015, available at: www.iconeye.com/architecture/features/item/11715-what-can-architects-do-about-worker-rights-in-the-gulf).

8 While the drawing up of contracts between clients and contractors is very much a role for lawyers, it is important to note that much of the work involved in planning and designing a construction project takes place long before the point is reached where the construction contract is put out to tender. This suggests that the role of industry consultants is more influential than that of lawyers in the decisions made prior to and during the procurement phase. However, both are key players.

lowest priced bid and the benefits of choosing contractors and subcontractors which can demonstrate strong wage payment and labour practices.

- When engaged as part of the client's delivery team, as project managers, consultants will have responsibility for supervising all aspects of the construction, administering the contract and seeing the project is delivered on time. They can advise the client on paying promptly and alert it to the effect on project delivery when payment is delayed.
- Consultants working as part of the client's delivery team with responsibility for payment (known as the "engineer" under International Federation of Consulting Engineers (FIDIC) contracts) will be certifying payments to the contractor. They can be influential in advising the client of the importance of paying on time and quickly resolving payment disputes when they arise.

**FIGURE 2:
TYPICAL CONSTRUCTION SUBCONTRACTING CHAIN SHOWING CONTRACTS WITH CONSULTANTS**



With the current focus on workers' welfare in GCC countries, companies offering professional services have also been active in assisting clients to draw up appropriate welfare standards. They may also be engaged in monitoring and auditing compliance with worker welfare standards that have already been adopted. However, these companies may not always be the best qualified to advise on labour issues, or indeed on payment issues. Questions are legitimately raised about the quality of the services provided as well as their objectivity.

Many consultants active in GCC countries are from multinational companies based in Europe or the USA. They will be familiar with international best practice related to project management and health and safety. It is not known whether consultants are making their clients aware of the significant benefits from making prompt payment to their principal contractors, while also providing advice on the steps that clients can take to ensure money flows down the supply chain so direct employers have funds to pay workers' wages on time. It would also be interesting to know the view of consultants working in the GCC on the possibility of introducing a ban on "pay when paid". However, it is concerning that the widely used 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)".⁹ A debate on the legitimacy of the practice of "pay when paid" on both practical and ethical grounds is long overdue.

While consultants are engaged by clients on a fee basis and are agents of clients, they are also supposed to be impartial when carrying out duties involved in administering contracts between clients and

“A debate on the legitimacy of the practice of pay when paid on both practical and ethical grounds is long overdue.”

9 International Federation of Consulting Engineers, Conditions of Subcontract for Construction (First Edition, 2011). For building and engineering works designed by the Employer, 2011, available at: www.fidic.org/books/construction-1999-red-book-subcontract-1st-ed-2011.

principal contractors. The recent study by Newbould et al.¹⁰ reports many complaints from contractors that consultants in the GCC region are not acting impartially and, in particular, that they are failing to certify payment for variations introduced by a client. The authors are optimistic that change may come from the new 2017 suite of FIDIC contracts, which differentiate the duties of consultants where they are acting for the client and those duties (such as certifying payments) where they are acting in a ‘deterministic capacity’ and have to be impartial. The new contracts place an obligation on the client not to interfere or

“A further key message for consultants to deliver to clients is that the contractor offering the lowest price is not necessarily the best choice if they want their projects delivered on time.

constrain the “engineer” in the execution of its duties. However, we have already seen that it is common practice in the GCC region to use the “particular conditions” in contracts to require the client’s approval in relation to discharge of the “engineer’s” duties.¹¹

Capacity building for consultants to provide appropriate advice on payment and other welfare issues could be very valuable,

given their powerful position as advisers to clients. Advising on procurement is critical. The normal practice in the GCC region is single-stage tendering, with the construction work awarded directly to the contractor offering the lowest price while ignoring quality, environmental, social and labour issues. It is now widely recognised that this may not always be the best option for the client.¹² Intense competition in the market means contractors cut prices to win contracts, leaving insufficient money to deliver the project to the required quality, with the inevitability of disputes over payment and the prospect of the project grinding to a halt. A further key message for consultants to deliver to clients is that the contractor offering the lowest price is not necessarily the best choice if they want their projects delivered on time.

¹⁰ See above, note 4.

¹¹ Corby C and Juergens S, “Construction C-suite survey, Deloitte GCC Powers of Construction 2015: Construction – The economic barometer for the region, 2015, pp 44–49, available at: www.deloitte.com/content/dam/Deloitte/uk/Documents/real-estate/deloitte-uk-gcc-powers-of-construction-2015.pdf.

