GAR KNOW HOW CONSTRUCTION ARBITRATION

Switzerland

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Legal system

1 Is your jurisdiction primarily a common law, civil law, customary law or theocratic law jurisdiction? Are the laws substantially derived from the laws of another jurisdiction and, if so, which? What instruments have legal force and effect? Who are the lawmaking bodies? How and where are new laws published? Can laws be passed with retrospective effect?

The Swiss legal system is based on the civil law tradition.

Owing to its plain wording, neutrality and business-friendliness, Swiss law is often chosen as the law to govern international commercial contracts in a wide range of industries, including the construction industry.

Instruments of legal effect are both federal and cantonal laws as well as numerous ordinances in execution of the superseding laws. However, civil substantive law matters are governed exclusively by federal law (as article 122(1) of the Swiss Federal Constitution). As Switzerland is not a member state of the European Union, EU laws do not directly apply in Switzerland.

The primary legislative body on a federal level is the Federal Parliament comprising the National Council and the Council of States. New federal laws are published in the Official Federal Gazette. Once enacted, they can be consulted on the website of the Swiss Confederation. The main legislation relating to contracts, that is, the Swiss Code of Obligations (CO), is also available in English.

As a matter of principle, laws are not passed and enacted with retroactive effect. There are, however, exceptions.

Contract formation

2 What are the requirements for a construction contract to be formed? When is a "letter of intent" from an employer to a contractor given contractual effect?

The formation of a construction contract requires – as any other contract under Swiss law – the exchange of an offer and corresponding acceptance between the contracting parties. Both offer and acceptance must contain the essentialia negotii of the construction contract (ie, the work to be carried out and a specific or determinable contract price). There is no requirement as to the form of the contract, although the vast majority of construction contracts are made in writing.

A "letter of intent" generally has no binding effect under Swiss law, unless explicitly stated by the parties. However, the letter of intent creates an obligation of each party to negotiate in good faith. If no main contract is concluded, a breach of such a pre-contractual obligation may in certain circumstances entail liability for damages (under the principle of culpa in contrahendo).

Choice of laws, seat, arbitrator and language

3 Are parties free to choose: (a) the governing law of their contract; (b) the law of the arbitration agreement; (c) the seat of the arbitration; (d) any arbitral rules; (e) anyone to act as arbitrator; and (f) the language of the contract and the arbitration? If not, what are the limitations on choice and what happens if the parties act contrary to them?

Swiss law is widely known for its liberal approach with respect to parties' autonomy when shaping their contractual relationship. The parties to an international construction contract are free to choose the governing law of the contract. They are also free to choose the mechanism for dispute resolution, the seat of the arbitration, the applicable arbitral rules, the law governing the arbitration agreement, the arbitrators, as well as the language of the contract and the arbitration. To the limited extent Swiss substantive law contains mandatory provisions, any deviation therefrom by the parties will be considered void; however, only with regard to the deviation and not with regard to the contract as a whole. For public projects in Switzerland, there are specific rules that apply (eg, for tender, dispute resolution).

Implied terms

4 How might terms be implied into construction contracts? What terms might be implied?

In practice, construction contracts are often comprehensive and stipulate all relevant issues, either in the written contract itself or by referring to a standard contract form such as one of those provided by FIDIC, the Swiss Association of Architects SIA or any other standard terms the parties may choose to adopt. Under Swiss law, there is no comparable concept to the common law concept of "implied terms". Non-mandatory statutory default provisions apply if the parties have not regulated certain issues in their contract. For construction contracts, the statutory provisions governing such contracts are article 363 et seq CO.

Certifiers

5 When must a certifier under a construction contract act impartially, fairly and honestly? To what extent are the parties bound by certificates (where the contract does not expressly empower a court or arbitral tribunal to open up, review and revise certificates)? Can the contractor bring proceedings directly against the certifier?

Certifiers and certificates are not distinct notions under Swiss law. Consequently, Swiss law does not contain specific rules governing a certifier. Nonetheless, the parties are free to agree on and enter into a contract with a certifier. The rights and obligations of the certifier are then governed by the terms of the contract and the rules of contract law. In accordance with his mandate, a certifier will usually undertake, expressly or impliedly, to act impartially, fairly and honestly. Depending on the terms of the contract, certificates may have the binding effect of an agreement between the parties and should be treated accordingly also by a court or arbitral tribunal. The contractor may be able to bring a claim directly against the certifier insofar as he has a claim out of the contract between the parties and the certifier.

Competing causes of delay

6 If an employer would cause (eg, by variation) a two-week critical delay to the completion of the works (which by itself would justify an extension of time under the construction contract) but, independently, culpable delay by the contractor (eg, defective work) would cause the same delay, is the contractor entitled to an extension?

Swiss law is not settled on the topic of concurrent delay. According to what can be considered to be prevailing authority, in cases of two (or more) independent causes of delay that at least partially overlap, whereby one cause is set by the contractor and one by the employer, the general rule is that the contractor is entitled to an extension of time notwithstanding its own delay, however, not to additional costs due to the employer's delay (time-no-money approach). It should be noted that so far no entirely satisfactory legal basis under Swiss law has been put forward for this approach, and that different authors have put forward different legal approaches. Furthermore, there is no guidance from case law on this issue. However, under Swiss law it will strongly depend on the individual circumstances of the case, including in particular the facts and evidence presented by the parties, whether a court or arbitral tribunal would follow this basic legal principle or rather a more sophisticated apportionment.

Disruption

7 How does the law view "disruption" to the contractor (as distinct from delay or prolongation to the completion of the works) caused by the employer's breaches of contract and acts of prevention? What must the contractor show for a disruption claim to succeed? If an entitlement in principle can be shown (eg, that a loss has been caused by a breach of contract) must the court or arbitral tribunal do its best to quantify that loss (even if proof of the quantum is lacking or uncertain)?

Different forms of disruption are accepted under Swiss law in different ways. For instance, the employer might disrupt the performance of the works by not fulfilling or by delaying certain cooperative duties. In these cases, the contractor is regularly entitled to an extension of time as well as, depending on the circumstances, reimbursement of the additional costs associated with the disruption or delay. Where the delay is caused by a failure by the employer to carry out a duty of cooperation, the contractor is normally not entitled to damages, unless the parties have provided otherwise in the contract. Where the employer disrupts the works by way of breaches of a positive contractual obligation (eg, an obligation to refrain from interfering with subcontractors), the contractor may claim for damages in addition to extension of time and costs.

In cases of disruption or delay in general, the contractor must prove a disruption caused by the employer, that the disruption caused him or her loss or damage, as well as the quantum of damages or losses. Under Swiss law, the contractor must generally prove actual damage (ie, he or she must quantify and substantiate in detail the specific damage suffered). Only in exceptional circumstances, where such quantification is not possible, the court or arbitral tribunal may applying article 42(2) CO, estimate the damage suffered, provided that the contractor has proven that it suffered some loss. However, this does not relieve the contractor of its obligation to substantiate and prove the facts which are required to enable or facilitate the damages calculation.

Acceleration

8 How does the law view "constructive acceleration" (where the contractor incurs costs accelerating its works because an extension of time has not been granted that should have been)? What must the contractor show for such a claim to succeed? Does your answer differ if the employer acted unreasonably or in bad faith?

As a general rule, under Swiss law the contractor is not obliged to take measures to accelerate the works due to a delay on the employer's part (which would entitle the contractor to an extension of time). However, (an interpretation of) the construction contract may provide otherwise. Therefore, a contractor who accelerates the works on his or her own initiative to make up for the delay caused by the employer runs the risk of not being able to recover the costs related to the acceleration. The contractor can only claim reimbursement for the incurred acceleration costs if he or she can show that the employer previously either ordered or at least authorised the acceleration of the works and agreed to compensate the contractor for the costs related to the acceleration. This often puts the contractor in the difficult position where he or she must make a choice between whether to hope that he or she can prove the extension of time or whether he or she should accept the (temporary) default and take steps to mitigate the damages, with the risk of not being able to recover the associated costs. In all cases, it is important for the contractor to give notice of events that would constitute "constructive acceleration".

Force majeure and hardship

9 What events of force majeure give rise to relief? Must they be unforeseeable and to whom? How far does the express or implied allocation of risk under the contract affect whether an event qualifies? Must the event have a permanent effect? Is impossibility in performing required or does a degree of difficulty suffice? Is relief available where only some obligations (eg, to make a single payment or carry out one aspect of the works) are affected or is a greater impact required? What relief is available and does it apply automatically? Can the rules be excluded by agreement?

