SWISS LAW VS ENGLISH LAW ON CONTRACT INTERPRETATION: IS SWISS LAW BETTER SUITED TO THE REALITIES OF INTERNATIONAL CONSTRUCTION CONTRACTS?

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1. INTRODUCTION

English and Swiss law are, respectively, the first and second most frequently chosen governing laws in international contracts, at least according to the International Chamber of Commerce’s statistics on contracts giving rise to arbitration under the ICC Rules of Arbitration. The difference between the approaches of these two systems to the interpretation of contracts, and in particular between the principles underlying those approaches, are, at first glance, marked. The English law approach, and more generally that of common law systems, is often characterised as an “objective” approach which is focused on the terms of the contract and shuns extrinsic evidence. In contrast, Swiss law, along with other civilian systems, is usually said to adopt a “subjective” approach which focuses on the real intentions of the parties. However, the distinction between the English and Swiss approaches, and more generally between common and civil law systems, is far more nuanced than the subjective versus objective dichotomy would suggest.

While the fundamental starting points of contract interpretation under Swiss and English law are at diametrical odds, a closer look at the doctrine and jurisprudence in both systems reveals a number of common features in their approaches to interpretation. In particular, the wording of a written contract, and how a reasonable person would interpret it, plays a far greater role in Swiss law than the popular perception of contract interpretation in civilian systems would suggest. Notwithstanding these similarities, certain features of the Swiss approach to contract interpretation, for instance the simplicity of its approach to the admissibility of evidence, might in fact make it better suited to the realities of international construction contracts. This paper explores why that might be the case in light of a number of particularities of international construction contracts.

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1 ICC International Court of Arbitration, 2013 Statistical Report, ICC International Court of Arbitration Bulletin, vol 25, no 1, p 5. The ICC’s statistics show that, in the cases submitted to ICC arbitration, 15.64% of contracts which contained a choice of law provided for the application of English law, while 10.09% provided for the application of Swiss law.
In doing so, this paper does not aim to provide a comprehensive overview of the different approaches to interpretation in civilian jurisdictions, the diversity of which is illustrated by the differences between French and German law, historically two of the most influential civilian systems. This paper will rather focus on Swiss law, probably the most prominent civilian law in the context of international contracts, which has been influenced by both French and German law, but which has also developed its own particularities. In the interest of brevity, this paper also does not propose to address the default (or mandatory) rules of Swiss law, or the issue of implied terms, which form part of the framework in which contracts are interpreted under Swiss law, although they will be touched on through a number of examples of the interpretation of frequently used clauses (see section 3.5 below).

This paper will first briefly identify a few particularities of international construction contracts which may be relevant in assessing the suitability of the rules of interpretation of different jurisdictions (section 2), before moving on to an analysis of the Swiss approach to the interpretation of contracts (section 3). It will then conclude with an assessment of how Swiss law differs from English law, and of its potential advantages in light of the particularities of international construction contracts identified in section 2 (section 4).

2. THE PARTICULARITIES OF INTERNATIONAL CONSTRUCTION CONTRACTS

Any discussion of the suitability of a given interpretive approach to international construction contracts should start with an overview of the particularities of such contracts. The aim of this section is not to set out an exhaustive list of particularities shared by all international construction contracts, but rather to identify certain key features which arise frequently and which may be relevant to their interpretation.

The first such feature, and perhaps the most important, is that international construction contracts are often concluded between parties which, although they are mostly part of the same broadly defined industry, have different cultural, commercial, and legal backgrounds. Unlike parties to domestic construction contracts, they may have little experience dealing with each other or with contractual partners from each other’s jurisdictions, and may therefore have different expectations. A related source of complication is the parties’ sometimes imperfect command of the language of the contract, which is most frequently English. This can lead to imperfectly

worded clauses, with misused words and connectors, grammatical errors, convoluted or unusual sentence structures, and literal translations, which the parties may or may not have understood in the same way.

