

International **Comparative** Legal Guides



Practical cross-border insights into construction & engineering law

Construction & Engineering Law 2022

Ninth Edition

Contributing Editors:

Alan Stone & Tom Green
RPC



ICLG.com

Expert Analysis Chapter

1

Proper Selection & Implementation of Forensic Schedule Analysis Methods
Kenji P. Hoshino, Project Controls & Forensics, LLC

Q&A Chapters

7

Brazil
Pinheiro Neto Advogados: Júlio César Bueno & Thaís Fernandes Chebatt

14

China
Merits & Tree Law Offices: Zheyuan Jin, Hong Lu & Chun Gu

23

Denmark
Bruun & Hjejle Advokatpartnerselskab:
Liv Helth Lauersen & Gregers Gam

31

England & Wales
RPC: Alan Stone, Tom Green, Elizabeth Alibhai & Arash Rajai

41

France
DS Avocats: Stéphane Gasne, Véronique Fröding,
Clémentine Liet-Veaux & Jean-Marc Loncle

50

Germany
Breyer Rechtsanwälte: Erlmest E. Burns, III, J.D. & Nicolas Kern

60

India
Kachwaha and Partners: Sumeet Kachwaha & Tara Shahani

69

Ireland
A&L Goodbody LLP: Myriam Lace & Enda O'Keeffe

82

Italy
Dardani Studio Legale: Luca Di Marco & Arianna Perotti

90

Japan
Mori Hamada & Matsumoto: Satoru Hasumoto,
Fuyuki Uchitsu & Yuki Tominaga

99

Malaysia
C. H. Tay & Partners: James Ding Tse Wen & Tey Siaw Ling

107

Mexico
COMAD, S.C.: Roberto Hernández García & Juan Pablo Sandoval

116

Nigeria
Abuka & Partners: Patrick C. Abuka & Sunday Edward, Esq.

125

Norway
Advokatfirmaet Thommessen AS: Jacob F. Bull & Henrik Møinichen

135

Singapore
Drew & Napier LLC: Mahesh Rai & Don Loo

144

Slovenia
Law Firm Neffat: Njives Prelog Neffat

154

Sweden
AG Advokat KB: Ola Ihse & Vincent Edberg

162

Switzerland
MLL Meyerlustenberger Lachenal Froriep Ltd.:
Philippe Prost & Jacques Johner

171

Taiwan
Lee and Li, Attorneys-at-Law: Wei-sung Hsiao & Chun-wei Chen

178

USA
Oles Morrison Rinker & Baker LLP:
Douglas Stuart Oles

187

Zimbabwe
Wintertons Legal Practitioners: Nikita Madya & Chantele Sibanda

Switzerland

MLL Meyerlustenberger Lachenal Froriep Ltd.



Philippe Prost



Jacques Johner

1 Making Construction Projects

1.1 What are the standard types of construction contract in your jurisdiction? Do you have: (i) any contracts which place both design and construction obligations upon contractors; (ii) any forms of design-only contract; and/or (iii) any arrangement known as management contracting, with one main managing contractor and with the construction work done by a series of package contractors? (NB For ease of reference throughout the chapter, we refer to "construction contracts" as an abbreviation for construction and engineering contracts.)

Swiss statutory law contains many general and specific contractual rules, regulating specific types of contract, including those for construction. Freedom of contract is, however, a prevailing principle in Swiss contract law, under which priority to the parties' intentions is, furthermore, often provided. Generally, parties are free to deviate from statutory law by altering provisions or adding new ones.

In practice, one observes, therefore, various types and configurations of contractual arrangements for construction projects, depending on their complexity. Three types may be distinguished:

- (i) A **total contract**, stipulating that the contractor both designs and executes the project. This type of contract is commonly applied in complex projects. The contractor may design the project in coordination with architects and other planners, yet executes it like a general contractor.
- (ii) A **general contract** in which project design and project construction are separated: an architect is hired for the design; a general contractor, or various specialised contractors, for the performance of work.
- (iii) A **management contract**, being a declaration of the total and general contractor's contract, stipulating that a management contractor manages the different contractors at the same worksite.

1.2 How prevalent is collaborative contracting (e.g. alliance contracting and partnering) in your jurisdiction? To the extent applicable, what forms of collaborative contracts are commonly used?

To date, collaborative contracting is a concept that is not commonly used in Switzerland, at least not under this term.

1.3 What industry standard forms of construction contract are most commonly used in your jurisdiction?

In Switzerland, several standard forms are used at different levels.

It should be noted that parties must expressly include these regulations in contracts in order for them to be applicable. As mentioned, it is not uncommon for parties to amend regulations to cater for specific project needs and/or to balance out provisions.

The Swiss Society of Engineers and Architects (**SIA**) issues standard terms that are widely used in Swiss construction and design contracts. It should be noted that different rules apply to different types of work. SIA 118, for instance, applies to construction contracts, whereas SIA 102 and 103 are used for contracts with architects and construction engineers respectively. For public procurement contracts, the Co-ordination Conference of the Responsible Federal and Cantonal Clients and Owners (**KBOB**) issues a standard form for general and total contractor agreements. These standards are increasingly applied to private projects too. For international agreements, the International Federation of Consulting Engineers (**FIDIC**) issues various sets of conditions, which are considered the most common standard forms.