According to Swiss case law, force majeure events are extraordinary "external" events related to elemental forces or actions of third parties that are unexpected and unforeseeable to both parties, and which cannot be prevented by applying due care. In line with the principle of freedom of contract, the parties are free to determine the events that shall be considered events of force majeure, and to determine the consequences of force majeure. It is common practice for parties to include a definition of force majeure in the construction contract, which often refers to a list of events that shall be considered force majeure and the consequences thereof.

Even though the concept of force majeure is recognised by Swiss courts, a general force majeure defence as such does not exist under Swiss law. The concepts that are most similar and that are normally relied on when arguing force majeure under Swiss law are impossibility of performance (in particular impossibility to perform after the contract was formed, ie, subsequent impossibility) and hardship due to significantly changed circumstances (referred to as clausula rebus sic stantibus).

Impossibility of performance is frequently referred to by contractors who are prevented temporarily (or, sometimes, permanently) from carrying out the works. The consequence of this defence is that the contractor is not in breach of the obligations that are impacted as long as the impossibility lasts (article 119(1) CO). Impossibility is not a cause of action that entitles the contractor to claim for time or money, unless the employer caused the impossibility to arise through his or her own fault.

With regard to significantly changed circumstances, relief may be granted under the concept of clausula rebus sic stantibus if the circumstances in a given situation change in such way that performance would become excessively burdensome for one party. In such cases, the affected party may request that the terms of the contract be amended or even declare the contract terminated if a mere adjustment is not a sufficient remedy. The prerequisites for such an adjustment or termination are: (i) a change of circumstances occurred after the contract became effective; (ii) the change of circumstances renders the transaction grossly disproportionate; (iii) the change of circumstances was not reasonably foreseeable; and (iv) the change of circumstances is not attributable to the party availing itself of the clausula doctrine. According to legal commentary and the Swiss Supreme Court's case law, the threshold for obtaining relief in a situation of hardship based on changed circumstances under the concept of clausula rebus sic stantibus is very high.

Swiss law does not generally determine the spheres of risk of parties to a construction contract with regard to force majeure events. The parties are free to allocate the respective risk spheres in the contract, and they generally do so. If the parties do not regulate force majeure in their construction contract, force majeure events may be taken into account based on specific statutory provisions related to construction contracts in the Swiss Code of Obligations. In case of destruction of the works before the delivery to the employer, the contractor is not entitled to receive any payment or reimbursement for costs (article 376 CO). In cases where the performance of the works becomes impossible due to extraordinary circumstances that lie in the employer's risk sphere, the employer must pay the contractor for the work already performed (article 378 CO). If such impossibility is due to his or her fault, the employer is liable for damages. Conversely, article 378 CO does not apply if there is a contributing culpability of the contractor, for instance, for having omitted to draw the employer's attention to certain risks. Further, force majeure events can constitute grounds for increasing the contract price or for termination in case of lump sum contracts (article 373(2) CO).

10 When is a contractor entitled to relief against a construction contract becoming unduly expensive or otherwise hard to perform and what relief is available? Can the rules be excluded by agreement?

With regard to the construction costs, the contractor may not generally seek relief if the contract price was determined on a lump sum or turnkey basis, unless certain, openly discussed and agreed assumptions related to the determination of the lump sum price were made. Otherwise, the contractor may seek adjustment of the contract price only if extraordinary circumstances occur which were unforeseeable or excluded based on the parties' joint assumptions, and which prevent performance of the works or render performance excessively difficult (article 373(2) CO). Reference is also made to hardship (see question 9).

Impossibility

11 When is a contractor entitled to relief if after the contract is concluded it transpires (but not due to external events) that it is impossible for the contractor to achieve a particular aspect of the contractual specification? What relief is available?

If it has become impossible for the contractor to fulfil a certain obligation under the contract, the contractor is freed from performing such obligation. If the contractor is responsible for such impossibility, the employer is entitled to damages as substitution for the primary performance under the contract (article 97(1) CO). If the contractor can show that the impossibility was not a result of culpable conduct on his or her part, he or she is excused from his or her performance under the contract without being liable vis-à-vis the employer (article 119(1) CO). The employer on his or her part is freed from his or her obligation to pay the contract price and the contractor must refund any payments that he or she already received under the contract (article 119(2) CO).

Where the contract has been entered into with a view to the specific qualifications of the contractor and the contractor passes away or becomes otherwise incapable of performing his obligations, the construction contract is deemed to be terminated (article 379(1) CO). In such case the employer is obliged to accept and pay for the parts of the work that have already been completed to the extent they are of use to him or her.

Clauses that seek to pass risks to the contractor for matters it cannot foresee or control

12 How effective are contractual provisions that seek to pass risks to the contractor for matters it cannot foresee or control, for example making the contractor liable for: (a) a specified event of force majeure; (b) ground conditions that no reasonably diligent contractor could have foreseen; or (c) errors in documents provided by the employer, such as employer's requirements in design and build forms?

Parties to a construction contract are generally free to allocate certain risks, including liability with regard to specific force majeure events, unexpected ground conditions or documents provided by the employer.

As the mandatory provision of article 100(1) CO does not allow for the exclusion of liability in cases of intent or gross negligence, the employer may not pass risks to the contractor that fall within that category (eg, with regard to documents provided by the employer if the employer is aware of the incorrectness of such documentation).

Article 27(2) of the Swiss Civil Code (CC), which prohibits, inter alia, contractual undertakings that are so onerous as to be contrary to good morals, constitutes a further potential limitation to the free contractual allocation of risks. However, this provision is very rarely applied to business-to-business agreements.

Duty to warn

13 When must the contractor warn the employer of an error in a design provided by the employer?

Even if the employer has assumed the responsibility for the project's design, the contractor has an obligation to inform the employer of defects in the design based on his or her general duty of care and duty to inform (article 364(1) CO). If no deadline is stipulated in the contract, the contractor must warn the employer "without delay", failing which it loses the right to rely on the error. The concrete meaning of "without delay" will depend on the circumstances; generally speaking, the contractor must give notice in time for the employer to correct the defect with no impact or as little impact as possible on the works. If the contractor delays the notice without a valid reason, he or she can be held liable for the delay and/or costs resulting directly from its delay.

Good faith

14 Is there a general duty of good faith? If so, how does it impact upon the following (where they are otherwise permitted under the construction contract): (a) the level of intervention in the works that is allowed by the employer; (b) a party's discretion whether to terminate or suspend the contract; or (c) the employer's discretion to claim pre-agreed sums under the contract, such as liquidated damages for delay?

Under Swiss law, a general duty of good faith is enshrined in article 2(1) CC, pursuant to which any party has to exercise its rights and perform its obligations under the contract in good faith.

The employer is under a general duty to cooperate with the contractor (eg, by granting the contractor access to the site or providing the contractor with the necessary information and instructions). However, the principle of good faith limits the employer's involvement in the contractor's performance of the works (ie, prohibits the employer from any undue interference). The extent to which interference is permitted will always depend on the circumstances.

The employer's right to terminate the construction contract for convenience, while granted rather freely based on the non-mandatory provision of article 377 CO, finds its limits in the principle of good faith (ie, in the prohibition of an abuse of rights (article 2(2) CC)).

There are two forms of pre-agreed sums regularly applied to construction contracts governed by Swiss law, namely penalties (governed by articles 160–163 CO) and liquidated damages (no express statutory provisions but accepted by case law). In practice, it is often a matter of contract interpretation whether the parties agreed on one or the other. With regard to penalties, article 163 CO allows for the court or arbitral tribunal to reduce – in the spirit of the principle of good faith – the agreed amount of penalties at its discretion if it deems them excessive. Whether this provision applies by analogy to liquidated damages is debated in legal commentary. The Swiss Supreme Court appears to be more inclined to reject such application by analogy. However, a reduction may be granted under article 99(3) CO in conjunction with article 44(1) CO, which allow for a reduction in cases where the injured party contributed to bringing about the damage incurred.