Another important feature of international construction contracts is the use of standard form contracts, whether in their original form or modified by the parties. Parties’ levels of familiarity with the standard forms they use, for instance the FIDIC Conditions of Contract, can vary greatly. In some instances, standard forms are mechanically adopted by the parties without any significant negotiation or a full understanding of their requirements and implications\(^3\). Indications that this may be the case include a subsequent failure of the parties to implement certain parts of the standard form, for instance by failing to appoint a standing dispute adjudication board, or the inclusion of a second arbitration clause in the special conditions in addition to that set out in the standard form.

International construction contracts, whether based on standard forms or not, are also often highly complex, and contain a number of detailed procedures, for instance for the submission of claims for additional costs or time, which are sometimes not followed by the parties when performing the contract. For example, the parties might from the beginning of the contract submit and accept claims which fall outside the contractual time limits. Such a failure to follow contractual procedures may be attributable to a disconnect between the lawyers who negotiated the contract and the contract managers, engineers, and others who implement its provisions\(^4\). It may, however, also provide a clue as to the parties’ intentions at the time the contract was concluded.

Finally, the parties’ choice of applicable law is sometimes at odds with the origins of the contractual terms they agree on. Clauses which find their origin in the laws of a specific jurisdiction are often recycled without regard to the law applicable to the contract in which they are incorporated. Lawyers from one jurisdiction may negotiate a contract which is governed by the law of another jurisdiction, without regard to how the applicable law would affect the interpretation of the terms of the contract. Lawyers might also negotiate a contract on the basis that it will be subject to a certain law only for the parties to agree prior to the conclusion of the contract to opt for a different applicable law. In such circumstances, it can be unclear whether the parties understood or intended the potential implications of their choice of law.

As a whole, these particularities underline the need for a certain degree of flexibility and sensitivity in the interpretation of a contract to the backgrounds and conduct of the parties, and the circumstances in which

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they concluded their contract, in order to ensure they are not held to an interpretation which is contrary to their intention.

3. THE MAIN FEATURES OF THE SWISS APPROACH TO CONTRACT INTERPRETATION

As is the case of other civilian jurisdictions, the theoretical starting point of contractual interpretation under Swiss law differs significantly from that in common law jurisdictions: a court or arbitral tribunal applying Swiss law must first seek to determine the real and common intention of the parties, which may be inconsistent with the wording of the contract. If the real and common intention of the parties cannot be established, a judge or arbitrator can resort to an objective interpretation, based on the so-called “principle of trust” (“Vertrauensprinzip”, or “principe de la confiance”). There is, therefore, a two-tiered approach to the interpretation of contracts under Swiss law, which is set out almost as a mantra by the Swiss Supreme Court at the beginning of its reasoning in every one of its decisions addressing the interpretation of a contract. However, despite the apparent importance of the order of the two tiers, they overlap in practice and can be difficult to distinguish. In addition, while the requirement of seeking the real and common intention of the parties is often phrased as a duty of the judge or arbitrator, a party seeking to rely on such an intention has the burden of proving it. A judge or arbitrator will therefore rely on the parties and the evidence adduced by them.

3.1. Real and common intention of the parties (subjective interpretation)

Article 18(1) of the Code of Obligations (“CO”) sets out what is, at least theoretically, the primary objective of contractual interpretation under

5 See eg, Decision of the Swiss Federal Tribunal (“DFT”) 4A_124/2014 dated 7 July 2014, [paragraph 3.4.1]: “Le juge s’attachera, tout d’abord, à mettre au jour la réelle et commune intention des parties, le cas échéant empiriquement, sur la base d’indices, sans s’arrêter aux expressions et dénominations inexactes dont elles ont pu se servir. S’il n’y parvient pas, il recherchera alors, en appliquant le principe de la confiance, le sens que les parties pouvaient et devaient donner, selon les règles de la bonne foi, à leurs manifestations de volonté réciproques en fonction de l’ensemble des circonstances.”

The Swiss Supreme Court emphasises the distinction between the subjective and objective approaches to interpretation in part because the distinction has consequences as to the scope of its power to review a lower court’s decision. A decision by a lower court on the real and common intention of the parties is considered to be a finding of fact by which the Supreme Court is bound, whereas objective interpretation is a question of law which the Supreme Court can freely review: see eg, DFT 5A_204/2009 [paragraph 4.2.3]; DFT 121 III 118 [paragraph 4(b)(aa)].