1.4 Are there any standard forms of construction contract that are used on projects involving public works?

In Switzerland, apart from the standard forms mentioned in question 1.3 above, no specific forms of construction contracts are used for projects involving public works. A construction contract between an employer and a contractor will be governed by the rules of private law, despite its public nature. The public nature of work does matter, however, in the process of choosing a contractor: for public works, a public body will have to comply with public procurement rules. Under Swiss law, a public procurement occurs when a public body or a company subject to public procurement law concludes a contract with a private tenderer concerning the acquisition of supplies, services or buildings, by means of financing. This law provides a procedure for awarding tenders transparently.

If a construction project requires that a public-private partnership (**PPP**) be set up, i.e. when private actors seek public funds or material and technical assistance of public authorities in order to implement a project, the contract between private actors and public bodies is governed by private law: PPP partners pool their resources and jointly assume responsibility for the execution of the relevant task concerned and its risks. PPP contracts usually entail the following elements:

- performance of a public task;
- at least one public and one private partner;
- joint responsibility;
- pooling of resources;
- risk allocation between partners; and
- long-term (usually over the entire project life cycle) and process-oriented collaboration.

A construction contract with a contractor will, like any construction contract, be governed by private law.

1.5 What (if any) legal requirements are there to create a legally binding contract (e.g. in common law jurisdictions, offer, acceptance, consideration and intention to create legal relations are usually required)? Are there any mandatory law requirements which need to be reflected in a construction contract (e.g. provision for adjudication or any need for the contract to be evidenced in writing)?

Like any contract under Swiss law, the conclusion of a construction contract involves the exchange of an offer and the resultant acceptance of the contracting parties. Expressions of will must encompass the *essentialia negotii* of a construction contract, which include work to be carried out and its price (article 363 of the Swiss Code of Obligations (CO)). However, due to the broad formulation of article 374 CO, parties do not necessarily have to agree on a fixed price or its calculating formula. Furthermore, there are no special conditions regarding the form of a contract. Most construction contracts, however, are concluded in writing for clarity and evidentiary purposes.

1.6 In your jurisdiction please identify whether there is a concept of what is known as a “letter of intent”, in which an employer can give either a legally binding or non-legally binding indication of willingness either to enter into a contract later or to commit itself to meet certain costs to be incurred by the contractor whether or not a full contract is ever concluded.

Under Swiss law, a “letter of intent” has in principle no binding effects, unless unequivocally specified by parties and provided that it contains all the *essentialia negotii*. However, a letter of intent requires each party to negotiate in good faith. A breach of this pre-contractual obligation may trigger liability for damages, even if no contract has been concluded (*culpa in contrahendo*).

1.7 Are there any statutory or standard types of insurance which it would be commonplace or compulsory to have in place when carrying out construction work? For example, is there employer's liability insurance for contractors in respect of death and personal injury, or is there a requirement for the contractor to have contractors' all-risk insurance?

Construction work requires many types of insurance. In most Cantons, it is compulsory to take out insurance covering fire and elementary damages during construction works.

Principally, contractors must hold civil liability insurance, which covers property damage and personal injury (including death), minimum coverage for which is often defined in the contract. The employer must also have civil liability insurance. At the end of the construction work, he is usually responsible for taking out the required insurance coverage for the building itself. Furthermore, it is common to take out “construction work” insurance to cover potential damages to the work itself, the premiums for which are often shared equally between the customer and the contractor.

Usually, material, tools and machinery on the worksite are also insured by their respective owners.

From a labour law perspective, contractors have to insure their employees against accident. Contributions to accident insurance must be paid either to the Swiss Accident Insurance Agency

(SUVA) or approved collective accident insurance institutions. The premiums for occupational accident insurance are borne by the contractor; premiums for non-occupational insurance are borne by his employees. Contractors do not take responsibility for health insurance for their employees. Employees must take out their own health insurance. Such insurance is also mandatory.

1.8 Are there any statutory requirements in relation to construction contracts in terms of: (a) labour (i.e. the legal status of those working on site as employees or as self-employed sub-contractors); (b) tax (payment of income tax of employees); and/or (c) health and safety?

There are various norms of labour and public law in Switzerland aimed at protecting workers, assuring payment of income tax and preserving employees' health and safety.

Construction sites are regularly inspected by authorities, notably to prevent undeclared work. If regulations are breached, authorities can stop the construction work and impose administrative fines. It should be noted that constructors may be held liable for violations by their sub-contractors.

Concerning labour law, the employer must comply with general principles, such as those of non-discrimination and equal treatment. In practice, it is common for collective labour schemes to set minimum standards for workers that must be followed by the employer. There are also mandatory declarations that must be made in the context of public procurements. In case of non-compliance, the contractor might be black-listed. Further, the standard anti-corruption and bribery regulations of the Swiss Criminal Code apply. The Federal Act on Public Procurement, which has undergone a complete revision that became effective in 2021, allows the employer to exclude a tenderer who has violated anti-corruption provisions. Such violations furthermore constitute admissible grounds to appeal against an award decision. However, no dedicated set of rules applies specifically to the (private) construction sector.

There are specific regulations that apply to certain foreign workers in Switzerland in terms of both labour and taxes, for example requiring the employer to pay employees' tax (with-drawal tax).