Time bars

15 How do contractual provisions that bar claims if they are not validly notified within a certain period operate (including limitation or prescription laws that cannot be contracted out of, interpretation rules, any good faith principles and laws on unfair contract terms)? What is the scope for bringing claims outside the written terms of the contract under provisions such as sub-clause 20.1 of the FIDIC Red Book 1999 ("otherwise in connection with the contract")? Is there any difference in approach to claims based on matters that the employer caused and matters it did not, such as weather or ground conditions? Is there any difference in approach to claims for (a) extensions of time and relief from liquidated damages for delay and (b) monetary sums?

In general, the parties may bring claims outside the express terms of the contract, such as, for example, based on statutory law, and no distinction is made in principle as to the nature of the claim.

If the contract provides for a notification regime, failure to comply with notification requirements generally precludes the claim from being successful. There is recent case law of the Swiss Supreme Court confirming its strict approach to notification requirements. However, depending on the nature of the notification requirements or the extent to which a party has failed to comply with them, such party may – exceptionally – not be barred from bringing its claim based on the principle of good faith (article 2(1) CC), for example, if the other party was already aware of the circumstances that were to be notified.

Suspension

16 What rights does the employer have to suspend paying the contractor or performing other duties under the contract due to the contractor's (non-)performance, or the contractor have to suspend carrying out the works (or part of the works) due to the employer's (non-) performance?

Unless the parties have contractually provided otherwise, pursuant to article 82 CO, either party may suspend the performance of its own obligations, including payment or performance, if the other party has failed to timely perform its corresponding obligation under the contract.

In addition, under (non-mandatory) Swiss statutory provisions governing construction contracts, the employer may rescind the contract where the contractor fails to commence works or is in substantial delay with regard to the ongoing performance of the works, if the reasons for the delay are not attributable to the employer and if the already accrued delay gives the employer justified ground to believe that the contractor will not be able to complete the works within the agreed time for completion (article 366(1) CO).

Omissions and termination for convenience

17 May the employer exercise an express power to omit work, or terminate the contract at will or for convenience, so as to give work to another contractor or to carry out the work itself?

Pursuant to article 377 CO, the employer may terminate the construction contract at any time prior to the completion of the works. In such case the employer is liable to pay the contractor to the extent the work has already been performed as well as for any other damages suffered by the contractor, including lost profits. Costs saved and other remuneration achieved by the contractor as a consequence of the early termination are deducted from the contractor's claim. The employer may not be liable for damages if culpable conduct of the contractor substantially contributed to the circumstances giving rise to the employer's decision to terminate the contract. The prevailing view is that article 377 CO is not mandatory law, although the Swiss Supreme Court has yet to rule on the issue.

Termination

18 What termination rights exist? Can a construction contract be terminated in part? What are the practical and financial consequences?

Unless the parties have contractually agreed otherwise, the contractor may terminate the construction contract (i) if the employer unduly delays payment (article 107(2) CO), (ii) due to a substantial increase in the costs of the contractor's performance where a lump sum was agreed (article 373(2) CO), (iii) owing to the performance under the contract becoming impossible as a result of circumstances allocated to the risk sphere of the employer (article 378 CO), or (iv) owing to the performance under the contract becoming impossible for reasons attributable to the contractor (article 379 CO). Furthermore, according to the case law of the Swiss Supreme Court, a contractor has an (implicit) right to terminate the contract for good cause. In such case, if the employer is responsible for the termination of the contract, it has to pay the contractor for the work already done and compensate it in full. Where the employer is not responsible for the termination for cause, the employer must compensate the contractor for the parts that are of use to him or her. Generally, the notion of "good cause" is interpreted restrictively under Swiss law.

Unless the parties have contractually agreed otherwise, the employer may terminate the construction contract (i) owing to failure by the contractor to commence works or delayed performance by the contractor (article 366(1) CO; see question 16), (ii) owing to substantial defects of the works either during the carrying-out of the works (article 366(2) CO, which requires a degree of certainty that the works will not be carried out in accordance with the contract through the contractor's fault) or after delivery (article 368(1) CO), (iii) due to substantially lower costs of the contractor's performance where a lump sum was agreed (article 373(2) CO), (iv) where the contractor excessively exceeds his or her quotation (article 375 CO), or (v) for convenience (article 377 CO). Moreover, in very exceptional circumstances, termination may be justified both by the contractor and by the employer, as the case may be, based on the concepts of changed circumstances/clausula rebus sic stantibus. In addition to termination rights, Swiss law provides for the rescission of a contract in cases of material error, wilful misrepresentation, or duress.

Depending on the circumstances of a given case, a construction contract may be terminated in part.

19 If the construction contract provides for the circumstances in which each party may terminate the contract but does not expressly or impliedly state that those rights are exhaustive, are other rights to terminate available? If so, what are they and what are the practical and financial consequences?

If the construction contract does not provide expressly or impliedly that the contractual termination rights are exhaustive, other rights to terminate remain available (see above question 18).

20 What limits apply to exercising termination rights?

If not limited by the contractual terms, eg, by a notification regime, the exercise of termination rights is limited by the principle of good faith (article 2(1) CC), for example, where a party purports to terminate a contract on factual grounds of which it was aware and that it tolerated for an extended time. Notably, some statutory termination rights are limited in that a party waives its right to terminate or rescind the contract if it does not give notice or exercise a certain right within a certain – defined or circumscribed – period of time.

Completion

21 Does the law of your jurisdiction deem the works to be completed (irrespective of what the contract says) if, say, the employer takes beneficial possession of the works and starts using them?

Under Swiss law, the works are completed when the contractor has performed all of the contractually agreed works including change orders. The works must be completed before they can be delivered (or accepted as free of defects) to the employer (unless the parties agreed on partial deliveries). As long as the works are not actually completed, the mere taking of possession by the employer does not lead to deemed completion of the works. However, if the employer takes possession of the works and begins to use them without any reservations, the employer may no longer purport to exercise any rights in respect of defects that could have been detected when the employer took possession (see question 22).

22 Does approval or acceptance of work by or on behalf of the employer bar a subsequent complaint? What constitutes acceptance? Does taking over the work by the employer constitute acceptance? Does this bar subsequent complaint?

Acceptance is the declaration by the employer that the delivered works are in accordance with the contract's terms and specifications. Construction contracts will generally define when acceptance shall be considered to have occurred (eg, with the issuance of a Final Acceptance Certificate) or shall be deemed to have occurred. The mere taking of possession of the works by the employer does not result in deemed acceptance. However, the works are deemed to be accepted if the employer starts using the works without reserving any rights in this regard. In such cases, the contractor is freed from any liability for defects, unless such defects were not detectable at the time of receipt and upon diligent inspection of the works, or if the contractor intentionally concealed such defects (article 370(1) CO). Apart from the contractor's liability for concealed defects, article 370 CO is not mandatory and the parties may contractually exclude its applicability.

Following acceptance, the employer may bring claims under the defects liability regime of the contract to the extent agreed. Such warranty claims are generally limited to a certain time period, after which defects claims become time-barred. Under Swiss statutory provisions, the works are considered to have been accepted if the employer does not examine the works and raise a complaint within certain (short) time periods (article 370 CO). The works are not considered to have been accepted under article 370 CO where the contractor concealed defects from the employer or where defects were not visible to the employer notwithstanding due inspection (article 370(1) CO).

Liquidated damages and similar pre-agreed sums ('liquidated damages')

23 To what extent are liquidated damages for delay to the completion of the works treated as an exhaustive remedy for all of the employer's losses due to (a) delay to the completion of the works by the contractual completion date; and (b) delays prior to the contractual completion date (in the absence of, say, interim milestone dates with liquidated damages for delay attaching to them)? What difference does it make if any critical delay is caused by the contractor's fraud, wilful misconduct, recklessness or gross negligence? If so, what constitutes such behaviour and can it be excluded by agreement?

Under Swiss law, the concept of liquidated damages is accepted, although Swiss statutory law does not contain any specific provisions on liquidated damages (see question 14). Depending on the specific contractual mechanism, a clause providing for "liquidated damages" will be characterised either as a contractual limitation of liability or as a penalty clause. Generally, liquidated damages are understood to constitute a contractual limitation of liability to the agreed amount of the liquidated damages. Therefore, it is generally not possible for the employer to claim for damages in excess of the stipulated quantum. Exceptions exist where the interpretation of the liquidated damages clause leads to a different conclusion, namely that it was not the parties' true mutual intention to limit liability. Exceptions may also apply in cases of wilful misconduct or gross negligence by the contractor. Under Swiss law, contractual provisions limiting or excluding a party's liability for wilful misconduct or gross negligence are null and void (article 100(1) CO). Only with regard to auxiliary persons (ie, persons who perform or participate in the performance of a contractual obligation such as employees or independent subcontractors), the parties may limit or exclude their liability for wilful misconduct or gross negligence (article 101(2) CO). A person acts with gross negligence when he or she grossly departs from elementary imperatives of precaution and thus disregards what would make sense to every conscientious person acting under the same circumstances. When determining the standard of care against which gross negligence will be measured, it is important to take into account the degree of specialisation of the breaching party: the higher the level of sophistication and specialisation, the higher the standard.

