CORRESPONDENTS' REPORT

SWITZERLAND

POSTING OF WORKERS: NEW SWISS LIABILITY RULES[1]

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The Partial Revision of the Swiss Posting of Workers Act (PWA), adopted by the Federal Assembly on 14 December 2012, came into effect on 15 July 2013. The new law imposes on companies in the construction and construction-related industries far-reaching liability in connection with violations of terms and conditions of employment. The new liability rules apply not only in cases involving sub-contractors from outside Switzerland, but include also those in which only Swiss companies are involved. The scope of liability now goes beyond simple compliance with existing minimum wage standards and makes prime contractors liable also for the consequences of construction accidents. The authors discuss the main changes to the law and examine the effects of the new liability rules in a set of brief case studies.

I. REVISION OF THE POSTING OF WORKERS ACT

1. Background

In connection with the amendment to the Accompanying Measures on the Free Movement of Persons,[4] a revision of the Posting of Workers Act (PWA)[5]

[1] These remarks were originally published in the online journal "*Jusletter*", 24 June 2013, in German. Some minor adjustments to the original text have been made for the present version in order to reflect the current stand of the legislation. The authors would welcome comments from readers, in particular, from an international point of view. They can be reached at hubert.stoeckli@unifr.ch or roger.bieri@unifr.ch. The authors would like to thank Mr Hal Wyner for the English translation.

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[4] See the Message of the Federal Council of 2 March 2012 on the Federal Act on the Amendment of the Accompanying Measures for the Free Movement of Persons (BBl 2012 3397; hereinafter, "Message"). The decision was later made to treat the question of "joint and several liability" separately from the other issues. The first part of the revision already came into effect on 1 January 2013 and 1 May 2013. On the two rounds of partial revision, see below, at I/2.

[5] Up until 31 December 2012, the name of the law, which dated from 8 October 1999, was the "Federal Act on Minimum Working Conditions and Wage Standards for Workers Posted to Switzerland from Abroad and Accompanying Measures" (SR 823.20). For the sake of simplicity we will, in the following, refer to the law as it stood on 1 May 2013, as the "*Posting of Workers Act*" (or, in abbreviated form, as the "*PWA*"), the official short-form name (and abbreviation) of the law as of 1 January 2013. We will use the term "*revised Posting of Workers Act*" (or, in abbreviated form, "*revPWA*") to refer to the PWA as partially revised on 14 December 2012, which came into effect on 15 July 2013.

was undertaken. Among a number of variants proposed by the Federal Administration,[6] the Federal Assembly decided in favour of the so-called "Middle Variant II", with some minor modifications to the text proposed by the Administration[7]. The proposed variant envisages (with application limited to the construction and construction-related industries, where the numbers of posted workers is the greatest[8] and where the enforcement authorities have apparently also found the greatest number of violations) the introduction of "joint and several liability on the part of the prime contractor for the failure of a sub-contractor to comply with minimum working conditions and wage standards" (revPWA Article 1, paragraph 2, 2nd clause). As compared with the old law (PWA Article 5), this represents a toughening of the rules on liability. Under the old rules, it was possible for a prime contractor to free himself from liability by contractually obliging a sub-contractor to maintain compliance with the statutory provisions on the posting of workers[9]. The purpose of the revision is to provide a more effective means of combating *wage and social dumping* by preventing underbidding through non-compliance with the laws on minimum wages and working conditions along the entire sub-contractor chain.

The introduction of a new form of liability in cases in which a sub-contractor fails to comply with the "minimum working conditions and wage standards", by making prime contractors liable towards workers employed by the offending sub-contractor, raises a number of legal issues, which will be the subject of this report.

[6] The State Secretariat for Economic Affairs (hereinafter, "SECO"), by letter dated 27 June 2012, had submitted to the interested trade associations and the cantons four different models for consideration in an informal consultation procedure: a "Minimum Variant", a "Middle Variant I", the "Middle Variant II" that was chosen, and a "Maximum Variant". On these variants, see SECO, Explanatory Report on Sub-contractor Liability, dated 5 June 2012 (hereinafter, "SECO Report"), p. 7ff.

[7] The principal changes made by parliament to the text of Article 5 of the revPWA as proposed by the SECO concerned two points: (i) Liability will, from now on, no longer be borne only for violations by foreign sub-contractors, but also for those committed by Swiss sub-contractors. See below, at III/2; (ii) The liability is now borne only for compliance with wage and working conditions pursuant to Article 2, paragraph 1 of the revPWA, but does not extend to the payment of any contractual penalties imposed pursuant to Article 2, paragraph 2^{quater} of the revPWA.