¹² See for example, Wells J, Getting better outcomes on construction projects: suggestions for modification of World Bank procurement procedures, Engineers Against Poverty, 2013, available at: www.engineersagainstopoverty.org/wp-content/uploads/2018/07/Getting-Better-Outcomes-on-Construction-Projects-f.pdf. The World Bank introduced a new procurement framework in July 2016, replacing lowest price with decisions to be based on fit-for-purpose, choice, quality, and greater value for public spending.

THE ROLE OF PRINCIPAL CONTRACTORS

Principal contractors have a responsibility to obey the law and to pay their subcontractors in accordance with the contract. If the contract with the client contains “pay when paid” clauses they cannot legally be held to account for late payment to subcontractors if they in turn have not been paid by the client. However, contractors still have an interest in taking steps to ensure that subcontractors are paying their workers’ wages on time. They also have a right and a need to know if wages are not being paid, as this is likely to lead to work stoppages and serious impact on their ability to deliver the project on time, as well as on their reputation.¹³

A properly functioning WPS should raise the alarm when wages are late, so principal contractors have a strong incentive to register their workers with the WPS and require that all subcontractors and labour suppliers employing workers on the project do the same. An additional precaution would be a dedicated hotline to alert the principal contractor if wages are late, so they could step in and take action to see that workers are quickly paid.

“A properly functioning WPS should raise the alarm when wages are late, so principal contractors have a strong incentive to register their workers with the WPS and require that all subcontractors and labour suppliers employing workers on the project do the same.”

Some responsible contractors in the GCC region are aware of the importance of taking the above steps and deserve prompt payment from the client in return, but there are many more which do not realise it is in their interest and shun the added responsibility. Pressure to persuade these contractors to take steps to ensure wages are paid on time to all workers on their project can only come from a change in the law, or from clients which realise the impact of late payment and wage delay on the progress and performance of projects, and prefer to work with principal contractors which pay promptly and ensure their subcontractors do the same.

Pressure can also come from below. Many of the measures introduced internationally to improve payment methods (as explained in **SECTION 3**) were designed to provide a fairer system for subcontractors. In many cases it has been strong pressure and lobbying

¹³ Discussions with principal contractors in Qatar in 2013 revealed that they frequently only find out that wages have not been paid by a subcontractor after two or three or even six months have passed, by which time the problem is likely to have escalated with serious consequences for both the workers and the project (Wells J, Improving employment standards in construction in Qatar, Engineers Against Poverty, 2014, available at: www.engineersagainstpoverty.org/wp-content/uploads/2018/07/EAP_Qatar_Report_Web_Version_RGB_Revised_20131125110200.pdf).

from subcontractors that has brought the changes about. The implication for the countries of the GCC is that subcontractors might also have a role to play in bringing about the necessary pressure for change.

“Subcontractors might also have a role to play in bringing about the necessary pressure for change.

SUBCONTRACTORS AND LABOUR SUPPLIERS

Subcontractors and companies supplying labour to contractors and subcontractors are major employers of the construction workforce in the GCC region. They have responsibility for the workers they employ, including for paying them on time. Many are small companies with limited financial capacity and lower standards of workers' welfare. Too often cost is an issue for these companies as contractors drive hard bargains with their subcontractors and a low contract price limits their ability to comply with welfare standards. They also have little control over payments, accommodation and so on, and no certainty as to when they will win another contract. While they take the blame when it is discovered that wages are delayed, it is seldom considered that they may not have the funds to pay on time.

It is clear that the degree of influence over payment (and other worker welfare issues) decreases from the top to the bottom of the supply chain, while responsibility increases. Companies at the bottom of the chain carry most of the risks involved in employing workers. Subcontracting does not have to lead to a deterioration in working conditions for those employed by subcontractors, but in practice this is often the outcome. The supply chain has been described as, “a hierarchical, socio-economic dependency network or triangle, based on a linked series of contracts and connections”.¹⁴ Companies at the lower levels of the chain are not on an equal footing with the main contractors; these imbalances of power can lead to questionable and possibly exploitative contracts with subcontractors.

“While subcontractors and labour suppliers take the blame when it is discovered that wages are delayed, it is seldom considered that they may not have the funds to pay on time.