24 If the employer causes critical delay to the completion of the works and the construction contract does not provide for an extension of time to the contractual completion date (there being no "sweep up" provision such as that in sub-clause 8.4(c) of the FIDIC Silver Book 1999) is the employer still entitled to liquidated damages due to the late completion of works provided for under the contract?

The purpose of liquidated damages is the pre-determination of a sum to be paid by the contractor in case of delay, thereby relieving the employer from his obligation to prove the actual damage incurred. However, the employer must still show that the general preconditions for damage claims are met, which includes fault on the contractor's part. Hence, if the delay was solely caused by the employer without any fault on the contractor's part, the employer cannot claim any damages, be it liquidated damages or any other form of damages. Conversely, even absent an express provision giving the contractor a right to an extension of time, the contractor has such a right as a matter of Swiss law, thus barring any claim by the employer for liquidated damages.

25 When might a court or arbitral tribunal award less than the liquidated damages specified in the contract for delay or other matters (eg, substandard work)? What factors are taken into account?

A court or arbitral tribunal may reduce the amount of liquidated damages for a number of reasons, including in cases of contributing fault of the party claiming liquidated damages or – if article 163 CO is applied by analogy (which remains controversial) – where the amount is considered excessive (see question 14). Where the court or arbitral tribunal, upon interpretation of the contractual clause based on the parties' common intent, concludes that the pre-estimated amount of liquidated damages constituted merely a fictitious amount and the contractor can prove that the actual damage suffered was in fact lower, the court or tribunal may, depending on the circumstances, also decrease the amount of the awarded damages.

26 When might a court or arbitral tribunal award more than the liquidated damages specified in the contract for delay or other matters (eg, work that does not achieve a specified standard)? What factors are taken into account?

As liquidated damages are generally understood to be an exhaustive remedy under Swiss law, a court or arbitral tribunal may generally not award more than the liquidated damages specified in the contract. However, if upon interpretation of the

contractual clause based on the parties' common intent the court or arbitral tribunal reaches the conclusion that the pre-estimated amount of liquidated damages constituted merely a minimum amount of damage, it might award a higher amount if so proven by the employer.

Assessing damages and limitations and exclusions of liability

27 How is monetary compensation for breach of contract assessed? For instance, if the contractor is liable for a defect in its works is the employer entitled to its lost profits? What if the lost profits are exceptionally high?

In general, damages and the related awarded monetary compensation due to breach of contract are determined by comparing the injured party's hypothetical financial situation if the contract had been properly fulfilled with the injured party's actual financial situation. The difference constitutes the damage that is to be compensated by the party in breach of the contract. This may include lost profits. With regard to the contractor's liability for defects of the works, Swiss law provides for a special liability regime, which also includes lost profits as recoverable damage if the contractor is at fault (article 368 CO).

In general, the employer may recover full compensation for lost profits irrespective of their extent and amount. For that reason, it is standard practice for parties to contractually exclude recovery of lost profits. This is permissible under Swiss law as article 368 of the Swiss Code of Obligations is not mandatory. However, liability cannot be excluded in cases of wilful misconduct or gross negligence (article 100(1) CO; see also question 23).

28 If the contractor's work is technically non-compliant, is the contractor liable for remedying it if the rectification cost is disproportionate to the benefit of the remedy? Can the parties agree on a regime that is stricter for the contractor than under the law of your jurisdiction?

Pursuant to article 368(2) CO, the contractor must rectify defects at its own cost provided such rectification does not result in excessive costs for the contractor. The assessment of whether the rectification costs are excessive is carried out by comparing the rectification costs on the one hand and the benefits for the employer resulting from the rectification on the other hand. The parties may contractually exclude this rule and stipulate a stricter regime for the contractor with regard to rectification, including the related costs.

29 If there is a defects notification period (DNP) during which the contractor must or may remedy any defect in its works that appears during a certain period after their completion, if the construction contract is otherwise silent, does it affect the employer's rights to claim for any defects appearing after the DNP expires?

DNPs are usually set out in the contract. What follows applies where the contract is silent (and can be varied by contract).

There are two time limits under Swiss law: time limits for the notification of defects and time limits to exercise warranty rights deriving from defects.

First, pursuant to article 367 CO, the employer must notify the contractor of a defect "without delay" after delivery. Without delay means, as a rule, within no more than a week, maximum 10 days (and even this has been held to be too long in certain cases). Failure to notify the defect without delay results in the employer forfeiting any warranty rights. This rule does not apply where the contractor has intentionally concealed the defects. This first time limit is a "sliding" time limit with respect to defects that could not be discovered at the time of delivery ("hidden defects"). For such defects, the employer must notify the contractor without delay from the time of discovery.

Second, provided that the employer notifies the defect(s) in a timely manner, for defects affecting immoveable works or moveable items such as equipment that have become an integral part of immovable property, the statutory limitation to exercise warranty rights is five years from acceptance (articles 371(1) and (2) CO). For defects affecting moveable works, the statutory limitation to exercise warranty rights is two years from acceptance (article 371(1) CO)). Beyond these limitation periods, the employer may no longer exercise any warranty rights even if the defects were discovered after expiry (see also question 39).

30 What is the effect of a construction contract excluding liability for "indirect or consequential loss"?

Contractual clauses restricting or excluding liability, including certain types of liability, are in principle valid and enforceable under Swiss law.

However, Swiss law does not define whether damage is compensable by categorising it as direct or indirect loss. Instead, Swiss law requires that damages have an "adequate" causal link to the breach in order to be compensable. Adequate causation means that, in light of general experience, the breach of contract at issue is generally of a nature to cause the loss at issue. Based on the test of the proximity of the causal link, indirect damage will often be understood to include lost profits.

Further, Swiss law does not know the term "consequential loss". A contract clause excluding liability for such loss will be interpreted based on the general principles of contract interpretation under Swiss law (ie, primarily based on the determination of the parties' common intent). Notably, there is one exception where Swiss case law and commentary refer to an equivalent of consequential losses. Under the statutory defects liability regime for contracts for works (article 368 CO), a distinction is made between direct damage as a result of the defect, and damage as a consequence of the defect. Direct damage relates to costs and expenditures resulting directly from the defect (eg cost of detection and diagnosis; cost of repair). With regard to direct damage, the contractor is generally liable for defects in the sense that the employer can choose – depending on the contract and the circumstances of the case – between the defect remedies of rectification, price reduction or rescission of the contract. By contrast, indirect damage does not result directly from the defect, and is regularly considered to include lost profits. With regard to indirect damage, the contractor is generally considered liable if it caused the defect in question in a culpable way.

In any case, pursuant to the mandatory rule of article 100(1) CO, any agreement purporting to exclude liability for wilful misconduct or gross negligence in advance is void (unless liability is excluded with regard to auxiliary persons, see question 23). It follows that if the limitation to "consequential" or "indirect" loss constitutes a limitation as compared to what would be owed under the statutory concept of causation, such limitation is not valid if the loss was caused by wilful misconduct or gross negligence.

31 Are contractually agreed limits on – or exclusions of – liability effective and how readily do claims in tort or delict avoid them? Do they not apply if there is fraud, wilful misconduct, recklessness or gross negligence: (a) if the contract is silent as to such behaviour; or (b) if the contract states that they apply notwithstanding such behaviour? If so, what causation is required between the behaviour and the loss?

Contractual clauses restricting or excluding liability are in principle valid and enforceable under Swiss law. They generally apply to both contractual claims and claims in tort. Limitation of liability clauses do not apply in cases of infliction of bodily injuries. Further, pursuant to the mandatory provision of article 100(1) CO, liability cannot be limited or excluded in advance for wilful misconduct or gross negligence (with the exception of liability for auxiliary persons, see question 23). In line with this principle, article 371(3) CO read in conjunction with article 199 CO provides that contractual warranty periods do not apply where the contractor has wilfully deceived the employer with regard to defects.