[8] In 2011 the number of workers registered as having been posted to Switzerland in the construction industry proper was 7,300, and stood at 28,400 in construction-related industries (SECO Report [fn. 6], p. 4). The most recent detailed data for Switzerland concerning implementation of the accompanying measures for the free movement of persons from the EU is provided in the SECO's Accompanying Measures Report of 26 April 2013. In Germany, 26,775 employers in the construction and related industries were subjected to controls for compliance with the minimum wage provisions, whereby in a good 6.3% of those cases (1690) formal investigations were opened for violations, and fines amounting to a total of €11,589,280.76 were imposed (cf. the Reply of the Federal Government of 19 April 2013 to the Low-Level Request by the Bündnis 90/The Greens Parliamentary Group, Printed Document 17/13206, accessible through the search engine at <www.bundestag.de/dokumente/drucksachen>, last consulted 19 October 2013).

[9] "Where the work is to be performed by sub-contractors resident or domiciled abroad, the prime contractor shall … place the sub-contractor under contractual obligation to maintain compliance with this Act" (PWA Article 5, paragraph 1).

2. The two rounds of Partial Revision

The partial revision to the Posting of Workers Act was carried out in two separate rounds. The provisions of the *first round* were adopted on 15 June 2012 and came into effect on 1 January 2013 and 1 May 2013[10]. The provisions of the *second round*, the focus of our attention here, were adopted on 14 December 2012 and came into effect on 15 July 2013.

(a) The primary purpose of the *first round of revision* was to combat bogus self-employment and to enlarge the scope of possible sanctions, as reflected in the law's somewhat bloated new name. The full official name, to be used as of 1 January 2013 when referring the revised Posting of Workers Act, is the awkward "Federal Act on Accompanying Measures Governing the Posting of Workers and on Control of the Minimum Wages foreseen in Normal Employment Contracts". The addition of the reference to "Control of the Minimum Wages Foreseen in Normal Employment Contracts" is noteworthy, in that it reflects the legislative will to include an indication in the title that the "law no longer applies only with regard to posted workers"[11] – which brings us to the subject-matter of the second round of revision.

(b) The *second round* concerned only a very few provisions, but nevertheless packed quite a wallop:
Article 1 of the revPWA describes the subject-matter of the law. In *paragraph 2* of that provision, a *second sentence* has been added, so that it now reads as follows:

> "It [the Posting of Workers Act] also regulates the control of Employers who employ workers in Switzerland, and the penalties for such Employers where they infringe provisions on minimum wages as set out in a normal employment agreement within the meaning of Article 360a of the Code of Obligations (CO). *The law further regulates joint and several liability on the part of prime contractors for non-compliance with minimum working conditions and wage standards by sub-contractors.*" [Our emphasis.]

The lynchpin of the second round of revision, however, was *Article 5* of the *revPWA*. This provides the statutory basis and the terms for prime contractor liability. Insofar as the sub-contractors themselves are concerned, it is – contrary to what the caption to the Article suggests – not Article 5, but Article 2 of the revPWA that is decisive for them, where the minimum obligations of sub-contractors with regard to "working conditions and wage standards" in employment agreements with "posted workers" are set out. While Article 2 of the revPWA survived both rounds of revision practically

[10] Cf. AS 2012 6703 (in addition, due to the change in the name of the Department of Economic Affairs to the "Federal Department of Economic Affairs, Education and Research", Article 7a, paragraph 3, of the PWA was also amended effective 1 January 2013, cf. AS 2012 2655).

[11] Message (fn. 4), p. 3421. See also below, at III/2.

unchanged,[12] Article 5 of the law governing the posting of workers was almost entirely rewritten. It now reads as follows:

> "1. Where tasks are performed in the construction or construction-related industries by sub-contractors, the prime contractor (design-build, general, or main contractor) shall bear civil liability for non-compliance by the sub-contractor with provisions governing net minimum wages and working conditions pursuant to Article 2, paragraph 1.
> 2. The prime contractor shall bear joint and several liability for all sub-contractors subordinate to him in a contract chain. He shall bear such liability only where action has previously been brought without success against the sub-contractor or where such action cannot be brought.
> 3. The prime contractor may free himself from liability pursuant to paragraph 1 by demonstrating that he has shown all due care with regard to compliance with wage and working condition standards for each subcontract awarded, as called for under the circumstances. The duty of care shall be considered to have been fulfilled, in particular, where the prime contractor has obtained from the sub-contractors *prima facie* evidence, in the form of documents and receipts, of their compliance with wage and working condition standards.
> 4. The prime contractor may further be subject to the penalties set out in Article 9 where he fails to fulfil his duties of care pursuant to the foregoing paragraph 3. Article 9, paragraph 3 shall not apply."

