GAR KNOW HOW CONSTRUCTION ARBITRATION

Switzerland

Katherine Bell, Christopher Boog and Elliott Geisinger

Schellenberg Wittmer

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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.

Swiss contract law in particular is very liberal in that it contains very few mandatory provisions and party-autonomy reigns supreme. 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 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 the 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. For public projects in Switzerland, there are specific rules that apply (eg, for tender, dispute resolution). 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.

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 notion of "implied terms". Non-mandatory statutory default provisions apply if the parties have not governed certain issues in their contract. For construction contracts, the non-mandatory statutory default provisions governing such contracts are article 363-379 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 the 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, if so agreed by the parties, will be treated accordingly also by a court or arbitral tribunal. The contractor may be able to bring a claim directly against the certifier as if it has a claim arising 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?

While there is no definitive case law on concurrent delay, the prevailing view in Swiss legal commentary holds that, 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). 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 the time-no-money approach 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)?

Swiss law recognises different forms of disruption are accepted 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. The contractor is normally not entitled to damages in these cases, 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 it additional costs and/or other losses or damages, as well as the quantum of the costs, losses or damages. Under Swiss law, the contractor must generally prove actual damage (ie, it must quantify and substantiate in detail the specific damage suffered). Only in exceptional circumstances, where such quantification is not possible, may a court or arbitral tribunal apply article 42(2) CO and 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 that 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, the construction contract may provide otherwise, either explicitly or if interpreted properly. Therefore, a contractor that accelerates the works on its 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 it 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 it must choose between whether to hope that it can prove the extension of time or whether it 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 that 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 Swiss courts recognise the concept of force majeure, 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 the impossibility was caused by the employer through its 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 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 considered based on specific statutory provisions related to construction contracts in the Swiss Code of Obligations. In the case of destruction of the works prior to 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 sphere of risk, the employer must pay the contractor for the work already performed (article 378 CO). If such impossibility is the fault of the employer, 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 may 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 construction costs, the contractor may not generally seek relief if the contract price was determined on a lump sum or turnkey basis, unless specifically 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, which is an example of the concept of clausula rebus sic stantibus).

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 the obligation. If the contractor is responsible for this 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 its part, it is excused from its performance under the contract without being liable vis-à-vis the employer (article 119(1) CO). The employer on its part is freed from its obligation to pay the contract price and the contractor must refund any payments that it 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 becomes incapable of performing its obligations, the construction contract is deemed to be terminated (article 379(1) CO). In such a 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 it.

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?

The general rule is that the parties are free to allocate risk in their contract, including risk for matters that a party cannot foresee or over which a party has no control. There are, however, two exceptions.

First, as the mandatory provision of article 100(1) CO does not allow for the exclusion in advance 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).

Second, article 27(2) of the Swiss Civil Code (CC) prohibits, inter alia, contractual undertakings that are so onerous that they must be considered contrary to good morals. However, this provision is very rarely applied to business-to-business agreements and the threshold is very high.

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 design of the project, the contractor has an obligation to inform the employer of defects in the design based on its 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, it can be held liable for the delay or costs, or both, resulting directly from its delay.

Where the contractor expressly warns the employer of flaws in the employer's instructions, and the employer nevertheless maintains its instructions, the employer forfeits its statutory defect rights in the event that the works turn out to be defective as a result of such instructions (article 369 CO).

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) of the Swiss Civil Code, pursuant to which any party to a contract must 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). At the same time, 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, with prevailing opinion and the Swiss Supreme Court leaning towards accepting an analogous application. Article 163(3) CO is one of the few mandatory provisions under Swiss law and courts and tribunals can apply it ex officio. The Swiss Supreme Court has held, however, that the provision does not constitute Swiss substantive public policy within the meaning of article 190(2)(e) of the Swiss Private International Law Act (PILA) governing the grounds on which arbitral awards may be challenged.

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?