Liens

32 What right does a contractor have to claim a lien (or similar) in the works it has carried out? If so, what are the limits of the right if, for example, the employer has no interest in the site for the permanent works? How is the right recognised and enforced?

As per article 837(1)(3) CC, a contractor may demand for collateral of his or her remuneration claims under the contract for works. The collateral consists of a lien that is put on the property on which the contractor performed the works. The contractor must request for the lien to be provisionally registered in the land register at latest within four months after the completion of the works. The contractor will then have to obtain a court judgment or an arbitral award for the lien to be definitely registered. If later on, the contractor obtains a title (ie, a judgment or award, for the remuneration claim), he or she may enforce the lien on the property and collect his or her remuneration from the proceeds of the auction of the property.

Subcontractors

33 How do conditional payment (such as pay-when-paid) provisions operate under the law of your jurisdiction (including interpretation rules, any good faith principles and laws on unfair contract terms)?

Conditional payment provisions are interpreted either as merely determining the timing of when the subcontractor's claim for payment becomes due, or as constituting an actual condition precedent for the subcontractor's right to receive payment (also called pay-if-paid clause). Such interpretation is carried out on a case-by-case basis pursuant to the general rules of contract interpretation under Swiss law.

In cases of doubt, it is assumed that a conditional payment provision merely determines the point in time when the subcontractor's claim becomes due. However, if a delay in payment by the employer is a result of reasons attributable to the contractor, the subcontractor may nevertheless request payment from the contractor. Further, the absolute nature of the subcontractor's right to remuneration as regards the contractor remains. Therefore, if it becomes clear that payment by the employer will not occur or be delayed for the unforeseeable future, the subcontractor's claim for remuneration still falls due.

If a conditional payment provision is interpreted as a pay-if-paid clause, certain restrictions still apply. In cases where the contractor is responsible for non-payment or delayed payment by the employer, or where the employer becomes insolvent, the subcontractor can claim payment from the contractor notwithstanding a pay-if-paid clause.

34 May a subcontractor claim against the employer for sums due to the subcontractor from the contractor? How are difficulties with the merits and proof of the subcontractor's claim addressed, including any rights the contractor has to withhold payment? What if aspects of the project suggest that the law of your jurisdiction should not apply (eg, the parties to both the main contract and the subcontract have chosen a foreign law as the governing law)?

As there is no contractual relationship between the subcontractor and the employer, the subcontractor may generally not claim against the employer for sums due under the subcontract. Exceptions may exist where express agreements to that effect were concluded. Incidentally, despite having no direct claim against the employer, a subcontractor may secure his or her claim under the subcontract by placing a lien on the works (ie, on the employer's property pursuant to article 837(1)(3) CC (see question 32)).

35 May an employer hold its contractor to their arbitration agreement if their dispute concerns a subcontractor (there being no arbitration agreement between the contractor and the subcontractor or no scope for joining two sets of arbitral proceedings) or can the contractor, for example, require litigation between itself, the employer and the subcontractor? Does it matter if the arbitration agreement does not have its seat in your jurisdiction?

Under Swiss law, an arbitration agreement contained in a contract generally binds only the parties that have entered into that agreement. Therefore, since there are generally two contracts, one between the employer and the contractor and one between the contractor and the subcontractor, that are not connected, the employer is generally not bound by the dispute resolution mechanism of the subcontract and the subcontractor is not bound by the dispute resolution mechanism of the main contract, respectively. Hence, the employer cannot be forced to join a dispute between the contractor and the subcontractor and the subcontractor cannot be forced to join a dispute between the employer and the contractor. The Swiss Supreme Court is rather strict when it comes to the extension of arbitration agreements to non-signatories. However, in exceptional circumstances, the subcontractor may be found to have agreed to arbitrate under the same arbitration agreement as the employer and the contractor, or the employer may be found to have agreed to arbitrate under the same arbitration agreement as the contractor and the subcontractor.

The seat of the arbitration may play a role in determining the law applicable to the arbitration agreement and its effects on non-signatories, and may thus play a role in determining whether the subcontractor may be joined to an arbitration between the contractor and the employer.

Apart from this, Swiss international arbitration law gives effect to provisions of institutional arbitration rules that provide for the consolidation of arbitral proceedings between different parties or for the participation or joinder, respectively, of third parties (eg, article 4 of the Swiss Rules of International Arbitration; articles 7 and 10 of the ICC Rules of Arbitration; articles 22.1(viii)-(x) of the LCIA Arbitration Rules; articles 27 and 28 of the 2013 Administered Arbitration Rules of the Hong Kong International Arbitration Centre; articles 6–8 of the SIAC Rules).

Third parties

36 May third parties obtain rights under construction contracts? How readily can those connected with the employer (such as future or ultimate owners) bring claims against the contractor in respect of (a) delays and (b) defects? To what extent are exclusions and limitations of liability in the construction contract relevant?

Swiss law recognises a strict principle of privity of contracts. Thus, in general, contractual rights exist only between the parties to the construction contract.

The employer may assign the entire contract or certain rights thereunder to a third party, unless the parties have agreed otherwise. As a general rule, under Swiss international arbitration law, the arbitration clause will follow the assigned claims. However, it is disputed in Swiss legal commentary whether the employer may assign his defect claims to a third party. The contractor may raise the same defences against the third party as it would have been entitled to raise vis-à-vis the initial employer, including limitations of liability.

37 How readily (absent fraud, wilful misconduct, recklessness or gross negligence) can those connected with the contractor (such as affiliates, directors or employees) face claims in respect of (a) delays (b) defects and (c) payment? To what extent are exclusions and limitations of liability in the construction contract relevant?

In general, claims raised under the construction contract against the contractor do not extend to the contractor's affiliates, directors and employees. However, in exceptional cases, such entities and persons connected to the contractor may be held liable (eg, where they have made assurances to that end, or where they are liable under quasi-contractual terms or tort). Whether the limitations of liability contained in the construction contract are applicable also to the liability of the contractor's affiliates, directors and employees must be assessed depending on the specific circumstances of the case at hand. It cannot be assumed that such limitations of liability would automatically extend to the liability of affiliates, directors and employees connected to the contractor.

Limitation and prescription periods

38 What are the key limitation or prescription rules for claims for money and defects (and insofar as you have a mandatory decennial liability (or similar) regime, what is its scope)? What stops time running for the purposes of these rules (assuming the arbitral rules are silent)? Are the rules substantive or procedural law? May parties agree different limitation or prescription rules?

The general limitation period under Swiss law for monetary claims is 10 years (article 127 CO). With regard to certain (minor) construction projects, a five-year prescription period applies to the contractor's claim for remuneration (article 128(3) CO). However, this shortened limitation period will regularly not apply to larger-scale international construction projects and contracts.

For warranty claims owing to defects, article 371 CO provides for a warranty or prescription period of two or five years as from delivery depending on the scope of the works: Claims for defects of movable works must be brought within two years of delivery; with regard to defects of immovable works, or of movable works that are integrated into immovable works, the limitation period is five years. However, parties in their construction contract may deviate from these non-mandatory statutory warranty periods.

Limitation periods are interrupted if the debtor acknowledges the claim, in particular if he or she unreservedly makes interest or partial payments, gives an item in pledge or provides surety for the claim (article 135(1) CO). Further, limitation periods are interrupted by debt enforcement proceedings, an application for conciliation, submission of a statement of claim or defence to a court or arbitral tribunal, or a petition for bankruptcy (article 135(2) CO).

Limitation periods are considered substantive law. However, a court or arbitral tribunal will only consider limitation periods upon the respondent's objection and may not raise the issue of its own motion (article 142 CO).

The Swiss Federal Parliament has recently enacted a modification of the relevant rules on limitation and prescription periods. As part of those changes, claims for unjust enrichment (which could arise following eg, a finding that the contract was null and void) will be subject to a limitation period of three years as from the aggrieved party's knowledge of its claim (revised article 67(1) CO). Furthermore, the parties will have the right to suspend any limitation period, by written agreement, during

the course of negotiations, a mediation or any other extrajudicial procedure aiming at an amicable settlement of their dispute (newarticle 134(1)(8) CO). These changes will enter into force as of 1 January 2020.