Finally, the revision includes a transitional provision, revPWA Article 14a, pursuant to which the prime contractor shall not be held liable where the "contract under which he transferred the work in question to the first sub-contractor in the contract chain was concluded prior to the entry of this amendment into effect". In other words, the new rules on liability will not apply even where further subcontracts in the contract chain are concluded subsequent to the entry of the revised Posting of Workers Act into effect, provided that the original agreement between the prime contractor and the first sub-contractor was concluded prior to the law coming into force.

3. Implementation provisions

Additional rules for the concrete implementation of the new liability rules (revPWA Article 5) have been enacted through a partial revision of the *Posting of Workers Ordinance (PWO)*,[13] which came into effect simultaneously with the new statutory provisions adopted in the second round of revision (i.e. on 15 July 2013). The revised Posting of Workers Ordinance (revPWO) sets out in the sections relevant to this report the means by which a prime contractor may fulfil his duty of care and thus free himself from liability.

[12] In Article 2, paragraph 1(a), of the PWA, the words "including supplementary payments" were added in the first round of revision.

[13] Ordinance of 21 May 2003 on Workers Posted to Switzerland from Abroad (SR 823.201).

II. A CASE STUDY

1. A sample case

To help work out the implications of revPWA Article 5, we have chosen the following sample case:

> "A construction company domiciled in Switzerland, having contracted with a property owner for a construction project, enters into an independent contractor agreement with a sub-contractor domiciled abroad. The foreign sub-contractor performs services in Switzerland, for which he pays his workers, who have been posted to Switzerland from abroad, wages that are below the minimum wage that was agreed upon in a generally binding collective agreement (GBCA). One of the workers posted by the sub-contractor brings legal action against the construction company, as the prime contractor, seeking compensation for the difference between the wages paid and the collectively bargained minimum wage."

What considerations must be taken into account in order to resolve this case?

2. Considerations towards a resolution of our sample case

(a) The suit brought by the worker who was posted to Switzerland against the prime contractor is civil suit, in keeping with the terms of revPWA Article 5, paragraph 1. The *place of jurisdiction* (meaning both international and local jurisdiction) is thus determined according to the terms of the Swiss Private International Law Act (PILA), Article 115, paragraph 3[14]. Because the prime contractor may be held liable only by default, it is also only by default that suit may be brought against him (cf. below, 2(c)). The first question that must be dealt with, therefore, concerns the jurisdiction of Swiss courts over suits brought by a posted worker directly against his foreign employer (that is, in our sample case, against the sub-contractor). PILA Article 115, paragraph 3, provides that also in such suits jurisdiction lies with Switzerland. Hence, in addition to the court with jurisdiction under the law of his home country, there is, pursuant to the Swiss PILA, also a Swiss court with jurisdiction, before which the posted worker may bring suit against his employer – bearing in mind however, that Swiss jurisdiction applies only for such claims as are listed in revPWA Article 2, paragraph 1[15]. Swiss jurisdiction also applies even over disputes that fall within the scope

[14] Federal Act of 18 December 1987 on Private International Law (SR 291).

[15] For the adjudication of other claims, the Swiss courts – unless otherwise agreed – do not have jurisdiction. This thus gives rise to a splitting of jurisdiction; cf. Furrer Andreas/Schramm Dorothee, "*Die Auswirkungen des neuen Entsendegesetzes auf das schweizerische IZPR*", SZIER 2003, p. 37ff., p. 46f.; Portmann Wolfgang, Entsendegesetz, in: Kellerhals Andreas/Portmann Wolfgang/Thürer Daniel/ Weber Rolf H (Eds.), Bilaterale Verträge I & II Schweiz - EU, Zurich 2007, p. 367ff., N 128.