If the contract provides for a notification regime, failure to comply with notification requirements generally precludes the claim from being successful. The Swiss Supreme Court tends to take a 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 aware of the circumstances that were to be notified. No distinction is made in principle as to the nature of the claim.

In general, the parties may bring claims outside the express terms of the contract, such as, for example, based on statutory law (to the extent not derogated by the contract), unless the contract expressly excludes or must be interpreted to exclude statutory remedies.

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. Further, the contractor may suspend and/or terminate the contract due to the employer's continued failure to comply with its duty to cooperate (article 95 CO).

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. Contract provisions relating to termination for convenience will take precedence if they depart from what is described above.

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), which is, however, subject to stringent conditions, (iii) owing to the performance under the contract becoming impossible for specific reasons attributable to – but without any fault on part of – 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 a case, if the employer is responsible for the circumstances giving rise to the termination of the contract, it has to pay the contractor for the work already performed 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 it. 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 substantial delay in the ongoing performance of the contract (article 366(1) CO), (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 its quotation (article 375 CO), or (v) for convenience (article 377 CO).

Moreover, in very exceptional circumstances, termination may be justified by the contractor or 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, fraudulent inducement 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.

Unless the parties have contractually agreed otherwise, the contractor may terminate the construction contract:

- if the employer unduly delays payment (article 107(2) CO);
- due to a substantial increase in the costs of the contractor's performance where a lump sum was agreed (article 373(2) CO);
- owing to the performance under the contract becoming impossible for specific reasons attributable to – but without any fault on part of – 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 a case, if the employer is responsible for the termination of the contract, it has to pay the contractor for the work already done performed 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 it. 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:

- owing to failure by the contractor to commence works or substantial delay in the ongoing performance of the contract (article 366(1) CO);
- 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);
- due to substantially lower costs of the contractor's performance where a lump sum was agreed (article 373(2) CO);
- where the contractor excessively exceeds its quotation (article 375 CO); or
- for convenience (article 377 CO).

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), which applies in exceptional circumstances, 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 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.

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 (explicit or implicit) 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. 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 detectable for 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?

Swiss law recognises the concept of liquidated damages, although Swiss statutory law does not contain any specific provisions on liquidated damages. Swiss law also, expressly (articles 160 et seq), recognises and regulates contractual penalties, which raises issues in distinguishing between the two.

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 contractually predetermined amount of damages that can be claimed and therefore a contractual limitation of liability. Therefore, it is generally not possible for the employer to claim for damages in excess of the stipulated liquidated damages, whereas a contractual penalty is owed irrespective of any loss and possibly in addition to damages. 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 (article 100(1) CO). A contractor acts with gross negligence when it grossly departs from elementary imperatives of precaution prevailing in the industry sector and thus disregards what would make sense to every conscientious contractor acting in 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 contractor: the higher the level of sophistication and specialisation, the higher the standard, meaning that a specialised contractor's actions and omissions will be assessed against the standard set by equally specialised contractors rather than against the actions of a layperson. Under Swiss law, contractual provisions limiting or excluding a party's liability for wilful misconduct in advance 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).

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 to pre-determine a sum to be paid by the contractor in case of delay, thereby relieving the employer from its obligation to prove the actual damage incurred. However, the general preconditions for damage claims must be 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 (on contractual penalties) is applied by analogy (which prevailing opinion and the Swiss Supreme Court appears to lean towards) – where the amount is considered excessive. 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 damages, it might award a higher amount if so proven by the employer. The same applies if the court or arbitral tribunal finds that the limitation of liability contained in the liquidated damages provision does not apply in the exceptional circumstances of the case, eg, in the case of wilful misconduct or gross negligence (article 100(1) CO).

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 CO is not mandatory. However, liability cannot be excluded in advance in cases of wilful misconduct or gross negligence (article 100(1) CO).

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 and their consequences are usually set out in the contract. What follows applies where the contract is silent (and can be modified by the parties in their contract).