Other key laws

39 What laws apply that cannot be excluded or modified by agreement where the law of your jurisdiction is the governing law of a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

It is not possible to add a comprehensive list of all mandatory provisions of Swiss law that may apply, depending on the circumstances, in the framework of a construction contract. What can be said is that Swiss construction law itself contains only very few mandatory provisions; the majority of the Swiss statutory provisions governing construction contracts are not mandatory.

An exception is article 370 of the Swiss Code of Obligations, pursuant to which the contractor may not exclude his or her liability for defects that he or she intentionally concealed from the employer.

Another example would be article 163(3) CO, under which a court or arbitral tribunal must reduce contractual penalties it deems to be excessive. The Supreme Court held that this provision forms part of Swiss domestic public order and must be applied even if not argued by the debtor of the penalty.

40 What laws of your jurisdiction apply anyway where a foreign law governs a construction contract? What are the key aspects of, say, the FIDIC Silver Book 1999 that would not operate as its plain words suggest?

No private law provisions apply, save maybe for extraordinary circumstances. One (rather academic) example is article 27(2) CC, which prohibits, inter alia, contractual undertakings that are so onerous as to be contrary to good morals. This provision has been held to form part of Swiss international public policy. That said, it is very rarely applied in business-to-business agreements. To our knowledge, it has never been applied to an international contract governed by a foreign law. Of course, local administrative and similar laws (construction permits, environmental law, labour law, etc) apply if the project under the construction contract is located in Switzerland.

Enforcement of binding (but not finally binding) dispute adjudication board (DAB) decisions

41 For a DAB decision awarding a sum to a contractor under, say, sub-clause 20.4 of the FIDIC Red Book 1999 for which the employer has given a timely notice of dissatisfaction, in an arbitration with its seat in your jurisdiction, might the contractor obtain: a partial or interim award requiring payment of the sum awarded by the DAB pending any final award that would be enforceable in your jurisdiction (assuming the arbitral rules are silent); or interim relief from a court in your jurisdiction requiring payment of the sum awarded by the DAB pending any award?

There is no conclusive Swiss case law on this issue. It is unlikely that a binding but not final DAB decision will be enforced by an arbitral tribunal in Switzerland in a partial or interim award without looking into the merits of the case; however, a party may seek to obtain interim payment in terms of an interim measure from the tribunal, in which case the DAB decision may help the party seeking payment to convince the tribunal.

It is unlikely but not impossible that a party could obtain interim relief from a Swiss court requiring payment of the sum awarded by the DAB based on a binding but not final DAB decision, since Swiss courts are generally very reluctant in granting interim payment orders. Depending on the circumstances, the DAB decision might help convince a competent Swiss court to grant an attachment. In any case, a DAB decision would not be considered to be a foreign judgment or arbitral award that would be subject to recognition and enforcement in Switzerland.

Courts and arbitral tribunals

42 Does your jurisdiction have courts or judges specialising in construction and arbitration?

In Switzerland, there is no regime of statutory adjudication, there are no specialised construction courts and no special procedures applying to construction disputes submitted to the general Swiss courts. Swiss courts generally also do not have special chambers dedicated to construction disputes. However, several Swiss cantons have established specialised commercial courts. These courts are used to handling complex construction disputes, and regularly do so.

The construction industry has established arbitration rules whereby disputes may be referred to specialised tribunals (these can be found on the website of the Swiss Society of Engineers and Architects (SIA): www.sia.ch). In 2008, the SIA substantially revised its arbitration rules, namely the SIA Standard 150: Provisions for Arbitration Proceedings (the SIA Rules). The revised SIA Rules contain specific mechanisms that are particularly appropriate for resolving construction disputes, such as the appointment of a technical expert (who is to act as consultant to the arbitral tribunal) and a procedure for urgent determination on issues that typically arise during construction (such as variation and compliance with duties to cooperate). Although the revised SIA Rules are primarily aimed at Swiss domestic arbitral proceedings in the construction industry, parties to international construction contracts may also provide for the applicability of the SIA Rules in their arbitration agreement.

As for arbitration, there is a form of de facto specialisation at the Swiss Supreme Court. All challenges to arbitral awards go straight to the Swiss Supreme Court, and there are only two chambers of the Supreme Court that handle arbitration (the First and Second Civil Chambers). For international arbitration, all matters are referred to the First Civil Chamber, which also handles most domestic arbitration cases. The composition of these chambers is quite stable, so that the Justices and their clerks have become highly knowledgeable in arbitration, especially the First Civil Chamber. It may be noted that this feature of the Swiss Supreme Court has led to the conclusion that there is no need in Switzerland to establish a specific Chamber or Division of the Court to deal with arbitration.

43 What are the relevant levels of court for construction and arbitration matters? Are their decisions published? Is there a doctrine of binding precedent?

The relevant levels of court for construction matters are the district court, the cantonal court of appeals and the Swiss Supreme Court. In some cantons, there are specialised commercial courts that usually replace the district and cantonal appeal courts (see question 42).

In terms of arbitration, Switzerland is one of the few jurisdictions where any application to set aside an arbitral award must be brought directly to the Swiss Supreme Court (ie, the country's highest court, as the single appeal instance. For further comments see question 42).

Decisions are published in the relevant periodicals. Leading case law of the Swiss Supreme Court can be consulted in the Official Compendium, which is available under www.bger.ch. The website also contains all decisions as of 2000, including those that were not published in the Official Compendium. The Swiss Supreme Court's decisions are rendered in German, French or Italian. The website www.swissarbitrationdecisions.com/ contains English translations of the Swiss Supreme Court's decisions related to international arbitration since 2008. Decisions of lower courts are periodically and selectively published in cantonal compendia or law journals, usually in German, French or Italian. A case digest on the Supreme Court's arbitration jurisprudence can be found at https://www.swlegal.ch/en/publications/blog-acd-overview/.

There is no doctrine of binding precedent. Nevertheless, Supreme Court decisions usually have at a minimum highly persuasive effect on lower courts and arbitral tribunals acting under Swiss law. However, if a court or arbitral tribunal finds reason to distinguish the facts from such precedent or if circumstances have changed in the view of the court or arbitral tribunal, such court or arbitral tribunal may deviate from the Swiss Supreme Court's precedent.

44 In your jurisdiction, if a judge or arbitrator (specialist or otherwise) has views on the issues as they see them that are not put to them by the parties, can they raise them with the parties? Is the court or arbitral tribunal permitted or expected to give preliminary indications as to how it views the merits of the dispute?

In general, it is the duty of the parties to present to the court or arbitral tribunal the facts and underlying evidence on which they wish to rely. Judges or arbitrators may not base their decision on factual information that has not been subject of discussion unless such information consists of public knowledge that is not specific to the individual case and is freely accessible and commonly known to anyone (notorious facts). In certain state court proceedings, the judge is required to clarify any uncertain facts with the parties. In practice, judges with "special knowledge" will often raise the issue with the parties and respect the

parties' right to be heard on such issues. Arbitrators will often do the same, but may at times be (even) more reluctant to raise facts or issues not pleaded by either party.

With regard to the law, judges and arbitrators have the authority to raise legal issues ex officio (except where this is prohibited; for example, a court or tribunal may not apply statutes of limitation if not argued by a party). Pursuant to the principle of jura novit curia (the court knows the law), a court is required to ascertain the law applicable to the merits on its own initiative and apply the law so determined on its own motion. Arbitrators have the right to apply the law pursuant to the same principle even if not expressly pled by the parties. However, in practice, arbitrators will seek complete briefing by the parties also on points of law. Under Swiss law, the right to be heard does not generally extend to the law, so that a court or arbitral tribunal is not under an obligation to raise with the parties issues of law that have not been pled but that may be relevant to the outcome of the case. However, there is a limit: a court or arbitral tribunal may not surprise the parties by basing its decision on legal grounds that have not been invoked by the parties and that the parties could not reasonably be expected to foresee.

Before state courts, it is common for a judge to share with the parties his or her preliminary (without prejudice) assessment of the case for the purpose of encouraging and facilitating an amicable settlement between the parties. In arbitration, arbitrators will be much more reluctant to share their preliminary views. In practice, this is done only if the parties have agreed so expressly, which is quite common in practice.