The question arises as to who will speak for the subcontractors? Local chambers of commerce may be relevant here as they have a role in representing local businesses and small- to medium-sized enterprises. An interview with the director of the Qatar Chamber in 2013 highlighted the major challenge facing small firms in recruiting workers on fixed-term contracts when they

¹⁴ Cremers J, “Changing employment practices and collective bargaining: The case of construction”, International Journal of Labour Research, Vol 1. No. 2, 2009.

themselves have no certainty of continuous work. Much could be achieved if the Qatar Chamber, in representing small firms working as subcontractors or labour suppliers, could direct its considerable influence up the supply chain by fighting for a fairer payment system and a fairer apportionment of risks between main contractors and subcontractors. Masreq, an Islamic bank financing SMEs in the UAE, may also be instrumental in pushing for change. In 2017 the bank reported it will continue to finance contractors despite serious cash-flow problems in the industry and called for greater transparency over payment.¹⁵

|||||

¹⁵ Abraham S, "The new realities of construction industry region", MEED, broadcast on 14 November 2017, available at: www.meed.com/highlights-new-realities-construction-region-broadcast/.

5. CONCLUSIONS



Late or non-payment of construction workers' wages is common in all Gulf Cooperation Council (GCC) states. This is a serious breach of human rights with disastrous consequences for the workers. It is also bad for GCC Governments, which are having to devote resources to resolve an increasing number of wage disputes. To aid them in this task, all GCC Governments have introduced a Wage Protection System (WPS). This is not functioning as intended and there is a long way to go in ensuring that all workers are paid what they are entitled to. But the WPS does create a basis for achieving that objective and the way forward is reasonably clear. The immediate priority in resolving the issues related to late or non-payment of wages must be a major initiative to extend and improve the system in all GCC countries.

However, GCC Governments and their advisers should also be aware of the underlying reasons why late or non-payment of wages is so common in the region. The change to more flexible forms of employment that has occurred over the past few decades involves subcontracting and outsourcing labour, whereby the risk of employing workers who may not always be needed is passed to others. While there are still some large companies employing workers directly, many of the direct employers of the workforce are now subcontractors with little control over when they will receive payment for work they have done. Some are small companies with limited financial resources which cannot pay wages until the money owing to them has been received.

Companies supplying workers on a labour-only basis have the additional uncertainty of not knowing when they may receive another contract to provide their employees with work and pay. While these small companies take the blame for the late or non-payment of wages, it is seldom acknowledged that they are bearing the cost of a flexible supply of labour.

Underlying the above are the even bigger problems facing GCC Governments and industry of late payment by clients and slow flow of money down the subcontracting chain. Governments have to take action to ensure that public clients pay on time. Legislation to promote prompt payment by public sector clients has been effective elsewhere and must be introduced sooner or later in the GCC region. As late payment is usually due to disputed items in payment applications, the introduction of statutory adjudication to resolve payment disputes in real time during project implementation would greatly improve cash flow in the construction industry and could benefit all participants.

To ensure money gets down to the direct employers of the workforce, GCC Governments should also place a ban on “pay when paid”, with the right of subcontractors to withdraw their service if payment is delayed. A 30-day maximum payment period is the norm in many countries and should be set as a target. Principal contractors may be expected to resist such a move which, if enforced, would restrict their control over project funds and require them to finance the project if payment from a client is delayed. The introduction of statutory adjudication, alongside a ban on “pay when paid”, would help to lower resistance if it can be demonstrated as an effective way of getting faster payment from clients, which contractors see as their main challenge.

The incentives for GCC Governments to take action along these lines are strong. The proposed measures should reduce the incidence of wage delay and the number of wage disputes, lessening the strain this imposes on the WPS and the labour courts. Prompt payment to all parties would also reduce the risk of insolvency among subcontractors, improve productivity and increase the chance of delivering projects on time.

While it is clearly in the Governments’ interest to act, the incentives for doing so could be strengthened by pressure from industry and those providing it with finance. There are major clients in the region which have developed strong worker welfare policies and are auditing their contractors to ensure the policies are implemented. Some of these clients are taking action themselves to protect the wages of workers on their projects by paying promptly and taking steps to ensure that contractors and subcontractors do the same. There are also principal contractors which are very aware of the damaging effects of wage delay and are accepting responsibility for ensuring that wages are paid to all workers on

their projects. Legislation to extend liability for wages to the principal contractor and/or the client would oblige others to follow and create a more level playing field. For the best to become the norm Governments need to act.