There are two relevant types of 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. Under an ongoing partial revision of the Swiss Code of Obligations related to the provisions governing contracts for works, the Swiss legislative bodies propose to increase the statutory defect notification period from 7-10 days to 60 days (or potentially abolish the statutory defect notification period altogether and instead rely solely on the applicable statute of limitation). The results of the public consultation related to this proposal have not yet been published and any changes would likely not become effective before 2025.

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.

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 sets out a double test of causation (or proximity). First, the breach must be the actual cause of the damages incurred from a factual standpoint ("natural" causation). Second, the breach must be a likely cause of the damages incurred in light of general experience in the given field ("adequate" causation). Based on this double proximity test, both direct and indirect loss may be considered compensable in a specific case. 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 loss. Under the statutory defects liability regime for construction contracts (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, eg 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, which is permissible even with regard to wilful misconduct or gross negligence, see article 101(2) CO). 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; article 100(2) CO). 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.

Pursuant to Swiss law, a contractor acts with gross negligence when it grossly departs from elementary imperatives of precaution prevailing in the industry sector and thus disregards what would make sense to every conscientious contractor acting in the same circumstances. When determining the standard of care against which gross negligence will be measured, the degree of specialisation of the contractor will be considered: the higher the level of sophistication and specialisation, the higher the standard, meaning that a specialised contractor's actions and omissions will be assessed against the standard set by equally specialised contractors rather than against the actions of a layperson.

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) of the Swiss Civil Code, a contractor may demand for collateral of its 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 of 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 judgment or award for the remuneration claim, it may enforce the lien on the property and collect its 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 (pay-when-paid clause), or as constituting an actual condition precedent for the subcontractor's right to receive payment (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.

Where a pay-if-paid clause is a true condition precedent in a subcontract, it triggers a fiduciary duty of the main contractor under the subcontract to make reasonable efforts to obtain payment from the employer. If the employer fails to make such reasonable efforts without a valid reason, the condition precedent is deemed to be fulfilled under article 156 CO and the payment will be owed by the main contractor irrespective of payment by the owner under the main contract. The same applies at main contract level where payments by the employer to the main contractor are conditional upon release of funds to the employer by the entity that is financing the project.

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 its claim under the subcontract by placing a lien on the works (ie, on the employer's property pursuant to article 837(1)(3) CC).

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 an underlying contract generally binds only the parties that have entered into that contract. Therefore, since there are generally two separate contracts, one between the employer and the contractor and one between the contractor and the subcontractor, 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. 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. 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. However, the Swiss Supreme Court is rather strict when it comes to the extension of arbitration agreements to non-signatories. In a recent decision, the Swiss Supreme Court stated with regard to subcontractors specifically that the officially communicated position of a party in a project as subcontractor supersedes actions of this party which might – otherwise – be seen as sufficient for an extension of an arbitration agreement to a non-signatory.

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 operates under 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 its 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 and begin to run afresh 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 defense 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 parties may 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 (revised article 134(1)(8) CO).

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 CO, pursuant to which the contractor may not exclude its liability for defects that it intentionally concealed from the employer.

Another example would be article 163(3) CO, under which a court or arbitral tribunal must reduce ex officio contractual penalties it deems to be excessive. The Supreme Court held that this provision forms part of Swiss domestic public policy 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 2018, 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 factospecialisation 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 and regularly handle complex construction disputes.

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).

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.

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 at a later stage.

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. 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.

Katherine Bell

Schellenberg Wittmer

Katherine Bell is a partner in Schellenberg Wittmer's dispute resolution group and heads the construction practice in Zurich. Her main areas of practice are domestic and international commercial litigation and arbitration. She specialises in the resolution of disputes arising out of complex construction, engineering and infrastructure projects across a variety of industries. She acts as counsel and arbitrator in arbitral proceedings, represents parties in 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 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; representing a multinational company in an ICC arbitration against a shipyard operator in a dispute over a contract regarding the delivery of technical equipment; acting as sole arbitrator in an arbitration under the Swiss Rules between an Austrian and a Turkish company in the field of hydropower technologies in a dispute related to the supply of electromechanical equipment; representing the Swiss subsidiary of an Austrian construction company in litigation proceedings before Swiss courts against a Swiss property developer in a dispute related to a turnkey contract for the construction of a business hotel.