45 If a contractor, say, wishes to arbitrate pursuant to an arbitration agreement, what parallel proceedings might the employer bring in your jurisdiction? Does it make any difference if the dispute has yet to pass through preconditions to arbitration (such as those in clause 20 of the FIDIC Red Book 1999) or if one of the parties shows no regard for the preconditions (such as a DAB or amicable settlement process)?

Where a (valid) arbitration agreement exists, the parties are barred from bringing a parallel action on the merits in the state courts. The state courts will only intervene in support of an arbitration (eg, where necessary with regard to the constitution of the arbitral tribunal, the enforcement of arbitral evidentiary orders or interim measures or to grant interim relief itself in support of an arbitration).

Swiss law upholds clauses that require the parties to resort to pre-arbitral ADR processes. If the intent of the parties was that such processes be a compulsory precondition to arbitration (and not merely an option), the clause will be enforced in the courts. In a decision rendered in 2016, the Swiss Supreme Court held that the failure to comply with a mandatory pre-arbitral ADR process (such as DAB proceedings) results in the stay of the arbitration proceedings until the pre-arbitral tier has been implemented.

46 If the seat of the arbitration is in your jurisdiction, might a contractor lose its right to arbitrate if it applied to a foreign court for interim or provisional relief?

No, the contractor would not lose its right to arbitrate merely because it sought interim or provisional relief in a foreign court.

Expert witnesses

47 In your jurisdiction, are tribunal- or party-appointed experts used? To whom do party-appointed experts owe their duties?

In international arbitrations in Switzerland, both party-appointed experts and tribunal-appointed experts – or more rarely a combination of both – are accepted and used. In practice, however, expert evidence is commonly submitted by the parties and tribunal-appointed experts remain the exception. The arbitral tribunal will generally only appoint an expert if requested by a party, if the tribunal considers that the issue it must decide is relevant and if the tribunal lacks the necessary expertise to decide. It is generally held that party-appointed experts owe their duties to their respective principal only, but this may be dealt with differently in the Terms of Reference or other procedural instruments agreed for each arbitration (it can also depend on any applicable professional rules governing the expert's discipline). A tribunal-appointed expert is considered an assistant to the arbitral tribunal and owes his or her duties to the tribunal.

In state court proceedings, court-appointed experts remain the norm.

State entities

48 Summarise any specific limitations or requirements that apply when the employer is a state entity or public authority (including, for example, public procurement rules, limits on rights to suspend or terminate, excluded lien rights and arbitrating – as well as enforcing an award – against such an employer).

When entering into construction contracts, state entities and public authorities are bound by Swiss public procurement laws and international treaties. There are no rules barring Swiss public entities from settling disputes by arbitration. In fact, public entities regularly conclude construction contracts providing for dispute resolution by arbitration. However, certain types of procurement disputes, such as administrative decisions involving the exercise of public powers, cannot be decided by arbitration. These include disputes as to decisions to allow a party to submit a bid, decisions awarding a tender and decisions excluding a party from the tender process.

Immunity of states or state entities from enforcement is not absolute but limited to what is necessary to protect the exercise of their sovereign powers in Switzerland.

Settlement offers

49 If the seat of the arbitration is in your jurisdiction, on what basis can a party make a settlement offer that may not be put before the arbitral tribunal until costs fall to be decided?

The parties are free to negotiate and agree on a settlement at any time before or during arbitration proceedings. The parties are under no obligation to inform the arbitral tribunal of the content of their settlement discussions or any offers made in the course thereof. It is common for parties to agree that settlement offers are "without prejudice". Swiss law has not explicitly acknowledged Calderbank Offers or the like. It is therefore rather uncommon for settlement offers to end up before the tribunal in view of the tribunal's decision on costs. However, based on the general and far-reaching principle of party autonomy regarding procedural issues in Swiss arbitration, the parties are free to agree otherwise and, for example, to exchange Calderbank Offers that they agree to submit to the tribunal later.

Privilege

50 Does the law of your jurisdiction recognise "without prejudice" privilege (such that "without privilege" communications are privileged from disclosure)? If not, may it be agreed that a sum is payable if communications to try to achieve a settlement are disclosed to a court or arbitral tribunal?

Under Swiss law, there is no general "without prejudice" privilege for settlement offers. However, settlement offers are generally exchanged by the parties' lawyers and are therefore protected as correspondence between lawyers is privileged. In any case, parties will often mark their settlement correspondence as privileged or confidential, or make statements emphasising that their settlement offers shall not be understood as an admission of liability or of fact.

51 Is the advice of in-house counsel privileged from disclosure under the law of your jurisdiction? Is the relevant law characterised as substantive or procedural law?

Unlike the correspondence of lawyers who are members of a cantonal bar association and registered in the cantonal attorney registries, the advice of in-house counsel is not legally privileged under Swiss law. As in most civil law jurisdictions, the relevant law is characterised as procedural law.

Guarantees

52 What are the requirements for a guarantee under the law of your jurisdiction? Are oral guarantees effective?

Under Swiss civil law, there are two types of guarantees: personal guarantees (sureties, governed by article 492 et seq CO) and guarantee contracts (governed by article 111 CO).

Personal guarantees must be concluded in writing and contain the maximum amount for which the guarantor shall be liable. Where a private person acts as guarantor, amounts up to 2,000 Swiss francs must be handwritten by the guarantor. Personal guarantees including amounts that exceed this threshold must be notarised. Where a legal entity acts as guarantor, simple written form is sufficient irrespective of the guaranteed amount.

Guarantee contracts are not subject to any formal requirements and may therefore be concluded in writing or orally, whereby written guarantees are the norm. It should be noted that on-demand bank guarantees fall under article 111 CO.

53 Under the law of your jurisdiction, will the guarantor's liability be limited to that of the party to the underlying construction contract, if the guarantee is silent? Can the guarantee's wording affect the position?

Pursuant to article 499(1) CO, the liability of a personal guarantor is limited to the maximum amount under the surety contract. The parties cannot deviate from this provision as it constitutes mandatory law.

The liability of a guarantor under a guarantee contract is considered separate from the underlying contract. Generally, the liability under the guarantee does not extend beyond the liability under the underlying contract. However, it cannot be excluded that an interpretation of the wording of the guarantee might lead to a more extensive liability of the guarantor.

54 Under the law of your jurisdiction, in what circumstances will a guarantor be released from liability under a guarantee, if the guarantee is silent? Can the guarantee's wording affect the position?

The personal guarantee ends upon the discontinuation for whatever reasons of the main obligation under the underlying contract. In any event the personal guarantee of private persons ends 20 years after the signing of the personal guarantee. If the personal guarantee has been entered into for a certain time period, the guarantee ends four weeks after the expiry of such period. If the personal guarantee is made in view of a future obligation, the guarantor may rescind from the personal guarantee at any time prior to the arising of the obligation.

The guarantor under a guarantee contract will be released from liability when the underlying contract is correctly fulfilled or when the creditor under the underlying contract does not accept the performance correctly offered by the debtor. The guarantor may also be released from liability in certain circumstances, including set-off against a claim vis-à-vis the creditor under the underlying contract.

On-demand bonds

55 If an on-demand bond is governed by the law of your jurisdiction on what basis might a call be challenged in your courts as a matter of jurisdiction as well as substantive law? Assume the underlying contract is silent on when calls may be made.

A guarantor may seek injunctive relief against the calling of an on-demand bond by the creditor. However, the guarantor must substantiate and prove with readily available evidence that the calling of the bond constitutes a manifest abuse of rights by the creditor. Due to the abstract nature of on-demand bonds, the courts take a very restrictive approach when deciding whether to grant injunctive relief against the calling of bonds. Often, a guarantor will have to seek recourse in ordinary court proceedings. The applicable principle, in general terms, is "pay first, litigate later".

56 If an on-demand bond is governed by the law of your jurisdiction and the underlying contract restrains calls except for amounts that the employer is entitled to (such as sub-clause 4.2 of the FIDIC Red Book 1999), when would a court or arbitral tribunal applying your jurisdiction's law restrain a call if the contractor contended that: (i) the employer does not have an entitlement in principle; or (ii) the employer has an entitlement in principle but not for the amount of the call?