Swiss law, namely to go beyond the terms used by the parties to establish their real and common intention:

“In order to decide on the form and clauses of a contract, it is necessary to seek the real and common intention of the parties, instead of relying on the incorrect expressions and terms which the parties used in error or with the aim of dissimulating the real nature of the contract.”

The approach mandated by Article 18(1) CO is therefore an empirical one, aimed at establishing the parties’ subjective intentions at the time of the conclusion of the contract.

No limitations are imposed on what a court or tribunal may look to in seeking the parties’ real and common intention. Any form of evidence that sheds light on the parties’ intentions can be adduced by the parties. In addition to the wording of the contract, judges and arbitrators can consider evidence of the circumstances in which the contract was concluded, the parties’ respective interests, the purpose or objective of the contract, and usage in a specific industry. In contrast to common law jurisdictions, they can also look to the conduct and declarations of the parties before the contract was concluded, in particular their negotiations and subjective declarations of intent, as well as to their conduct after the contract was concluded.

3.1.1. The wording of the contract

The text of the contract adopted by the parties is an important means of determining their real intentions under Swiss law, and is sometimes referred to as the “primary” means of interpretation, with all other forms of evidence being referred to as “complementary” means. This characterisation does not, however, imply that there is a strict hierarchy among the various types of evidence used to interpret a contract, and that the wording adopted by the parties should necessarily be given greater weight. It rather means that the wording of the contract is to be the starting point or the foundation of the interpretation. A judge or arbitrator cannot limit him or herself to a literal interpretation of the wording of the contract, even if it is clear and unambiguous.

7 Article 18(1) CO (unofficial translation). The German version of Article 18(1) CO reads as follows: “Bei der Beurteilung eines Vertrages sowohl nach Form als nach Inhalt ist der übereinstimmende wirkliche Wille und nicht die unrichtige Bezeichnung oder Ausdrucksweise zu beachten, die von den Parteien aus Irrtum oder in der Absicht gebraucht wird, die wahre Beschaffenheit des Vertrages zu verbergen.”

8 Wiegand, supra note 6, Art 18, N 26.


10 Wiegand, supra note 6, at N 18.

As a general rule, the terms of the contract are to be interpreted in accordance with their ordinary meaning at the time the contract was concluded. If, however, a term has a specific meaning, technical or otherwise, in a certain industry or sector, that meaning will prevail provided that both parties can be considered to be part of that industry or sector, or familiar with the special vocabulary it uses. Therefore, if both parties to a contract are considered to be part of the construction industry, any specific meaning given to terms within that industry will generally take precedence over their ordinary meaning.

However, while parties to an international construction contract can usually both be considered to be part of the same broadly defined industry, they often have different cultural and commercial backgrounds (see section 2 above). They may also have concluded their contract in a language with which they are not familiar, or at least in which they are not familiar with the technical vocabulary. A court or tribunal applying Swiss law would likely take such factors, which could potentially lead to diverging understandings of technical terms, into account in assessing the meaning of the terms used by the parties.

Swiss courts will also be sensitive to the parties’ backgrounds when interpreting contractual terms that have specific legal meanings under Swiss law. While the courts may be inclined to ascribe a specific legal meaning to terms used by parties that are specialists in the relevant field, they have shown themselves to be cautious in doing so, especially when foreign parties refer to Swiss law concepts.