of application[16] of the Lugano Convention,[17] despite the fact that the latter, as an international treaty, would normally prevail over the PILA[18]. The exception is justified by the fact that the EU Member States (through the implementation of Article 6 of the Posting of Workers Directive[19] in their respective national legislation) and Switzerland (in PILA Article 115, paragraph 3) have established uniform rules in this regard. In application of Article 67 of the Lugano Convention, in conjunction with Point 3 of Protocol 3 to that Convention, a Swiss court may base its own jurisdiction on PILA Article 115, paragraph 3, the terms of which constitute an autonomous implementation of Article 6 of the PWD[20]. Judgments given in reliance upon PILA Article 115, paragraph 3, may, pursuant to the Lugano Convention, be recognised and enforced, in particular, against companies that post workers (sub-contractors) and are domiciled in the EU[21].

(b) After jurisdiction, comes the question of *applicable law*. What are the provisions governing working conditions and wage standards, for compliance with which a posted worker may bring legal action in Switzerland? Choice of law clauses are of no relevance here. Rather, it is Article 18 of the PILA that applies, and it may be assumed that Article 2 of the revPWA must be considered as one of the "provisions of Swiss law" that "by reason of their special purpose find mandatory application, without regard for the law designated in this Act" (PILA Article 18). Article 2 of the revPWA is of the nature of a "*loi d'application immédiate*", the application of which is mandatory[22]. Any other solution would require acceptance of a situation in which revPWA Article 2 would remain dead letter in all cases in which a suit for performance was brought by an employee whose individual employment agreement was subject not to Swiss law but to the legal regime of another country (cf. PILA Article 121).

[16] Stämpflis Handkommentar LugÜ-Müller Thomas, 2nd Edition, Bern 2011, No 18 on Article 19; Furrer/Schramm (fn. 15), p. 50ff.; Portmann (fn. 15), N 129, with further references.

[17] Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention; OJ L 339, 21/12/2007, pp. 3 to 41).

[18] The proviso giving precedence to international treaties is found in PILA Article 1, paragraph 2.

[19] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21/01/1997, pp. 1 to 6; hereinafter, "PWD"). Article 6 is here relevant on jurisdiction as it reads: "In order to enforce the right to the terms and conditions of employment guaranteed in Article 3 [of the PWD], judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State."

[20] Furrer/Schramm (fn. 15), p. 51f., esp. fn. 42, on the now prevailing legal situation; see also Spühler Karl/Rodriguez Rodrigo, Internationales Zivilprozessrecht, 2nd Edition, Zurich 2013, No 178, fn. 224.

[21] Spühler/Rodriguez (fn. 15), N 178, fn. 224.

[22] BSK IPRG-Brunner Alexander, 2nd Edition, Basel 2007, N 37 on Article 121; Portmann (fn. 15), No 115. The immediate effect of Article 2 of the revPWA also extends to CO Article 342, paragraph 2, on the compatibility of civil claims with public employment duties; accordingly, an employee may also file a civil suit for performance even in cases where the parties have made the employment agreement subject to another legal regime through a choice of law clause (PILA Article 121, paragraph 3). Cf. ZK IPRG-Vischer Frank, 2nd Edition, Zurich/Basel/Geneva 2004, N 15 on Article 18.

(c) Any action by an employee *must first be brought against the foreign employer* (the sub-contractor), whereby, in such cases, the employee is entitled to elect unilaterally to forego conciliation proceedings (Civil Procedure Code [CPC] Article 199 paragraph 2[a])[23].

It is only *by default* that the employee (in our sample case) can file suit against the "*prime contractor*" within the meaning of revPWA Article 5 paragraph 1, that is, the construction company that was hired directly by the end client. While it is true that Article 5 paragraph 2 of the revised Posting of Workers Act expressly states that the prime contractor is jointly and severally liable with the sub-contractor, it also contains the proviso that such liability can only be invoked "*where action has previously been brought without success against the sub-contractor or where such action cannot be brought*". The preparatory material does not contain any reliable indication as to the legal implications of a "joint and several liability" that can only be invoked by default. As we understand it, the new regime, contrary to the actual text of the law, does not envisage joint and several liability at all, since the employee is expressly not given a free choice as to whether he wishes to bring action for performance against his employer or against the prime contractor (cf. CO Article 144, paragraph 1)[24]. Rather, what is involved here is a statutory suretyship, so that the provisions governing suretyships would apply, *mutatis mutandis*. Under the terms of this implicit statutory guarantee, it is a simple suretyship, so that the surety cannot be held jointly and severally liable.