In terms of health and safety, at a Swiss federal level, labour law as well as administrative and environmental laws set numerous regulations regarding the protection of workers (equipment, working hours, etc.) and the use, elimination and/or storage on the worksite of toxic materials, asbestos, polychlorinated biphenyls (PCBs), leaded paint, chemicals, etc. Specific local regulations should also be considered. For older buildings (notably those built before 1990), building permits are subject to an asbestos analysis and, in some Cantons, to a PCB/leaded paint analysis. If a building contains asbestos (or PCBs/leaded paints), the contractor must comply with special requirements for workers (duty to report, paper trail, special equipment containment to be used by workers, etc.). Furthermore, materials considered hazardous must imperatively be eliminated in authorised waste disposal areas.

As of January 2020, the limitation period for compensation claims in case of illness or injury due to a breach of health and safety regulations has been extended from one year to three years. The *dies a quo* of the limitation period corresponds to the day on which the injured party became aware of damage and of the person liable for compensation. With respect to the absolute limitation period, claims for damages or satisfaction in cases of illness or injury are now time-barred after a period of 20 (instead of 10) years from the day on which the harmful conduct occurred or ceased.

As of January 2022, construction work must be planned in such a way that the risk of occupational injury, illness or damage to health is as low as possible. According to the new Construction Work

Regulation, the respective measures must now be documented in writing in a safety and health protection plan and included in the contractor agreement.

1.9 Are there any codes, regulations and/or other statutory requirements in relation to building and fire safety which apply to construction contracts?

For construction work, Switzerland applies a complex system with various regulations and norms, which are issued either by public authorities or by professional associations.

In the Swiss federal system, Swiss Cantons and, to a lesser extent, their municipalities, are responsible for issuing **building safety standards** concerning buildings located in their territory. The federal government can only set safety standards for construction works of a federal nature such as cable cars, highways or railways. Cantons and municipalities prescribe merely that buildings must be constructed “safely”. Yet, few concrete requirements are provided. Therefore, private associations such as the SIA regularly issue guidelines containing safety standards. These guidelines are often adopted by cantonal legislation and by parties in their construction contracts.

The Cantons are also responsible for setting **fire safety standards**. It is, thus, necessary to refer to cantonal public law to find out what technical elements must be considered for fire protection.

The responsibility for meeting standards lies with the building owner. If a construction is not compliant with standards, the owner is responsible towards the authorities and may be fined as well as ordered to make the building compliant. The owner, then, can take civil action against the contractor if the latter has not respected contract and construction standards.

1.10 Is the employer legally permitted to retain part of the purchase price for the works as a retention to be released either in whole or in part when: (a) the works are substantially complete; and/or (b) any agreed defects liability period is complete?

Although not a legal requirement, contractors often take out – and the employer will often request – a security for liability for defects covering claims of the employer for defects that appear during the warranty period. It can either be a bank or insurance guarantee (abstract, irrevocable, payment on first demand without any further justification) or a retention on progress payments to secure the performance of the contract after the acceptance of the work, namely with respect to the employer’s warranty rights.

Retention of part of the purchase price (usually 5–10% of the cost of the work) is therefore common in construction projects, whether contractually agreed or further to applicable standards. It either comes in addition to, or instead of, a performance bond (see question 1.11 below).

1.11 Is it permissible/common for there to be performance bonds (provided by banks and others) to guarantee the contractor’s performance? Are there any restrictions on the nature of such bonds? Are there any grounds on which a call on such bonds may be restrained (e.g. by interim injunction); and, if so, how often is such relief generally granted in your jurisdiction? Would such bonds typically provide for payment on demand (without pre-condition) or only upon default of the contractor?

It is common for the contractor to be required to provide a performance bond, which subordinates the achievement of works,

predominantly for large-scale construction works. The contractor usually must provide the employer with a performance guarantee securing its performance obligations under a contract. The performance guarantee is usually valid until a few months after the final acceptance of the work performed by the contractor. Yet, it is not commonly used for smaller projects. Upon achievement, a guarantee related to defects of the construction must be provided.

Both the performance guarantee and the defects warranty are generally secured by a bank guarantee or a security bond. If so, the guarantor’s bank undertakes to pay to the party benefiting from the guarantee, upon its first demand, any amount up to a defined maximum. Such guarantee is irrevocable, unconditional and may be exercised if certain obligations are not properly fulfilled. The security for liability for defects can also be a retention on progress payments to secure the performance of a contract after the acceptance of work, namely with respect to the employer’s warranty rights. If a retention is agreed, it is usually set at 10% of work costs.

A guarantor can seek interim measures (relief) against a guarantee’s calling. However, in an interim measure litigation, the guarantor must demonstrate (with readily available evidence) that the calling of the guarantee constitutes a clear abuse of rights by the creditor. Courts tend to approach such appeals restrictively as bonds/guarantees are of an abstract nature and do, like banks, usually apply the principle “pay first, litigate after”.

Finally, the security must usually be valid for as long as the employer’s warranty rights exist. The exposure can be limited either with a time period within which performance can be improved and reassessed, or by requesting back-to-back warranty guarantees to be provided by subcontractors.

1.12 Is it permissible/common for there to be company guarantees provided to guarantee the performance of subsidiary companies? Are there any restrictions on the nature of such guarantees?