Given it will take time to realise the above changes, the WPS provides an essential backup in the form of a chance of redress when wages have not been paid. It should be strengthened and coverage extended in all GCC states.



BIBLIOGRAPHY

Abraham S, "The new realities of construction industry region", MEED, broadcast on 14 November 2017, available at: www.meed.com/highlights-new-realities-construction-region-broadcast/.

Arabian Business, "200 'Asian' workers strike in Kuwait over unpaid wages", 30 August 2016, available at: www.arabianbusiness.com/200-asian-workers-on-strike-in-kuwait-over-unpaid-wages-643956.html.

Asia News, "Riyadh, strike against non-payment of salaries: immigrants arrested and flogged", 1 April 2017, available at: www.asianews.it/news-en/Riyadh,-strike-against-non-payment-of-salaries:-immigrants-arrested-and-flogged-39571.html.

Asset Based Finance Association, "Construction companies hit hardest by growing waits for payment. Delays increase by 22% in just a year", ABFA News, 22 August 2016, available at: www.abfa.org.uk/news/124/Construction-companies-hit-hardest-by-growing-waits-for-payment-Delays-increase-by-22pc-in-just-a.

Buckley M, "From Kerala to Dubai and back again: Construction migrants and the global economic crisis", *Geoforum*, Vol. 43, No. 2, 2012, pp. 250–259, available at: www.sciencedirect.com/science/article/pii/S0016718511001734.

Buckley M, Zendel A, Biggar J, Frederiksen L and Wells J, *Migrant Work & Employment in the Construction Sector*, International Labour Office, 2016, available at: www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_538487.pdf.

Bureau Expo Dubai 2020, Assurance Minimum Standards: Worker Welfare 05007-STD-P990000-WW-000001 Revision 3, 2017, section 3.5, w.

Constructing Excellence, *The Payments Minefield: A Review of Payments within the UK Construction Industry*, CE Funding and Finance Group, 2016, available at: www.constructingexcellence.org.uk/wp-content/uploads/2016/07/Payments-Minefield-%E2%80%93-A-review-of-payment-practices-within-the-UK-Construction-industry.pdf.

Corby C and Juergens S, "Construction C-suite survey, Deloitte GCC Powers of Construction 2015: Construction – The economic barometer for the region, 2015, pp 44–49, available at: www.deloitte.com/content/dam/Deloitte/uk/Documents/real-estate/deloitte-uk-gcc-powers-of-construction-2015.pdf.

Cremers J, "Changing employment practices and collective bargaining: The case of construction", *International Journal of Labour Research*, Vol 1. No. 2, 2009.

Farooqui M and Kumar A, "How companies circumvent government-backed Wage Protection System to cheat workers", *Gulf News*, 20 October 2018, available at: www.gulfnews.com/uae/government/how-companies-circumvent-government-backed-wage-protection-system-to-cheat-workers-1.2291834.

- Gasne S**, Barbier C and Duprey A, "Construction and projects in France: overview", Practical Law, 1 December 2016, available at: [www.uk.practicallaw.thomsonreuters.com/8-502-1461?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](http://www.uk.practicallaw.thomsonreuters.com/8-502-1461?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1).
- Gordon J**, Global labour recruitment in a supply chain context, International Labour Office, 2015, available at: www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_377805.pdf.
- Guirges W**, "The prospect of introducing statutory adjudication in the UAE construction industry", The British University in Dubai Digital Repository, 2013, available at: www.bspace.buid.ac.ae/handle/1234/365.
- Houwerzijl M and Peters S**, "Liability in subcontracting process in the European construction sector", European Foundation for the Improvement of Living and Working Conditions, EF/08/94/EN, 2008, available at: www.eurofound.europa.eu/publications/report/2008/labour-market/liability-in-subcontracting-processes-in-the-european-construction-sector.
- Houwerzijl M**, Jorens Y, Peters S and Gillis D, Study on the protection of workers' rights in subcontracting processes in the European Union, Ghent University, 2012, available at: www.biblio.ugent.be/publication/8572315.
- Ibrahim A**, "Subcontracting under UAE law", Fenwick Elliott International Quarterly, No. 14, 2015, available at: www.fenwickelliott.com/research-insight/newsletters/international-quarterly/subcontracting-under-uae-law.
- Impactt**, Annual External Compliance Report of the Supreme Committee For Delivery & Legacy's Workers' Welfare Standards, 2017, available at: www.impacttlimited.com/wp-content/uploads/2017/01/SC-Annual-Report-Issue-3.2.pdf.
- International Federation of Consulting Engineers**, Conditions of Subcontract for Construction (First Edition, 2011). For building and engineering works designed by the Employer, 2011, available at: www.fidic.org/books/construction-1999-red-book-subcontract-1st-ed-2011.
- Jureidini R**, Migrant Labour Recruitment to Qatar, Bloomsbury Qatar Foundation Journals, 2014, available at: www.qscience.com/userimages/ContentEditor/1404811243939/Migrant_Labour_Recruitment_to_Qatar_Web_Final.pdf.
- Jureidini R**, Wage protection systems and programs in the GCC, Gulf Labour Markets and Migration, GLMM-RR-No.01/2017, 2017, available at: www.gulfmigration.org/media/pubs/rp/GLMM_EN_2017_RR01.pdf.
- Kenley R**, Financing Construction: Cash Flows and Cash Farming, Routledge, 2002, available at: www.taylorfrancis.com/books/9780203467398.
- Kilani M**, Building and Construction Sector in Qatar, Invest-Export.Brussels, 2014, available at: www.invest-export.brussels/documents/16349/1298834/Building+and+Construction+Sector+in+Qatar+-2014.pdf/b976848e-e0cb-4ac3-a1d9-59064aaa6f8d.

