International Comparative Legal Guides

Construction & Engineering Law 2021

A practical cross-border insight into construction and engineering law

Eighth Edition

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Expert Analysis Chapter

Q&A Chapters

Switzerland

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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.)

In Swiss contract law, pursuant to the Swiss Code of Obligations (CO), freedom of contract and priority to the parties' intentions are the main principles that apply. Swiss statutory law contains many general and specific contractual rules regulating certain types of contract, such as those relating to construction. However, subject to mandatory legal provisions, parties are generally free to deviate from statutory law by altering provisions or adding new ones.

Parties can therefore enter into all types of contract and define their content. As a consequence, in practice, there are various types and configurations of contractual arrangement that may be concluded in the context of a construction project, depending on its complexity, regardless of whether the main parties are local or international: (i) in terms of design and construction obligations of the contractor, the total contractor's model is very common in practice, in particular for complex projects. In such configuration, the total contractor both designs the project in coordination with architects and other planners and executes it as a general contractor does; (ii) one can also freely decide to separately mandate an architect only for the design and to entrust a general contractor or various specialised contractors for the performance of the work; and (iii) management contracting is also an option, as it is a declination of the total/general contractor's model. In this case, the 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?

Collaborative contracting is a concept that is not yet 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 Swiss construction and design contracts, the standard terms issued by the Swiss Society of Engineers and Architects (SIA) are widely used. There are different rules for different types of work. For instance, SIA rule 118 is relevant to construction contracts, whereas SIA regulations 102 and 103 are used for contracts with architects and construction engineers, respectively. Often, because the parties have to expressly include those regulations in their contract if they want them to apply, they do so and modify them where needed. In the context of public procurement, the Co-ordination Conference of the responsible federal and cantonal clients and owners (KBOB) issued a standard form for general and total contractor agreements. However, it is increasingly common for KBOB contracts to be concluded in relation to private projects. In the international context, the various sets of conditions issued by the International Federation of Consulting Engineers (FIDIC) are 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, there are no specific forms of construction contract that are used on projects involving public works, other than those mentioned in question 1.3. Indeed, whether or not the construction project involves public works, the construction contract between the employer and the contractor will be governed by the rules of private law. However, the main difference between a project that involves public works and one that does not is in the process of choosing the contractor: when public works are involved the public body will have to comply with public procurement rules. Thus, under Swiss law, a public procurement occurs when a public body or a company subject to public procurement law has to enter into a contract with a private tenderer concerning the acquisition of supplies, services or buildings, by means of financing. Public procurement law establishes the procedure for awarding tenders in a transparent way.

Furthermore, when the construction project requires the setting up of a public-private partnership (PPP), 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 the private actors and the public bodies is of private law. Under this agreement, the partners pool their resources and jointly assume responsibility for the execution of the relevant task

concerned as well as the risks. There is no pre-established form of PPP contract but these 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 the partners; and
- long-term (usually over the entire project life cycle) and process-oriented collaboration.

In such a case, the construction contract with the contractor will also be governed by private law, like any construction contract.

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)?

Similarly to any other contract under Swiss law, the creation of a construction contract involves the exchange of an offer and the resultant acceptance of the two contracting parties. Both expressions of will must encompass the *essentialia negotii* of the construction contract, which entails the work to be carried out and its price (article 363 CO). However, it is not necessary for parties to agree on a fixed price or the manner of calculating it, as article 374 CO contains a general rule in this regard. As to the form of the contract, there are no special conditions, although most construction contracts are made 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" usually has no binding effects, unless unequivocally specified by the parties and provided that it does not contain all the *essentialia negotii*.

However, the letter of intent requires each party to negotiate in good faith. In some circumstances, a breach of such a pre-contractual obligation may involve liability for damages, even if the main contract has not 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 the works.

Building owners often take out civil liability insurance covering damages caused to third parties in relation to a specific project. In addition, it is common for the owner, contractor and other parties involved to take out insurance covering damages to the building during the process.

Material and tools on the worksite are usually also insured by their respective owner.

Contractors often take out – and the employer will often request – insurance covering claims of the employer for defects that appear during the warranty period.