An on-demand bond or bank guarantee may only be called upon the occurrence of the underlying event for which the guarantee was given. If such event, for example, a breach of contract by the contractor, has not occurred, the employer is not entitled to call the bond. If the contractor can demonstrate that the prerequisites for the calling of the on-demand bond are not fulfilled and that the employer is aware thereof, the court may enjoin the employer from calling the bond in full or to the extent that the amount of the call is considered to be excessive. In view of the purpose of contractually agreed on-demand bonds, and to safeguard the employer's rights in this regard, a court will generally be inclined not to enjoin the employer from calling the bond even where doubts exist as to the underlying merits of the call. Again, the applicable principle is "pay first, litigate later".

As for decisions restraining a call of the guarantee before it is made at all, they are common in international arbitration if the party having arranged for the guarantee offers to extend the guarantee. In Swiss-based arbitration, this is usually based on the procedural principle that parties should refrain from aggravating the dispute.

Further considerations

57 Are there any other material aspects of the law of your jurisdiction concerning construction projects not covered above?

No.

Nathalie Voser

Schellenberg Wittmer

Nathalie Voser is a partner in Schellenberg Wittmer's dispute resolution group in Zürich. She has acted as counsel and arbitrator in a vast number of cases. Nathalie's areas of specialisation include disputes regarding construction / infrastructure projects, civil engineering and energy related projects (including investor – state disputes), pharmaceutical and automotive industries.

According to leading legal directories and publications such as C*hambers and Partners, The Legal 500, GAR* and *Who's Who Legal*, Nathalie is highlighted in 2018 as a "strong leader", with an "impressive depth of understanding", which is "not matched by everyone". She is praised as a "highly skillful arbitrator and counsel in complex disputes", whom peers describe as a "leading figure on the scene". Nathalie is also described as a "strong, high-level and technical lawyer who has a big international following" and who is "a very experienced practitioner".

Nathalie is currently a vice president of the London Court of International Arbitration (LCIA) and a board member of the Swiss Arbitration Association. She is an immediate past member of the board of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). She has other functions in various institutions such as being a Swiss delegate in the ICC Arbitration and ADR Commission in Paris.

In 2005, Nathalie received the venia docendi for private law, conflicts of laws and comparative law, and in 2014, she was awarded the title of professor in private law, arbitration law, private international law and comparative law by the University of Basel, where she regularly teaches courses in commercial arbitration and other areas of Swiss private law.

Nathalie frequently publishes in her specialised field with a focus on international commercial arbitration and litigation dealing with matters such as conflicts of interests, provisional measures and multiparty arbitration and certain areas of Swiss and comparative substantive law. She has co-authored a textbook on international arbitration in Switzerland, notably the third edition of *International Arbitration – Comparative and Swiss Perspectives* (Zurich: Schulthess, 2016).

Furthermore, Nathalie has given numerous presentations in these areas in Europe, the US and Asia.

Elliott Geisinger

Schellenberg Wittmer

Elliott Geisinger heads Schellenberg Wittmer's international arbitration group as global chair. He has acted as counsel and arbitrator in over 130 international arbitrations in complex commercial disputes involving international construction contracts, consortia and joint venture agreements, sponsorship contracts, and sales and distribution contracts. He has also advised foreign states and Swiss corporations in investment disputes.

Elliott is particularly specialised in construction and engineering matters. He is co-founder of the Istanbul International Construction Law Conferences project, with Professor Dr Yeşim Atamer of Istanbul Bilgi University (www.construction-law.bilgi.edu.tr). Contract management in large-scale construction and infrastructure projects is a further specialisation of his.

Elliott regularly represents clients in arbitration-related court proceedings. Elliott has represented parties before the Swiss Supreme Court in several landmark cases, many of which have been reported in the official collection of Swiss Supreme Court cases and in arbitration journals.

Elliott is highly recognised and ranked for his work as counsel and arbitrator by leading international directories such as *Chambers and Partners, The Legal 500, GAR, Expert Guides, ILO* and *Who's Who Legal*. They describe him as "a high-caliber arbitration counsel who is a fantastic technician and construction specialist". As a winner of ILO's Client Choice Award, clients said: "as a lawyer, Elliott is flexible enough to think like an engineer or a project manager." Additionally, according to clients: "he is very careful with the details, but never lets go of the big picture. He is reliable, responsive and quick." He comes "highly recommended", by sources, who report that he is "extremely well regarded, efficient and organized". Elliott's reputational expertise is further described as "a well-known arbitrator with a wealth of experience acting as both counsel and arbitrator in complex disputes".

Elliott is president of the Swiss Arbitration Association (ASA) since 2014, having been elected to the ASA board in 2007 and becoming ASA vice-president in 2007. He sat on the arbitration committee of the Geneva Chamber of Commerce and Industry from 1999 to 2003. Elliott is a Member of the Council of CIDS

– Geneva Center for International Dispute Settlement of the University of Geneva's Institute of International and Development Studies and sits on the board of trustees of the Foundation for International Arbitration Advocacy. Elliott is one of four arbitration experts currently advising the Swiss government on the ongoing revision of Swiss law of international arbitration. He has authored several publications in the fields of international arbitration and private international law.

Christopher Boog

Schellenberg Wittmer

Christopher Boog is a partner and vice chair of the International Arbitration Practice Group at Schellenberg Wittmer. He splits his time between the firm's Singapore and Zurich offices.

Christopher represents clients in international commercial, investment and sports arbitration matters in civil and common law jurisdictions around the world as well as in setting-aside proceedings before the Swiss Supreme Court, and regularly sits as arbitrator in Europe, the Middle East and throughout Asia.

A large part of Christopher's practice focuses on complex construction and engineering disputes in the energy, mining and metals, infrastructure, shipping and manufacturing sectors.

Examples of Christopher's recent work in construction matters include the representation of an international construction consortium in several parallel multibillion-dollar arbitrations regarding one of the world's largest infrastructure projects; counsel to a German client in a US$500 million construction dispute in the mining sector; and counsel to multinational contractor in several disputes over power plant projects around the world.

Christopher is admitted to the Swiss and Singapore bars (foreign lawyer), holds law degrees from universities in Switzerland, the Netherlands and the US, a PhD from the University of Zurich, and is a fellow of both the Chartered Institute of Arbitrators and the Singapore Institute of Arbitrators. He is a vice-president of the Arbitration Court of the Swiss Chambers' Arbitration Institution and vice chair of the IPBA International Construction Projects Committee.

Katherine Bell

Schellenberg Wittmer

Katherine Bell is a senior associate in Schellenberg Wittmer's dispute resolution and construction group in Zurich. Her main areas of practice are domestic and international commercial litigation and arbitration. She has acted as counsel and administrative secretary in complex international arbitrations involving an array of matters, including in particular large construction and engineering projects around the globe.

Katherine also represents parties in commercial litigation proceedings before Swiss courts and assists clients in the drafting and negotiation of construction contracts.

Examples of Katherine's expertise in construction matters include: representing a multinational company in an ICC arbitration against a shipyard operator in a dispute over a contract regarding the delivery of technical equipment; representing a German party in ICC arbitration proceedings against an Eastern European party in a dispute under a series of supply and engineering contracts related to a metals processing plant; and acting as sole arbitrator in an arbitration under the Swiss Rules between an Austrian company and a Turkish company related to a dispute over the engineering and supply of electro-mechanical equipment.

Katherine regularly publishes in her areas of expertise. She is a member of several professional institutions, including the Swiss Arbitration Association, the Arbitral Women Association, the ICC Young Arbitrators Forum and YConstruction. In 2019 Katherine was recognised as a Future Leader by *Who's Who Legal* in construction.

Prior to joining Schellenberg Wittmer, Katherine was a contract manager for an international healthcare company based in Zug, Switzerland. Katherine was also a legal intern at the High Prosecutor's Office of the Canton of Berne. Thereafter she served as a law clerk with the District Court of Horgen, Zurich, where she was also chair of the conciliation authority for disputes relating to the tenancy and lease of property.

Schellenberg Wittmer is one of the leading business law firms in Switzerland. Over 150 lawyers in Zurich, Geneva and Singapore advise domestic and international clients on all aspects of business law. The firm's areas of expertise include: banking and finance, competition and antitrust, construction, dispute resolution and international arbitration, intellectual property/information technology, mergers and acquisitions, private equity and venture capital, private clients and estates, real estate, restructuring and insolvency, taxation, white-collar crime and compliance. Schellenberg Wittmer's Singapore office covers key jurisdictions and markets in the Asia-Pacific region, assisting clients in both inbound and outbound investments as well as in international arbitration.

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