- Labour Markets and Migration**, A survey of working and living conditions of low-income migrant workers in the hospitality and construction sectors in the United Arab Emirates, forthcoming.
- Lambert A and Wilkinson P**, "Digitising the supply chain", Constructing Excellence Blog, 2 September 2015, available at: www.constructingexcellence.org.uk/late-payment-a-guest-blog-from-textura-europe/.
- Latham M**, Constructing the Team: Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry, HMSO, 1994, available at: www.constructingexcellence.org.uk/wp-content/uploads/2014/10/Constructing-the-team-The-Latham-Report.pdf.
- Moubaydeen S**, Pope J, Tuck J, Walker M and Mackay N, "Construction and Projects in Qatar: overview", Practical Law, 1 October 2013, available at: [www.uk.practicallaw.thomsonreuters.com/5-519-5882?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](http://www.uk.practicallaw.thomsonreuters.com/5-519-5882?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1).
- Muscatti S**, For a Better Life: Migrant worker abuse and the government reform agenda, Human Rights Watch, 2012, available at: www.hrw.org/report/2012/09/30/better-life/migrant-worker-abuse-bahrain-and-government-reform-agenda.
- Nagraj A**, "Struggling construction firm Saudi Oger shuts down – report", Gulf Business, 31 July 2017, available at: www.gulfbusiness.com/struggling-construction-firm-saudi-oger-shuts-report/.
- Newbould S**, Butcher T, Anagnostou P, Haque A, Rahman H and Hammadi A, Time for Change: Construction in the GCC reaches a tipping point, DLP Piper, 2018, available at: www.dlapiper.com/en/uk/insights/publications/2018/11/construction-in-the-gcc-reaches-a-tipping-point/.
- Omar F and Saleh A**, "Airport cleaners strike over unpaid wages", Kuwait Times, 12 July 2016, available at: www.news.kuwaittimes.net/website/airport-cleaners-strike-unpaid-wages/.
- Qatar News Agency**, "Cabinet ratifies bill on fund for workers' support insurance", Gulf Times, 26 October 2017, available at: www.gulf-times.com/story/568788/Cabinet-ratifies-bill-on-fund-for-workers-support-.
- Ray D**, "What can architects do about workers' rights in the Gulf?", Icon, 26 March 2015, available at: www.iconeye.com/architecture/features/item/11715-what-can-architects-do-about-worker-rights-in-the-gulf/.
- Reuters**, "Saudi Arabian builders delay payments amid state spending clampdown", 9 February 2016, available at: www.reuters.com/article/saudi-construction-slump/saudi-arabian-builders-delay-payments-amid-state-spending-clampdown-idUSL8N15N2LU.
- Robertson D**, "The continued growth of statutory adjudication is good news for a global construction industry", Practical Law Construction Blog, 4 June 2014, available at: www.constructionblog.practicallaw.com/the-continued-growth-of-statutory-adjudication-is-good-news-for-a-global-construction-industry/.