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?

Swiss law entails various norms of labour and public law whose objective is workers' protection, payment of income tax and preservation of the employees' health and safety.

Construction sites are regularly inspected by authorities, in particular to prevent undeclared work. In the event of a breach of the regulations, the authority can stop the construction work and impose administrative fines. Constructors must be aware that they may also be held liable for violations by their sub-contractors.

Concerning labour law, the employer has to comply with general principles such as those of non-discrimination and equal treatment. It is common in practice for collective labour schemes to set minimum standards for workers that have to be followed by the employer. There are also mandatory declarations that have to be made in the context of public procurements. In case of non-compliance, the contractor might be blacklisted.

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

In terms of health and safety, Swiss labour law as well as Swiss administrative and environmental law set numerous regulations regarding workers' protection (equipment, hours of work, etc.) as well as the use and storage on the worksite of toxic materials, asbestos, polychlorinated biphenyls (PCBs), leaded paint, chemicals, etc.

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

In the field of construction, Switzerland has a very complex system made up of various regulations and norms, which are issued either by public authorities or by professional associations.

Firstly, because of the Swiss federal system, it is the Swiss Cantons, and to a lesser extent the municipalities, that 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. However, the Cantons and municipalities mainly prescribe that buildings must be "safe" in their construction and few concrete requirements are made. Therefore, private associations, such as SIA, regularly issue guidelines containing safety standards. These guidelines are often adopted by cantonal legislation and by the parties in their construction contracts.

The Cantons are also responsible for setting fire safety standards. It is therefore necessary to refer to cantonal public law to find out what technical elements must be taken into consideration in terms of fire protection.

In this context, it is important to note that the responsibility for meeting these standards lies with the building owner. If the construction is not up to standard, the owner will have to answer

to the authorities and may be fined and ordered to make the building compliant. The owner can then take civil action against the contractor if the latter has not respected the contract and the 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?

Yes. Even though this is not a legal requirement, retention of part of the purchase price (usually 5–10%) is common in construction projects, whether contractually agreed or because of other applicable standards. It either comes in addition to, or instead of, a performance bond (see question 1.11). Parties are free to decide whether the retention is released upon the acceptance of the works or after the defects liability period is complete, even though 100% of the price is usually paid when the works are substantially completed. Pursuant to SIA rules, it is the latter option that prevails.

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 not uncommon for the contractor to be required to provide a performance bond, which subordinates the achievement of the works, predominantly for important construction works. However, it is very unusual in smaller projects. Upon achievement, a guarantee related to the 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. In such a case, 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.

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. The courts tend to take a very restrictive approach on this issue as a bond/guarantee is of an abstract nature. The principle usually applied by courts (and banks) is "pay first, litigate after".

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?

Yes, generally speaking, it is permissible to have downstream guarantees (as an obligation of the subsidiaries of the guarantor), although this is not very common in construction projects. In this context, the Swiss CO foresees a number of forms of guarantee 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?

A right as described in the question does not exist in Switzerland. It would be deemed a strong violation of property rights in Swiss law. 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. These are broadly used in practice, given that their provisional registration can be obtained easily, 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?

When he deems it appropriate, the employer will usually appoint an architect to supervise the contractor or the general contractor, checking the works and invoices on his behalf. The architect has a duty of loyalty to the employer and a duty of care *vis-à-vis* him only.

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?

Even though such a clause is not frequently used in Swiss construction contracts, parties are free to agree on "paid if paid" or "paid when paid" provisions. However, according to Swiss statutory law, unless otherwise agreed between parties, payment for construction work is due upon completion or delivery. 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 statutory Swiss law but are nevertheless admissible. These are treated in the same way as contractual penalties, despite their purpose not being to penalise – in opposition to contractual penalties – but rather to compensate an anticipated damage. To assess whether parties agreed upon liquidated damages or a contractual penalty, their true intention is relevant rather than the potentially incorrect designation used in the agreement.

If liquidated damages exceed the 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).

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?