Decisive in determining the effectiveness of the new liability rules will be the standard used in determining whether the conditions rendering action against the prime contractor admissible, as set out in the revised Posting of Workers Act (and not pursuant to the law on suretyships), have been fulfilled. In view of the formulation chosen by the legislators for describing those conditions in revPWA Article 5, paragraph 2, it would appear that the intent was for a strict standard to be applied. Regardless of the criteria chosen, however, the burden of proving that those conditions have been fulfilled will lie with the employee who wishes to bring legal action against the prime contractor in reliance upon the revised Posting of Workers Act.

(d) A further condition upon which the prime contractor's liability is contingent is that the sub-contractor himself be subject to liability for "non-compliance with provisions governing the minimal wages and working conditions pursuant to Article 2, paragraph 1 [revPWA]" (revPWA Article 5, paragraph 1). Where a sub-contractor has paid wages to his employee that are in conformity with the GBCA, the employee does not have any right of action that he can successfully assert against the prime contractor. The prime contractor may be held liable only if, and to the extent that, the

[23] Swiss Civil Procedure Code of 19 December 2008 (SR 272).

[24] Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations; SR 220).

sub-contractor also bears liability. Pursuant to Article 8 of the Civil Code,[25] it is incumbent upon the employee to prove the existence of such a right of action if he wishes to obtain satisfaction from the prime contractor. The prime contractor may free himself from liability pursuant to paragraph 1 "by demonstrating that he has shown all due care with regard to compliance with wage and working condition standards for each subcontract awarded, as called for under the circumstances" (revPWA Article 5, paragraph 3). In other words, the prime contractor – contrary, for example, to the situation under German law[26] – is not subject to any *strict liability* in the event that the sub-contractor fails to fulfil the minimum "working conditions and wage standards" as required under revPWA Article 2, paragraph 1. At the same time, however, it is not entirely clear what, specifically, is meant by *"all due care" within the meaning of the revPWA*.

One thing, to be sure, is certain: the administrative expense involved in showing that all due care was taken will involve a substantial increase in overheads for the prime contractor. In principle, it should be sufficient for the prime contractor to have "obtained from the sub-contractors *prima facie* evidence, in the form of documents and receipts, of their compliance with wage and working condition standards" (revPWA Article 5, paragraph 3). What this means is defined in more concrete terms in the *revised Posting of Workers Ordinance*. A note of criticism is called for by the fact that the Ordinance mentions only "documents", in which a sub-contractor makes declaration that he is in compliance with wage and working condition standards, while the Act evidently does not consider such simple declarations to be sufficient, since it also refers to "receipts" and thus apparently requires that the prime contractor not be satisfied with mere declarations but that he also demand receipts for wages paid. The fault, in our view, nevertheless lies less with the Ordinance than with the terms of revPWA Article 5, paragraph 3, which sets the bar much too high for meeting the duty of care imposed on the prime contractor.

III. FOUR VARIATIONS ON THE SAMPLE CASE

1. Liability of prime contractors domiciled outside Switzerland

The other cases we would like to look into are all variations on the above sample case, for which we sketched out a solution. For the *first variation* we have moved the domicile of the prime contractor from Switzerland to another (European) country. This switch, which is naturally of particular

[25] Swiss Civil Code of 10 December 1907 (SR 210).

[26] §14 of the Act of 20 April 2009 on Mandatory Employment Conditions for Workers Posted Cross-Border and Regularly Employed Domestically (*Arbeitnehmer-Entsendegesetz; AEntG*) envisages strict liability on the part of the "awarder of the contract" (*Auftraggeber*), which is limited, however, to compliance with minimum wage requirements (and the here not relevant "payment of contributions to a joint scheme for parties to a collective agreement").

interest for foreign companies planning construction in Switzerland, does not, however, have any effect on the applicability of the new Swiss liability rules. Prime contractors from abroad are equally bound by the new provisions when workers are posted to Switzerland. This being the case, the same situation obtains as in our sample case: jurisdiction over actions brought by a worker against a prime contractor domiciled in an EU Member State lies with the Swiss courts, at the place to which the worker was posted (PILA Article 115, paragraph 3); and a judgment in favour of the worker is enforceable against the prime contractor in conformity with the Lugano Convention[27]. Not only that: our first variation applies also in combination with any of the other variations that follow, so that the findings in those examples are also relevant in all cases where the prime contractor is domiciled outside Switzerland.