3.1.2. The parties’ negotiations and conduct before the conclusion of the contract

A significant difference between civil law and common law systems is the admissibility of evidence of the parties’ conduct prior to the conclusion of their contract, in particular of their negotiations. It is not uncommon in proceedings relating to a contract governed by Swiss law for parties to produce as evidence the draft contracts and correspondence they exchanged during their negotiations, or to adduce witness evidence concerning their discussions and intentions at the time of the negotiations. Under Swiss law, such evidence is considered to be a particularly important means of establishing the parties’ real intentions, although commentators recognise

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12 DFT 59 II 318, p. 322; DFT 104 II 281 [paragraph 2]; Winiger, supra note 9, at N 26.
13 DFT 122 III 426 [paragraph 5]; Winiger, ibid, at N 26. If the parties themselves define terms in their contract, which is often the case in international construction contracts, those definitions will also prevail over the ordinary meaning of the terms. Swiss commentators have noted that the practice of defining terms in a contract, which they consider to be an phenomenon influenced by practices in the United States, has become increasingly common in contracts governed by Swiss law (see Wiegand, supra note 6, at N 19).
14 Winiger, supra note 9, at N 27.
15 Wiegand, supra note 6, at N 22.
that it must be assessed with care given that the parties’ intentions may have evolved until the contract was actually concluded\textsuperscript{16}.

It is unclear whether integration clauses, or clauses providing that the contract sets out the parties’ entire agreement, which are common in international construction contracts, can be interpreted as evidentiary rules that would limit a court’s or tribunal’s ability to look to evidence of the parties’ conduct before the conclusion of the contract. Indeed, they may be considered as substantive provisions which merely restate the rule that the contract replaces all prior contracts or draft contracts, and which therefore do not limit the court’s ability to look at drafts or negotiations to interpret the contract. In any event, an entire agreement clause is itself a contractual provision which is subject to interpretation, and commentators have questioned whether parties can by agreement restrict a court or tribunal’s ability to take into account certain types of evidence in seeking to establish their real and common intention\textsuperscript{17}.

\subsection*{3.1.3. The parties’ conduct after the conclusion of the contract}

The parties’ conduct after the conclusion of the contract can also be used under Swiss law to determine the parties’ real intentions\textsuperscript{18}. Courts and tribunals applying Swiss law will in particular look to the manner in which the parties exercised their rights and performed their obligations under the contract. For example, the parties’ failure to implement a contractual provision might, depending on the circumstances, be considered to be an indication that it did not reflect their real intention, or that it was subsequently waived.

However, in looking to the parties’ conduct after the conclusion of the contract, a court or tribunal must be cautious, as a contract must be interpreted in accordance with the parties’ intentions at the time it was concluded\textsuperscript{19}. Such evidence is therefore relevant only to the extent that it provides indications as to the common intention of the parties at the time of conclusion,\textsuperscript{20} as opposed for example to indications that the parties implicitly amended their agreement by their conduct\textsuperscript{21}.

\begin{footnotesize}
\begin{enumerate}
\item[16] Winiger, supra note 9, at N 27; Wiegand, \textit{ibid}, at N 35.
\item[17] Winiger, \textit{ibid}, at N 35a.
\item[18] DFT 5A_204/2009 [paragraph 4.2.3]: “Les faits postérieurs au moment où le contrat a été passé, en particulier le comportement ultérieur des parties, permettent d’établir quelles étaient à l’époque les conceptions des contractants eux-mêmes et constituent ainsi un indice de leur volonté réelle …”); DFT SJ 1996 549, (paragraph 3(a)).
\item[19] Wiegand, supra note 6, at N 29.
\end{enumerate}
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3.2. Principle of trust (normative or objective interpretation)

If the parties’ real intentions cannot be established, or if they are divergent, a court or tribunal will move on to the second interpretive step: establishing the parties’ presumed intention in accordance with the so-called principle of trust ("Vertrauensprinzip", or "principe de la confiance")\(^{22}\). In contrast to the first step outlined in section 3.1 above, which focuses on the parties’ subjective intentions, the application of the principle of trust is said to constitute an “objective” interpretation,\(^{23}\) although some commentators have questioned whether that is an accurate characterisation\(^{24}\). It is also referred to in the jurisprudence as “normative” interpretation\(^{25}\).

Interpretation in accordance with the principle of trust, which is based on the general duty of good faith enshrined in Article 2 of the Swiss Civil Code, consists in establishing how each of the parties’ “declarations”\(^{26}\) of intent could and should have reasonably been understood, in good faith, by the other party under the circumstances\(^{27}\). As is the case for subjective interpretation, the starting point for the analysis is the text of the contract\(^{28}\). However, a court or tribunal cannot adopt a purely literal interpretation of the text, even if it may appear to be clear\(^{29}\). It must examine the wording of the contract in its context, taking into account “all the circumstances

\(^{22}\) DFT 140 V 145 [paragraph 3.3].