Downstream guarantees are, indeed, allowed (as an obligation of the subsidiaries of the guarantor), although not commonly used in construction projects. The CO provides a few guarantee forms that are admissible.

1.13 Is it possible and/or usual for contractors to have retention of title rights in relation to goods and supplies used in the works? Is it permissible for contractors to claim that, until they have been paid, they retain title and the right to remove goods and materials supplied from the site?

Swiss law does not provide such a right. It would be considered a strong violation of its property rights. Nevertheless, any contractor that supplied labour and/or materials for construction work, demolition work or other similar work, may register a legal mortgage on the property. This right is granted to all contractors, even if they are not in a direct contractual relationship with the employer or property owner.

Legal mortgages are one of the most efficient methods for contractors to secure payment claims and, thus, are broadly used in practice: their provisional registration can be obtained easily from a judge, quickly and at low cost, through a “summary judicial procedure”.

2 Supervising Construction Contracts

2.1 Is it common for construction contracts to be supervised on behalf of the employer by a third party (e.g. an engineer)? Does any such third party have a duty to act impartially between the contractor and the employer? If so, what is the nature of such duty (e.g. is it absolute or qualified)? What (if any) recourse does a party to a construction contract have in the event that the third party breaches such duty?

The larger the construction project, the more common it is for the employer to appoint a third party (usually an architect) as project manager, whose task is to assist it with respect to the construction works, to follow and supervise the progress of the work, to represent the employer towards the contractor(s) and other parties involved (architect, engineers) and to check works and invoices on his behalf. The consultant has a duty of loyalty to the employer and a duty of care towards him only.

The agreement concluded between the employer and the consultant is usually qualified as an agency contract (mandate) within the meaning of articles 394 to 406 CO. This typically implies that the consultant only has an obligation of means and not of result.

2.2 Are employers free to provide in the contract that they will pay the contractor when they, the employer, have themselves been paid; i.e. can the employer include in the contract what is known as a “pay when paid” clause?

Although not frequently used in Swiss construction contracts, parties are free to agree on “paid if paid” or “paid when paid” provisions. According to Swiss law, however, payment for construction work is due upon completion or delivery, unless otherwise agreed between parties. If parties agreed on a delivery in parts and a payment by instalments, the amount due for each phase is payable upon delivery of the partial work agreed.

In addition, the right of subcontractors to register a legal mortgage is mandatory and may not be validly waived with subcontractor agreements.

2.3 Are the parties free to agree in advance a fixed sum (known as liquidated damages) which will be paid by the contractor to the employer in the event of particular breaches, e.g. liquidated damages for late completion? If such arrangements are permitted, are there any restrictions on what can be agreed? E.g. does the sum to be paid have to be a genuine pre-estimate of loss, or can the contractor be bound to pay a sum which is wholly unrelated to the amount of financial loss likely to be suffered by the employer? Will the courts in your jurisdiction ever look to revise an agreed rate of liquidated damages; and, if so, in what circumstances?

Liquidated damages are not explicitly regulated by Swiss law but are, nevertheless, allowed. These are treated in the same way as contractual penalties. Contrary to contractual penalties, intended to penalise, liquidated damages rather aim to compensate an anticipated damage. To assess whether parties agreed upon liquidated damages or a contractual penalty, their true intention prevails over the potentially incorrect designation used in an agreement.

If liquidated damages exceed actual damage incurred, they are subject to the same judicial review and possible reduction that applies to the contractual penalty (article 163 para. 3 CO).

Liquidated delay damages provisions are common in large-scale construction projects but are often difficult to enforce, since according to Swiss law or to relevant applicable regulations (SIA 118), many circumstances allow for an extension of contractually agreed deadlines.

3 Common Issues on Construction Contracts

3.1 Is the employer entitled to vary the works to be performed under the contract? Is there any limit on that right?

Generally, parties to a construction agreement are free to modify their contractual terms, including works, if they agree on a modification and respect the mandatory nature/scope of a contract. Regarding the works description, construction contracts usually contain a “change order” clause that entitles the employer to seek variations to works during its execution. If so, parties must agree (generally in writing) on its scope and its consequences on the price and delivery date.

3.2 Can work be omitted from the contract? If it is omitted, can the employer carry out the omitted work himself or procure a third party to perform it?

If the contractor has omitted the work due to lack of diligence, the employer will first have to warn the contractor and seek remediation upon the delivery of works. If the contractor does not remedy works within an agreed and reasonable time, the employer can ask a third party to perform them instead of the contractor at the latter's risk and costs.

However, where at the time of the delivery of the work, it is so defective or deviates from the contractual terms to such an extent that the employer has no use for it or cannot equitably be expected to accept it, he may refuse acceptance and, if the contractor is at fault, seek damages. In the case of minor defects in the work or only slight deviations from the contractual terms, as well as in the event of work carried out on his land or property which by its nature cannot be removed without disproportionate detriment to the contractor, the employer may reduce the price in proportion to the decrease in its value or require the contractor to rectify the work at his own expense and to pay damages if he was at fault, provided such rectification is possible without excessive cost to the contractor (article 368 CO).

3.3 Are there terms which will/can be implied into a construction contract (e.g. a fitness for purpose obligation, or duty to act in good faith)?