Since 2019, Katherine has been recognised by *Who's Who Legal* as a Future Leader in Construction as well as in Arbitration, highlighting her "skillful handling of complex construction disputes" and describing her as "brilliant counsel in the field of construction arbitration". In 2021, Katherine was recognised as a Rising Star in Commercial Arbitration by *LMG Expert Guides*.

Katherine is a lecturer on construction law at the Swiss Educational Centre for Construction (Campus Sursee). She is a member of the editorial board of *Construction Law International* and regularly publishes in her areas of expertise. She is a member of several professional institutions, including ASA Below 40, YConstruction, IBA International Construction Projects, the Society of Construction Law and ArbitralWomen.

Christopher Boog

Schellenberg Wittmer

Christopher Boog is a partner and vice chair of the international arbitration practice group and co-chairs the construction practice group at Schellenberg Wittmer. He splits his time between the firm's Singapore and Zurich offices.

Christopher represents clients in international constructions disputes before dispute boards, in mediation and conciliation proceedings, as well as before international arbitral tribunal, including in investment disputes related to construction and infrastructure projects, 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$600 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 Arbitration Centre and a former vice chair of the IPBA International Construction Projects Committee. Christopher Boog is the 2020 recipient of the ASA Prize for Advocacy in International Commercial Arbitration, awarded every two years to international arbitration counsel to recognise exceptional advocacy in international arbitration.

Elliott Geisinger

Schellenberg Wittmer

Elliott Geisinger heads Schellenberg Wittmer's international arbitration group. He has acted as counsel and arbitrator in over 130 international arbitrations in complex commercial disputes involving international commercial 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 Yesim Atamer of Istanbul Bilgi University (www.construction-law.bilgi.edu.tr). He is further specialised in contract management in large-scale construction and infrastructure projects.

Elliott regularly represents clients in arbitration-related court proceedings. Elliott has represented parties before the Swiss Supreme Court in several landmark cases.

Elliott's recent experience in arbitration matters includes representation, as co-counsel, for the construction consortium in several ICC proceedings relating to the enlargement of the Panama Canal; representation of the Russian Federation in investment arbitration matters in proceedings before the Swiss Supreme Court to set aside interim awards on jurisdiction under the ECT and under the Ukraine-Russia BIT; and representation of a major North African state company in proceedings relating to saltwater desalination projects.

Elliott was president of the Swiss Arbitration Association (ASA) from 2014 to 2019 and is now honorary president. Elliott is one of four arbitration experts to have advised the Swiss government on revisions to the Swiss law on international arbitration.

Schellenberg Wittmer

Schellenberg Wittmer is your leading Swiss business law firm, with more than 150 lawyers in Zurich and Geneva, and an office in Singapore. We take care of all your legal needs – transactions, advisory and disputes. Our offices in Zurich and Geneva cover the whole of Switzerland, while our office in Singapore is a gateway to and from the Asia Pacific region. We provide a comprehensive range of legal services to a worldwide client base of domestic and international companies and entrepreneurs. Our new regional desks were set up to develop our existing cross-border business initiatives, centralise case-work across these regions, and underpin Schellenberg Wittmer's commitment to the provision of top-tier, full business law services to clients on a global level.

Löwenstrasse 19
P.O. Box 2201
8021 Zurich
Switzerland
Tel: +41 44 215 5252
Fax: +41 44 215 5200

www.swlegal.ch

Katherine Bell
katherine.bell@swlegal.ch

Christopher Boog
christopher.boog@swlegal.ch

Elliott Geisinger
elliott.geisinger@swlegal.ch