\(^{23}\) “Il doit être rappelé que le principe de la confiance permet d’imputer à une partie le sens objective de sa déclaration ou de son comportement, même s’il ne correspond pas à sa volonté intime.” (DFT 129 III 118 [paragraph 2.5]; DFT 136 III 186 [paragraph 3.2.1]).

\(^{24}\) Gauch, supra note 20, at paragraph 3(a).

\(^{25}\) DFT 140 V 145 [paragraph 3.3]; DFT 132 V 286 [paragraph 3.2.1]: “L’interprétation en application de ce principe, dite objective ou normative, consiste à établir le sens que, d’après les règles de la bonne foi, chacune des parties pouvait et devait raisonnablement prêter aux déclarations de volonté de l’autre.”

\(^{26}\) These will often be the written terms of the contract, however the rules of interpretation under Swiss law apply to all forms of contracts, not only written contracts.

\(^{27}\) See DFT 136 III 186 [paragraph 3.2.1], which describes the approach in slightly different terms: “Il sied ainsi de rechercher comment les termes précités pouvaient être compris de bonne foi en fonction de l’ensemble des circonstances.” See also DFT 130 III 147: “Il convient de rechercher comment une déclaration ou une attitude pouvait être comprise de bonne foi en fonction de l’ensemble des circonstances.”

\(^{28}\) DFT 140 V 145 [paragraph 3.3]; DFT SJ 1996 549, [paragraph 3].

\(^{29}\) DFT 136 III 186 [paragraph 3.2.1]: “Le sens d’un texte, apparemment clair, n’est pas forcément déterminant, de sorte que l’interprétation purement littérale est prohibée. Même si la teneur d’une clause contractuelle paraît limpide à première vue, il peut résulter d’autres conditions du contrat, du but poursuivi par les parties ou d’autres circonstances que le texte de ladite clause ne restitue pas exactement le sens de l’accord conclu.” The Swiss Supreme Court has used the exact same formulation in a number of other decisions; see eg, DFT 130 III 417 [paragraph 3.2].

The approach to interpretation of “clear” contractual clauses changed at the beginning of the 2000s, when the Swiss Supreme Court rejected the previously applied “clarity rule” (in German, the “Eindeutigkeitsregel”), according to which it was unnecessary to look beyond the text of the contract if it was clear (DFT 127 III 444 [paragraph 2(c)]; DFT 5C.21/2007 dated 20 April 2007 [paragraph 3.1]).
which preceded or accompanied its conclusion ….” 30 These circumstances
include the other clauses of the contract, its purpose, the parties’ interests,
usage in the parties’ industry or field, and the parties’ negotiations. They
do not, however, include the conduct of the parties after the conclusion of
the contract, which, according to the Swiss Supreme Court, only provide
an indication of the parties’ real intentions at the time of concluding the
contract, but not of their objective intentions 31.

The Swiss courts will, in particular, give more or less weight to the
apparently clear meaning of the text of the contract depending on the
background of the parties. A stricter interpretation of the text of a contract
can be appropriate if the parties are commercially experienced and
familiar with the type of transaction and the meaning of the terms used
in the contract, or if they were advised by legal counsel 32. This would be
the case, to take an example from the jurisprudence of the Swiss Supreme
Court, of banks or companies with international operations in respect of
a hedging agreement 33. It may also be appropriate to adopt the “objective
legal meaning” under Swiss law of certain legal terms used by parties the
representatives of which have a Swiss legal education 34. However, according
to the Swiss Supreme Court’s jurisprudence, a more careful analysis of the
other circumstances surrounding a contract is necessary if a party is foreign,
or if the party’s declaration of intent is made in a foreign language 35.
Therefore, even the “objective” interpretation of international construction
contracts would, under Swiss law, take into account the parties’ different
linguistic, cultural, and legal backgrounds.