Switzerland has a civil law legal system. The common law concept of “implied terms” does not exist under Swiss law, which rather contains mandatory and non-mandatory statutory provisions that are to be applied if parties have not regulated certain issues in their contract. For construction contracts, statutory provisions are stated in article 363 CO, whilst relevant provisions for engineering contracts can be found either in article 363 CO or article 394 CO, depending on its qualification. In addition, parties will frequently refer to corresponding SIA regulations, which set industry standards and state of the art.

3.4 If the contractor is delayed by two concurrent events, one the fault of the contractor and one the fault or risk of the employer, is the contractor entitled to: (a) an extension of time; and/or (b) the costs arising from that concurrent delay?

Swiss case law has not provided a clear answer to this question. The response depends on the importance of the two events and their factual circumstances.

However, according to current doctrine, the contractor would be entitled to an extension of time, even if he is partly at fault for the delay and would not be entitled to claim for costs resulting from his own delay.

3.5 Is there a statutory time limit beyond which the parties to a construction contract may no longer bring claims against each other? How long is that period and when does time start to run?

The CO provides limitation periods of five and 10 years, depending on the type of claim (see article 127 *et seq.* and article 371 CO respectively). **Contractual claims** are time-barred after 10 years, unless otherwise stated by law. **Claims of the employer regarding defects** of an immovable work (warranty claims) against the contractor, any architect or engineer who rendered services in connection with such work, are, however, time-barred five years after the work's completion.

Contractual or statutory notice requirements may impose a much shorter time limit on a party that wishes to assert that a claim must be observed. According to article 370 CO, the employer must notify hidden defects immediately upon their discovery. Yet, parties may agree on diverging notice requirements or warranty periods in their contract.

The limitation exception must, however, be actively raised by the defendant as it is not examined *ex officio* by Swiss courts.

3.6 What is the general approach of the courts in your jurisdiction to contractual time limits to bringing claims under a construction contract and requirements as to the form and substance of notices? Are such provisions generally upheld?

According to article 129 CO, the parties are not allowed to contractually deviate from the limitation periods provided for in articles 127 and 128 CO (see question 3.5). Except for mandatory provisions, other limitation periods provided for in the CO may be shortened or extended by parties, but the agreed period may not exceed the 10-year period stipulated by law.

Thus, on the one hand, in the event of a payment claim (e.g. payment of the price of the work, of the architect's or engineer's fees and/or additional works, etc.), the court will examine the time limit on the basis of articles 127 and 128 CO and consider any contractual deviating provisions, in view of the fact that the limitation is not examined *ex officio* by the court.

On the other hand, the admissibility of warranty claims requires strict compliance with rules governing the notification of relevant defects (namely in terms of deadlines). Such rules are binding under the general principles of the CO, although parties may provide for diverging notice requirements or warranty periods in their contracts. Under SIA 118, the employer benefits from more flexibility to announce relevant defects: any time within two years as from the final reception of works; after this period, the employer must announce any hidden defects immediately.

3.7 Which party usually bears the risk of unforeseen ground conditions under construction contracts in your jurisdiction?

Usually, the employer bears this risk. The contractor is often not willing to accept it, as it may have a significant impact on the deadlines, price and quality of works.

3.8 Which party usually bears the risk of a change in law affecting the completion of the works under construction contracts in your jurisdiction?

Swiss law does not cover this issue. In practice, a construction agreement provides that the contractor will perform the works based on current legal provisions at the time of its conclusion. Therefore, any change of law that might impact important aspects of the agreement, such as the price, deadlines and quality of works, would trigger a mutual modification of the contract. The employer will usually bear associated risks and costs.

Given the freedom of contract principle, parties may agree that this burden shall be borne either by the employer or the contractor, or to have it shared between them.

3.9 Which party usually owns the intellectual property in relation to the design and operation of the property?

The architect primarily owns the full intellectual property rights in relation to the design he drew and can assign them to the contractor or the property owner. However, only patrimonial intellectual property rights are transmissible, whereas moral rights, such as copyright in works, are not.

3.10 Is the contractor ever entitled to suspend works?

The parties are free to negotiate the suspension of work if required by external circumstances. Moreover, pursuant to article 82 CO, each party may suspend the performance of its own obligation, including payment or works, if the other party has failed to perform its corresponding obligation in a timely manner (*exceptio non adimpleti contractus*).

In specific cases, the contractor can suspend work unilaterally if the continuation of work could result in strong and otherwise inevitable damages for the employer, or if any decision from a public authority obliges him to do so.

3.11 Are there any grounds which automatically or usually entitle a party to terminate the contract? Are there any legal requirements as to how the terminating party's grounds for termination must be set out (e.g. in a termination notice)?

Each party is allowed to terminate the contract if the other party does not respect its obligation, i.e. if the contractor fails to start work on time or performs it in a defective manner, or if the employer fails to pay the contractor for work performed.

The employer may, pursuant to article 377 CO, unilaterally withdraw from the contract at any time before work is completed, provided he pays for work already executed and fully compensates the contractor. In addition, if a cost estimate agreed with the contractor is exceeded in a disproportionate manner through no fault of the employer, the latter has the right to withdraw from the contract before or after completion.