2. Liability also for offending sub-contractors domiciled in Switzerland

The *second variation* consists in moving the *domicile of the offending sub-contractor to Switzerland*. This means that there are no international relationships involved to which the PILA would apply (PILA Article 1). Rather, the case is now purely domestic in nature. It is occasionally argued that the Posting of Workers Act has no role to play in such cases. This was also our initial understanding of the situation, which we have, however, been compelled to revise. In the future, prime contractors will bear unpaid wage liability also for sub-contractors domiciled in Switzerland. It is true that Article 2, paragraph 1, of the revPWA speaks only of "working conditions and wage standards" that must be complied with towards "*posted* workers" (our emphasis), so that this provision is aimed only at employers (which also includes sub-contractors) who operate abroad by posting workers to Switzerland; employers domiciled in Switzerland are not subject to revPWA Article 2, but are required in any case to satisfy the conditions mentioned there. It is thus only foreign employers (sub-contractors) who fall within the scope of Article 2, paragraph 1, of the revPWA, to which Article 5, paragraph 1, of the revPWA expressly refers. It must further be recognised that also the previous version of PWA Article 5, paragraph 1,[28] was intended to be applied only to cases in which "work by sub-contractors resident or domiciled abroad" was performed, to the exclusion (by *argumentum e contrario*) of domestic sub-contractor relationships.

This notwithstanding, we have come to the conclusion that, under the revised Posting of Workers Act, all construction subcontracting agreements, including those to which all of the parties are domiciled in Switzerland, are now also subject to the rules on prime contractor liability, as set out in that law. In support of this view, we refer, firstly, to Article 1, paragraph 2, 2nd

[27] See above, at II/2/a.
[28] For the text, see AS 2003 1370, and fn. 9, above.

clause, cited above,[29] which was introduced into the law in the second round of revision; and secondly, to the records of the parliamentary deliberations on the law. The documentation[30] makes it clear that the inclusion of Article 1, paragraph 2, 2nd clause, in the revPWA (upon the proposal of a Committee minority) was the result of a conscious decision, and was specifically designed to ensure that also domestic sub-contractors were included within the scope of the law's application. That same Committee minority was also successful in imposing its view with regard to the wording of revPWA Article 5, paragraph 1. The "Middle Variant II", with which we are here concerned, originally foresaw a similar limitation of prime contractor liability to violations on the part of "sub-contractors *domiciled abroad*". (our emphasis)[31] In the course of the parliamentary deliberations, however, this limitation was dropped in favour of the proposal by the Committee minority, so that according to the final draft the prime contractor bears "joint and several liability for all sub-contractors subordinate to him in a contract chain" (revPWA Article 5, paragraph 2, 1st clause). This being the case, it makes no difference at what point (or even whether) a foreign sub-contractor was engaged.

The ostensible reason for widening the scope was to prevent the sort of discrimination prohibited under the Free Movement of Persons Agreement between Switzerland and the EU[32]. Claims of discrimination would have been possible if prime contractors could have been held liable only for foreign contractors, but not for Swiss contractors, since, in such case, prime contractors would naturally have had a tendency to prefer (as a general rule) Swiss sub-contractors over their foreign counterparts, as a means of avoiding the additional liability risk[33]. The principal effect of this extension of the scope of liability, however, is that it reinforces the position of Swiss workers, who may now have recourse against prime contractors, who are obliged under the new law to assume statutory suretyship for compliance with working conditions and wage standards by their sub-contractors.

3. Liability for the consequences of work accidents

In the *third variation*, we have the case where a sub-contractor has paid the wages due, so that the employee has no right of action against the prime contractor for the recovery of unpaid wages, but is entitled to bring

[29] See above, at I/1.

[30] Cf., e.g., the Zanetti vote, AB 2012 p. 873f., and the remarks by Federal Councillor Schneider-Amman, AB 2012 N 2031 and AB 2012, p. 878. The Council of States adopted the Committee's minority proposal by a vote of 22 to 18 (AB 2012, p. 880).

[31] Draft proposal for Article 5 of the PWA, quoted on p. 2 of the appendix to the SECO Report (fn. 6).

[32] Agreement of 21 June 1999 between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (OJ L 114, 30/04/2002, p. 6-72). The prohibition on discrimination is found in Article 2 of that Agreement.