As a general principle, parties to a construction agreement are always free to modify its contractual terms, including the works, as long as they agree on the modification and respect the mandatory nature/scope of the contract. With regard to the works description, construction contracts usually contain a "change order" clause that entitles the employer to seek variations to the works during the execution of the contract. However, in such event, the parties have to agree (generally in writing) on the scope of the change 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 the works. If the contractor does not remedy the works within an agreed and reasonable timeframe, the employer is allowed to ask a third party to perform them *in lieu* of the contractor at the latter's risks and costs.

However, once the delivery has taken place, the employer can only ask the contractor for a reduction of the price (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 is a civil law country. The common law concept of "implied terms" does not exist under Swiss law, which contains mandatory and non-mandatory statutory provisions that would apply if the parties have not regulated certain issues in their contract. For construction contracts, the statutory provisions are contained in article 363 CO, while for engineering contracts, the relevant provisions can either be article 363 CO or article 394 CO depending on how the contract is qualified. In addition, the parties will frequently refer to the corresponding SIA regulations, which set the industry standard 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 law has not yet provided a clear answer to this question. The response depends on the importance of the two events and their factual circumstances.

However, the current trend is that in such event, 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?

Yes. On the one hand, the CO provides limitation periods depending on the type of claim (of five and 10 years, respectively; see article 127 *et seq.* and article 371 CO). This means that, unless otherwise provided by law, contractual claims are time-barred after 10 years. In contrast, 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 time-barred five years after the work's completion.

On the other hand, 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. In particular, according to article 370 CO, the employer has to notify hidden defects immediately upon their discovery. The parties may, however, agree on diverging notice requirements or warranty periods in their contract.

The limitation exception must, however, be actively raised by the defendant since it is not examined *ex officio* by the 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 articles 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 the parties, but the agreed period may not exceed the ordinary period of 10 years.

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 will not take into account 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 the rules applying to the notification of the relevant defects (namely in terms of deadlines) to be strictly followed. Such rules are stringent under the general principles of the Swiss CO, although the parties may provide for diverging notice requirements or warranty periods in their contracts. Under SIA rule 118, the employer benefits from more flexibility to announce the relevant defects (any time within two years as from the final reception of the 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?

The employer usually bears this risk because the contractor does not often agree on bearing it, as it may have a significant impact on deadlines, the price and the quality of the 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 statutory law does not cover this issue. In practice, the construction agreement provides that the contractor will perform the works based on the 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 the works, would trigger a mutual modification of the contract and the employer will usually bear the associated risks and costs.

Given the freedom of contract principle, it is, however, admissible for parties to agree to either have this charge borne 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 (and not moral rights such as the copyright in the works).

3.10 Is the contractor ever entitled to suspend works?

The parties are always free to negotiate the suspension of the work if this is 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 is allowed to suspend the work unilaterally if the continuation of the 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 the work on time or performs it in a defective manner, or if the employer fails to pay the contractor for the work performed.

On his side, pursuant to article 377 CO, the employer may unilaterally withdraw from the contract at any time before the work is completed, provided he pays for the work already done and compensates the contractor in full. In addition, where a cost estimate agreed upon with the contractor is exceeded disproportionately 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 the work, which entitle each party to terminate the contract early.

The termination notice is usually served in the same form as the contract and the specific communication rules provided for in the contract, if any, have to 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?

Yes. As mentioned under question 3.11, pursuant to article 377 CO, the employer can withdraw from the contract at any time, provided it pays for work already done and compensates the contractor in full.

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 as such 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 therefore become strictly impossible (either temporarily or permanently). In such an event, the contractor does not breach the impacted obligations as long as the impossibility persists.

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

Since the beginning of the COVID-19 pandemic, Swiss authorities (both federal and cantonal) have intervened little in the construction sector, with the result that few construction works have been halted. Indeed, rather than ordering a generalised interruption of the construction sites, Swiss authorities preferred to introduce measures of hygiene and social distancing in order to allow the continuation of the construction works.

Swiss authorities have not enacted any special legislation to modify the general regime applicable to construction contracts. There has therefore not been any State intervention in the current contracts, except for the above-mentioned hygiene and social distancing measures.

Accordingly, the delays and/or additional costs due to the implementation of those measures have to be discussed between the 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).