Extraordinary circumstances (e.g., *force majeure*) may lead to the contract's termination, only after a court finds that, even with a price adjustment, the execution of the contract cannot be reasonably required.

In practice, parties to a construction contract frequently include in their agreement a list of events qualifying as acceptable grounds, such as insolvency or bankruptcy of a party, repeated and serious breach of the contract or major delay in the start or delivery of work, which entitle each party to terminate the contract early.

The termination notice is usually served in the same form as the contract and specific communication rules provided for in the contract, if any, must be followed.

3.12 Do construction contracts in your jurisdiction commonly provide that the employer can terminate at any time and for any reason? If so, would an employer exercising that right need to pay the contractor's profit on the part of the works that remains unperformed as at termination?

As mentioned under question 3.11, pursuant to article 377 CO, the employer can withdraw from the contract at any time, if he pays for work already completed and fully compensates the contractor.

3.13 Is the concept of *force majeure* or frustration known in your jurisdiction? What remedy does this give the affected party? Is it usual/possible to argue successfully that a contract which has become uneconomic is grounds for a claim for *force majeure*?

Swiss law recognises the concept of *force majeure*, even though it is not described specifically in statutory law. In accordance with article 119, para. 1 CO, an obligation is deemed extinguished when its performance is made impossible by circumstances that are entirely beyond the control of the concerned party and the performance has thus become strictly impossible (either temporarily or permanently). The contractor does not then breach the impacted obligations if the impossibility persists.

With respect to *force majeure* events, parties can allocate related risks in a contract. If they do not regulate this topic in a contract, some legal, non-mandatory, statutory provisions of the CO may apply. For example, article 376 CO states that, if work is destroyed by accident and prior to completion or delivery, the contractor is not entitled to payment for work done or of the expenses incurred, unless the employer is in default on acceptance of work. Similarly, article 378 CO provides that if completion of work is rendered impossible by an incidental occurrence affecting the employer, the contractor is entitled to payment for work already done and expenses incurred that were not included in the price. The contractor may further claim for compensation if such impossibility is due to the employer's fault.

In case of lump-sum contracts, *force majeure* events may lead to a price increase or to the termination of a contract (article 373, para. 2 CO).

Concerning hardship or economic impossibility, the affected party may ask to amend the terms of the contract or request its termination, if subsequent circumstances have changed in such a way that the performance of a contractual obligation would become excessively burdensome (*clausula rebus sic stantibus*).

3.14 Is there any legislation or court ruling that has been specifically enacted or handed down to provide relief to parties to a construction contract for delay, disruption and/or financial loss caused by the COVID-19 pandemic? If so, what remedies are available under such legislation/court ruling and are they subject to any conditions? Are there any other remedies (statutory or otherwise) that may be available to parties whose construction contracts have been affected by the COVID-19 pandemic?

During the COVID-19 pandemic, the Swiss authorities have intervened little in the construction sector: few construction works have been halted. Indeed, rather than ordering a generalised interruption of construction sites, the authorities preferred to introduce hygiene and social distancing measures to allow the continuation of construction works. Apart from these measures, the authorities have not enacted any special legislation to modify the general regime applicable to construction contracts.

Accordingly, delays and/or additional costs due to the implementation of those measures must be discussed between parties. Several contractual norms such as *force majeure*, impossibility of execution, hardship or economic impossibility (*clausula rebus sic stantibus*) allow for solutions to be found in such situations (see question 3.13).

Moreover, to overcome the economic crisis caused by COVID-19, federal and cantonal authorities took a series of economic measures. A key measure was the payment of salaries to workers unable to work due to the impact of COVID-19. Further, COVID-19 loans were introduced. However, no such loans were provided to the construction sector, as they were dedicated only to companies in sectors which had to temporarily stop their activity due to measures taken by the authorities.

3.15 Are parties, who are not parties to the contract, entitled to claim the benefit of any contractual right which is made for their benefit? E.g. is the second or subsequent owner of a building able to claim against the contractor pursuant to the original construction contracts in relation to defects in the building?

Swiss law strictly applies the “privity of contract” principle. Thus, third parties do not have any right deriving from the contract, unless specific rights have been duly assigned to them. This may be the case, for example, where the subsequent owner of the building is entitled to a claim against the contractor, when the deed of sale of the building includes an assignment of the seller's rights under the original construction contract in his favour.

However, not all rights can be transferred to a third party. Usually, such agreements take the form of a tripartite agreement with a proxy.

3.16 On construction and engineering projects in your jurisdiction, how common is the use of direct agreements or collateral warranties (i.e. agreements between the contractor and parties other than the employer with an interest in the project, e.g. funders, other stakeholders, and forward purchasers)?

In Switzerland, such agreements are rarely seen for construction projects.

3.17 Can one party (P1) to a construction contract, who owes money to the other (P2), set off against the sums due to P2 the sums P2 owes to P1? Are there any limits on the rights of set-off?

Pursuant to article 120 CO, where two persons owe each other sums of money or performance of identical obligations, and provided that both claims are due, each party may unilaterally decide to set off his debt against his claim. There is no limitation on the use of this right. Yet, the party who does so must expressly declare it.

3.18 Do parties to construction contracts owe a duty of care to each other either in contract or under any other legal doctrine? If the duty of care is extra-contractual, can such duty exist concurrently with any contractual obligations and liabilities?