[33] See the SECO Report (fn. 6), p. 14f.

action for the consequences of an accident at work, and thus *sues for compensatory damages*. That this should also be possible may, at first, seem surprising, since it is widely assumed with regard to the Posting of Workers Act, that its sole purpose is to prevent wage dumping and thereby to maintain local wage levels. This assumption was already incorrect while the previous version of the Protection of Workers Act was still in effect – and it remains so following the revision. The compliance that is required concerns not only net minimum wages, but also "working conditions pursuant to Article 2, paragraph 1", as is set out in revPWA Article 5, paragraph 1. This also includes the provisions on "work safety and health protection at the workplace" (revPWA Article 2, paragraph 1[d]), as "prescribed in the Federal statutes [and in the] ordinances of the Federal Council" (revPWA Article 2, paragraph 1). The reference here is to the Employment Act[34] and the Accident Insurance Act,[35] along with their respective Ordinances, and thus also to the Construction Work Ordinance[36]. Failure on the part of a sub-contractor to comply with work safety standards may thus also serve as a basis for prime contractor liability, and this even in those cases where the prime contractor would not normally bear any (tortious) liability towards the accidentally injured worker (e.g., where he is able to free himself from liability by invoking CO Article 55).

The fact that they may be held accountable also for the consequences of an accident at work means that prime contractors bear notably broader liability under Swiss law than under the legal regimes of other countries. Germany and Austria, for example, are more restrained in this regard. It is true that an employer (sub-contractor) who posts a worker to an EU Member State must guarantee compliance with the "terms and conditions of employment" as are laid down "in the Member State where the work is carried out" (Posting of Workers Directive Article 3, paragraph 1)[37]. The decisive difference, however, lies in the fact that the liability of the prime contractor with regard to minimum "terms and conditions of employment" under the national laws of Germany and Austria extends only to the protection of minimum wages, but does not cover safety at the workplace[38]. The Swiss regime, as set out in revPWA Article 5, in conjunction with Article 2, paragraph 1, thus goes significantly further than the rules applicable under German and Austrian law.

[34] Federal Act of 13 March 1964 on Employment in Industry, Crafts and Trade (SR 822.11).

[35] Federal Act of 20 March 1981 on Accident Insurance (SR 832.20).

[36] Ordinance of 29 June 2005 on the Safety and Health Protection of Employees in Construction Work (SR 832.311.141).

[37] In Germany this provision was implemented through §2 of the AEntG.

[38] For Germany, cf. AEntG §14 (Liability of the Awarder of the Contract) "A contractor … shall be held liable for obligations … for the payment of the minimum wage to workers …". In Austria, the applicable rule is set out in §7c paragraph 3 of the Employment Contract Legislation Amendment Act of 26 February 2013 (*Arbeitsvertragsrechts-Anpassungsgesetz vom 26 Februar 2013 [AVRAG]*) on the liability of general contractors: "The general contractor shall be liable … for claims for remuneration by the workers … employed by sub-contractors."

4. Liability for all sub-contractors along the entire contract chain

In our *fourth variation* (and, for the moment, the last) the offending employer does not have a direct contractual link with the prime contractor, but is a sub-contractor to another sub-contractor who is, in turn, a direct party to a contract with the prime contractor. The indirectness of the relationship does not, however, have any effect on the liability of the prime contractor, since revPWA provides that the prime contractor is to bear liability not only for his own sub-contractors, but also for all sub-contractors subordinate to him in a contract chain. Hence, the fact that there is no contractual relationship between the prime contractor and the sub-sub-contractor has no relevance. Here again, the prime contractor can free himself from this liability by producing proof that he used all due care "with regard to compliance with wage and working condition standards". This duty of care must, however, be exercised personally by the prime contractor with respect to all sub-contractors in the contract chain, so that it is not sufficient for him to merely obtain warranties in that regard from his own direct contractual partners.

IV. CONCLUSION

The introduction of unpaid wage liability for construction companies, through the partial revision of the Posting of Workers Act, is an attempt to strengthen the position of sub-contractor employees. Whether this attempt will be successful, and whether the desired effects will be achieved, is still an open question. It will depend, firstly, on the steps that an employee will be required to undertake against his employer before he can bring legal action against the prime contractor. The second decisive factor will be the standards that are set for the proof that a prime contractor must produce in order to free himself from liability. However, the question remains as to why Swiss legislators have chosen to intervene in the construction industry, in particular, as there is no doubt that similar abuses also occur in other industries.