- Saudi Gazette**, “50,000 Binladin workers issued exit visas”, 30 April 2016, available at: www.saudi-gazette.com.sa/article/153969/50000-Binladin-workers-issued-exit-visas.
- Singh K**, “Pay-when-Paid Clauses in the UAE: Is there a way around for a Subcontractor”, Al Tamimi & Co., 2015, available at: www.tamimi.com/law-update-articles/pay-when-paid-clauses-in-the-uae-is-there-a-way-around-for-a-subcontractor/.
- Supreme Committee for Delivery and Legacy**, Workers’ Welfare Standards: Bulleting 1 to Edition 2, February 2018, available at: www.sc.qa/sites/default/files/docs/Bulletin_to_WW_standards.pdf/.
- Tourism Development and Investment Company**, Employment Practices Policy, August 2015, available at: www.tdic.ae/ECollateral/TDIC%20Documents/EPP%20Policy.pdf.
- Trade Arabia**, “Labourers strike over unpaid wages in Bahrain”, 17 March 2015, available at: www.tradearabia.com/news/EDU_277690.html.
- Trenwith C**, “Kuwaiti construction workers win wages dispute”, Construction Week Online, 11 January 2015, available at: www.constructionweekonline.com/article-32100-kuwaiti-construction-workers-win-wages-dispute/.
- United Arab Emirates Ministry of Human Resources and Emiratisation**, Ministerial Decree No. (739) On Wage Protection, 2016, available at: www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=104217&p_count=2&p_classification=12.02
- United Arab Emirates Ministry of Human Resources and Emiratisation**, 2015 Worker Welfare Report, 2015, available at: www.business-humanrights.org/sites/default/files/documents/UAE-MOHRE-Worker-Welfare-Report-2015.pdf.
- United Arab Emirates Ministry of Labour**, Ministerial Decree No. (788) On Wage Protection, 2009, available at: www.mohre.gov.ae/handlers/download.ashx?YXNzZXQ9NDg5.
- Vargas O**, Gonzalez J and Rodriquez F, Undeclared Labour in the Construction Industry: Country report - Spain, European Institute for Construction Labour Research, 2006, available at: www.clr-news.org/wp-content/uploads/2017/11/Spain-03-OK.pdf.
- Wells J**, Exploratory study of good policies in the protection of Construction Workers in the Middle East, International Labour Organization, Regional Office for Arab States, 2018, available at: www.engineersagainstpoverty.org/wp-content/uploads/2018/11/ILO-White-Paper.pdf.
- Wells J**, Getting better outcomes on construction projects: suggestions for modification of World Bank procurement procedures, Engineers Against Poverty, 2013, available at: www.engineersagainstpoverty.org/wp-content/uploads/2018/07/Getting-Better-Outcomes-on-Construction-Projects-f.pdf.
- Wells J**, Improving employment standards in construction in Qatar, Engineers Against Poverty, 2014, available at: www.engineersagainstpoverty.org/wp-content/uploads/2018/07/EAP_Qatar_Report_Web_Version_RGB_Revised_20131125110200.pdf.

Wells J, Protecting the Wages of Migrant Construction Workers, Engineers Against Poverty, 2016, available at: www.engineersagainstpoverty.org/wp-content/uploads/2018/07/Protecting-the-Wages-of-Migrant-Construction-Workers.pdf.

Whitaker B, "Labouring in vain: the Gulf's unpaid workers", Al-Bab, 29 September 2016, available at: www.al-bab.com/blog/2016/09/labouring-vain-gulfs-unpaid-workers.

Young A and Fairbairn S, "What's happening in the UAE construction market", Deloitte GCC Powers of Construction 2017: If it's fundable it's feasible, 2018, pp 44–47, available at: www.deloitte.com/content/dam/Deloitte/xe/Documents/realestate/construction/gccpowersofconstruction/me_construction_gccpoc2017.pdf.

Zakaria S, "New low-cost insurance for UAE workers", Khaleej Times, 15 October 2018, available at: www.khaleejtimes.com/nation/dubai/New-low-cost-insurance-for-UAE-workers.

CREDITS

Front cover image: LongJon/Shutterstock

Page 06: LongJon/Shutterstock

Page 08: LongJon/Shutterstock

Page 13: Rob Crandall/Shutterstock

Page 19: Niyazz/Shutterstock

Page 37: Kokliang/Shutterstock

Page 48: shutterlk/Shutterstock