Furthermore, in order to overcome the economic crisis caused by the COVID-19 pandemic, the federal and cantonal authorities have taken a series of economic measures. A key measure is the payment of salaries to workers unable to work due to COVID-19's impact. COVID-19 loans were also introduced; it being specified, however, that these loans were exclusively dedicated to the companies of other sectors which, because of measures taken by the authorities, had to temporarily stop their activity, such as restaurants and cultural institutions.

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 principle of privity of contract. As a result, third parties do not have any right deriving from the contract, unless specific rights have been duly assigned to them. This may, for example, be the case if the subsequent owner of the building was entitled to a claim against the contractor if 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, it is not very common to see such agreements in the context of 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, but 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 owe each other a duty to act in good faith. Parties have to cooperate in order to help each other perform their respective obligations, namely by providing relevant information to each other in due course. 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 the 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 the true intention 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 the rules of good faith, taking into account all of the relevant circumstances.

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

As Swiss law has a very liberal approach, most of the terms chosen by the parties will be enforceable. Nevertheless, 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). Therefore, contractual terms that go against mandatory statutory law are unenforceable.

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?

In terms of extent, the liability of the designer is similar to any other party's liability. Swiss law does not make any distinction regarding a designer's liability with any other contractor. In addition, the liability will be defined based on the qualification of the contract,

which depends on the factual circumstances and not on the determination of the contract itself (mainly "mandate" or "contractor's agreement"). Therefore, 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 above).

In practice, parties frequently modify the liability regime by including SIA rule 118 in their agreement. Hence, it is very unusual for them to agree on more than a five-year liability period. Such extensions are typically agreed, in certain sectors, in relation to a specific part of the work (e.g. sealing) and provided that the building owner enters into a maintenance contract with the contractor.

Finally, there is also a 10-year liability period that applies only to defects intentionally hidden by the contractor.

4 Dispute Resolution

4.1 How are construction disputes generally resolved?

The parties can freely define the mechanism for dispute resolution. The most commonly used formal dispute resolution mechanism is State court litigation or, more rarely, domestic arbitration, while international contracts often provide for international institutional arbitration (e.g. through the Swiss Chamber's Arbitration Institution 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 by statute under Swiss law. It is rarely used in construction contracts for small and medium-sized construction projects. In contrast, it is more frequently seen 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 Switzerland, arbitration clauses are rare in practice. This type of clause is more common for contracts relating to large or complex projects and/or when at least one of the parties is a person abroad.

Arbitration is possible in Switzerland both in domestic and international matters. In the former case, article 353 *et seq.* of the Civil Procedural Code (CPC) will apply (unless the parties decide that article 172 of the Swiss Private International Law Act (PILA) applies). In the latter case, article 172 PILA will apply. A notable difference between the two is the possibility for the parties to 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, violation of the right to be heard).

SIA has published a specific arbitration regulation (SIA 150), but it is not often used in contracts.

Parties are free to determine the arbitration procedure and to decide on the procedural steps, subject to the 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 is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Switzerland has made no reservations, withdrawing its declaration of reservation in 1993.

Both domestic and international arbitral awards are easily recognised and enforced. As a matter of fact, 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.

As Switzerland is organised as a federal system, all Swiss Cantons have their own judiciary system. Nevertheless, the Swiss CPC obliges each Canton to set up a double judiciary instance system. Therefore, parties have a right to appeal in the Canton. Moreover, under very strict conditions, the Swiss federal Supreme Court, which is the highest court in Switzerland, may review final decisions of the cantonal courts of appeal, but only on matters of law, not facts.

The length of those proceedings can be between two and five years. The first instance proceedings are the longest as they usually include hearings, expert opinions, proof examinations, etc. These could last two years or much more depending on the complexity of the case. Moreover, interim measures such as expert opinions can also take a few months.

Courts of appeal are faster and usually take their decision within a year, while 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 the judgment was rendered. EU judgments will typically be easier to enforce in Switzerland (on the basis of the Lugano Convention) than those of other countries with 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, drafting and reviewing of contracts, including the due diligence process.
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