According to article 2 of the Swiss Civil Code, parties to any contract must act in good faith. Parties must cooperate in order to help each other perform their respective obligations, notably by providing relevant information to each other in a timely manner. For example, the contractor has an obligation to inform the employer of any defect in the design (article 364 CO).

3.19 Where the terms of a construction contract are ambiguous, are there rules which will settle how that ambiguity is interpreted?

Under Swiss law, when terms of a construction contract are ambiguous, the judge will first try to establish the true and common intention of the parties, using an empirical approach, despite any inaccurate expressions or designations used either in error or by way of disguising the true nature of their agreement. If it cannot be identified at this first stage, the judge will then, by applying the “principle of trust”, seek to determine what meaning the parties could and should have given to their mutual expressions of will, pursuant to rules of good faith, considering all relevant circumstances.

3.20 Are there any terms which, if included in a construction contract, would be unenforceable?

Swiss law adopts a liberal approach. Most of the terms chosen by parties will be enforceable. However, contractual terms that go against mandatory statutory law are unenforceable: contract clauses that deviate from those legally prescribed are only admissible where the law does not prescribe mandatory wording and provided that they do not contravene public policy, morality or rights to personal privacy (article 19, para. 2 CO).

3.21 Where the construction contract involves an element of design and/or the contract is one for design only, are the designer's obligations absolute or are there limits on the extent of his liability? In particular, does the designer have to give an absolute guarantee in respect of his work?

Regarding the extent of the liability of the designer, the same rules shall be followed as for any other party's liability. Swiss law does not make any distinction regarding a designer's liability with any other contractor. In addition, liability will be defined based on the qualification of a contract, which depends on

factual circumstances and not on the determination of a contract itself (mainly “mandate” or “contractor's agreement”). Thus, the obligation of the designer will be to work towards a result, but without guaranteeing it.

3.22 Does the concept of decennial liability apply in your jurisdiction? If so, what is the nature of such liability and what is the scope of its application?

Under Swiss law, liability for defects is governed by article 371 CO (see question 3.5), imposing a 10-year liability period. In practice, parties frequently modify the liability regime by including SIA 118 in their agreement, which limits the liability period to five years. In certain sectors, extensions are typically agreed in relation to a specific part of work (e.g. sealing) and provided that the building owner concludes a maintenance contract with the contractor. However, a 10-year liability period applies to defects intentionally hidden by the contractor.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

Parties can freely define a dispute resolution mechanism. State court litigation is used most often; domestic arbitration more rarely. International contracts often provide for international institutional arbitration (e.g. through the Swiss Arbitration Centre or International Chamber of Commerce) or *ad hoc* arbitration.

4.2 Do you have adjudication processes in your jurisdiction (whether statutory or otherwise) or any other forms of interim dispute resolution (e.g. a dispute review board)? If so, please describe the general procedures.

An adjudication process is not provided under Swiss law. Interim dispute resolution is rarely included in construction contracts for small and medium-sized construction projects, but is more frequently used in international or large-scale projects.

4.3 Do the construction contracts in your jurisdiction commonly have arbitration clauses? If so, please explain how, in general terms, arbitration works in your jurisdiction.

In Swiss law practice, arbitration clauses are rarely adopted. They are more frequently used in contracts for large-scale or complex projects and/or when at least one of the parties is domiciled abroad.

Arbitration is widely available in Switzerland. In domestic matters, article 353 *et seq.* of the Civil Procedural Code (CPC) applies (unless parties decide that article 172 of the Swiss Private International Law Act (PILA) applies). In international matters, article 172 PILA applies. It should be noted that parties may only appeal against a domestic arbitral award, whereas no appeal is possible in international arbitration (awards may, however, be challenged on the basis of very limited grounds: public order; improper composition of the arbitration panel; or violation of the right to be heard).

SIA has published a specific arbitration regulation (SIA 150), which is increasingly used in contracts.

Parties are free to determine the arbitration procedure and to decide on procedural steps, subject to requirements of due process.

4.4 Where the contract provides for international arbitration, do your jurisdiction's courts recognise and enforce international arbitration awards? Please advise of any obstacles (legal or practical) to enforcement.

Switzerland adopted the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as of 1993 without any reservations.

Both domestic and international arbitral awards are recognised and enforced. The Swiss Supreme Court does not review the merits of an international award unless it manifestly violates public policy.

4.5 Where a contract provides for court proceedings in your jurisdiction, please outline the process adopted, any rights of appeal and a general assessment of how long proceedings are likely to take to arrive at: (a) a decision by the court of first jurisdiction; and (b) a decision by the final court of appeal.

Further to the Swiss federal system, Swiss Cantons have their own judiciary system. Nevertheless, the CPC obliges each Canton to adopt a double judiciary instance system. Consequently, parties have a right to appeal in Cantons. Moreover, under strict conditions, the Swiss federal Supreme Court, Switzerland's highest

court, may review final decisions of cantonal courts of appeal, but only on matters of law, not on facts.

The length of those proceedings varies between two and five years. Proceedings at first instance last the longest as they usually include hearings, expert opinions, proof examinations, etc. These may last two years or longer depending on cases' complexity. Moreover, interim measures such as expert opinions can also take several months.

Proceedings progress more quickly through the courts of appeal, which usually take their decisions within a year; whilst the Swiss federal Supreme Court generally issues its rulings within six to nine months.

4.6 Where the contract provides for court proceedings in a foreign country, will the judgment of that foreign court be upheld and enforced in your jurisdiction? If the answer depends on the foreign country in question, are there any foreign countries in respect of which enforcement is more straightforward (whether as a result of international treaties or otherwise)?

Enforcement depends on the country where judgment was rendered. EU judgments will typically be easier to enforce in Switzerland (based on the Lugano Convention) than those of other countries for which no international treaty exists.



Philippe Prost gives legal advice to companies and private clients regarding real estate acquisitions or sales, constitution or sale and purchase of rights of acreage (land lease), construction projects, architect and engineer contracts, financing of real estate projects and mortgage negotiations, related tax issues, lease contracts, and the drafting and reviewing of contracts, including the due diligence process. Since 2015, Philippe has been certified as a specialist lawyer in Construction and Real Estate by the Swiss Bar Association.

Philippe directs and manages both a privately owned real estate company, active in the market since 1998, and a publicly owned real estate company, incorporated in 1898. He has built solid experience over many years in the fields of commercial building rentals in downtown Geneva, major renovation and construction projects, as well as in the oversight of development and construction projects, risk management and surveillance of real estate agencies in charge of day-to-day business.

As a litigator, Philippe represents clients before the competent courts of Geneva, Vaud, Valais, Neuchâtel, Jura and Fribourg in all types of legal disputes, mainly in rental law, construction law, zoning and administrative matters, as well as in arbitration proceedings.

MLL Meyerlustenberger Lachenal Froriep Ltd.

65 rue du Rhône
PO Box 3199
1211 Geneva 3
Switzerland

Tel: +41 58 552 01 00
Email: philippe.prost@mll-legal.com
URL: www.mll-legal.com



Jacques Johner is a senior associate lawyer in both the Real Estate and Dispute Resolution teams at MLL in Geneva and Lausanne. His practice includes real estate, construction law, land and use planning law, as well as public procurement law and other aspects of public law. He is also a member of the competition and distribution practice group.

Jacques holds a Certificate of Advanced Studies in Legal Professions (**ECAV**) delivered by the University of Geneva. He holds a Bachelor's degree and a Master's degree in law from the University of Lausanne, with specialisations in business law and in litigation, *magna cum laude*. Prior to joining MLL in 2015 as a junior associate, Jacques worked for five years as an in-house lawyer for the City of Lausanne, in the energy and telecommunications department. He is a native French speaker and his working languages are French, English, Italian and German.

MLL Meyerlustenberger Lachenal Froriep Ltd.

65 rue du Rhône
PO Box 3199
1211 Geneva 3
Switzerland

Tel: +41 58 552 01 00
Email: jacques.johner@mll-legal.com
URL: www.mll-legal.com

MLL Meyerlustenberger Lachenal Froriep Ltd. (**MLL**) is an international business law firm in Switzerland, with offices in Zurich, Geneva, Zug, Lausanne, London and Madrid. MLL specialises in representing and advising clients at the intersection of high-tech, IP-rich and regulated industries. MLL's broad-based expertise in all fields of real estate law is cemented by its involvement in the boards of directors of real estate, construction, engineering and architecture companies and its leading role in professional organisations such as the Royal Institution of Chartered Surveyors (**RICS**), the Swiss Real Estate Association (**SVIT**) and the Geneva Real Estate Chamber (**CGI**). The close collaboration of our experts in real estate, company and tax law when planning transactions and setting up real estate holding structures guarantees optimum results.

MLL's expertise is focused on the purchase and sale of real estate and real estate portfolios, advice on company law and tax law issues related to real estate holding structures, assistance in tender procedures and development projects, advice regarding subcontractor and general contractor agreements, and representation in rental matters.

www.mll-legal.com



ICLG.com



Current titles in the ICLG series

Alternative Investment Funds	Franchise
Anti-Money Laundering	Gambling
Aviation Finance & Leasing	Insurance & Reinsurance
Aviation Law	International Arbitration
Business Crime	Investor-State Arbitration
Cartels & Leniency	Lending & Secured Finance
Class & Group Actions	Litigation & Dispute Resolution
Competition Litigation	Merger Control
Construction & Engineering Law	Mergers & Acquisitions
Consumer Protection	Mining Law
Copyright	Oil & Gas Regulation
Corporate Governance	Patents
Corporate Immigration	Pharmaceutical Advertising
Corporate Investigations	Private Client
Corporate Tax	Private Equity
Cybersecurity	Product Liability
Data Protection	Project Finance
Derivatives	Public Investment Funds
Designs	Public Procurement
Digital Business	Real Estate
Digital Health	Renewable Energy
Drug & Medical Device Litigation	Restructuring & Insolvency
Employment & Labour Law	Sanctions
Enforcement of Foreign Judgments	Securitisation
Environment & Climate Change Law	Shipping Law
Environmental, Social & Governance Law	Technology Sourcing
Family Law	Telecoms, Media & Internet
Fintech	Trade Marks
Foreign Direct Investment Regimes	Vertical Agreements and Dominant Firms

The International Comparative Legal Guides are published by:

gig global legal group