Nevertheless, the text of the contract is considered to have priority over
other evidence, and therefore will often be determinative. Indeed, the Swiss
Supreme Court repeatedly states in its jurisprudence that a court or tribunal
should not move away from the literal meaning of the text adopted by the
parties if there is no “serious reason” to think that it does not correspond to

30 DFT 140 V 145 [paragraph 3.3]; DFT 132 V 286 [paragraph 3.2.1]; DFT SJ 1996 549 [paragraph
3]; See also DFT 125 III 435 [paragraph 2(a)(aa)]; DFT 129 III 118 [paragraph 2.5]; DFT 123 III 165
[paragraph 3(aa)].
31 DFT 133 III 61 [paragraph 2.2.1]; DFT 5A_204/2009 [paragraph 4.2.3]; Kostkiewicz, supra note
11, at N 6.

The position of the Swiss Supreme Court on this issue has been criticised by a leading Swiss
commentator, who notes that a party’s conduct after the conclusion of the contract could also be based
on its own interpretation of the contract in accordance with the principle of trust (Gauch, supra note
20, at paragraph 2(b)).
32 DFT 129 III 702 [paragraph 2.4.2].
33 Ibid.
34 Ibid.
35 DFT 129 III 702 [paragraph 2.4.1]: “Insbesondere darf nicht ohne weitere Prüfung auf einen
entsprechenden Wortlaut abgestellt werden, wenn die verpflichtende Partei eine ausländische
Person ist oder die Willenserklärung von ihr in einer Fremdsprache abgegeben wurde. Gegenüber
geschäftserfahrenen, im Gebrauch von Fachbegriffen gewandten Personen, kann allerdings eine strikte
Auslegung nach dem Wortlaut angezeigt sein.”; Kostkiewicz, supra note 11, at N 8.
their intention\textsuperscript{36}. In other words, if the other evidence does not clearly lead to a different conclusion, a court or tribunal will fall back on the wording of the contract\textsuperscript{37}.

3.3. Burden of proof

Under Swiss law, the burden of proof, which is a matter of substance rather than of procedure,\textsuperscript{38} falls on the party seeking to rely on an alleged intention of the parties which diverges from the “normal” or objective meaning of the text of the contract\textsuperscript{39}. This rule emphasises both the importance of the text of the contract as the “primary” means of interpretation, as well as the practical importance under Swiss law of objective interpretation in comparison to subjective interpretation, despite the nominal primacy of the latter. Objective interpretation might even be said to effectively have priority over subjective interpretation in light of the allocation of the burden of proof, given that it will be determinative unless and until a real and common intention of the parties is alleged and proven\textsuperscript{40}.

3.4. Interpretation of standard form contracts

Unlike in certain other civilian jurisdictions, such as Germany, standard form contracts cannot be interpreted in a strictly objective or uniform way under Swiss law. Instead, a court or tribunal must interpret them in an “individualised” way, as it would other types of contracts,\textsuperscript{41} regardless of whether the parties adopted the standard form in whole or in part, and

That a party making a declaration of intent was not aware of the scope of his or her declaration would not, however, be relevant if the recipient could not have perceived that this was the case (DFT 125 III 263 [paragraph 2(c)(aa)]).

\textsuperscript{36} DFT 136 III 186 [paragraph 3.2.1]: “Il n’y a cependant pas lieu de s’écarter du sens littéral du texte adopté par les intéressés lorsqu’il n’existe aucune raison sérieuse de penser qu’il ne correspond pas à leur volonté …”;

\textsuperscript{37} DFT 135 III 295 [paragraph 5.2]; DFT 130 III 417 [paragraph 3.2]; DFT 129 III 118 [paragraph 2.5].

\textsuperscript{38} Article 8 of the Swiss Civil Code provides that the burden of proof of an alleged fact rests on the party which derives a right from it.

\textsuperscript{39} DFT 121 III 118 [paragraph 4(b)(aa)]: “Die Behauptungs- und Beweislast für Bestand und Inhalt eines vom normativen Auslegungsergebnis abweichenden subjektiven Vertragswillens trägt jene Partei, welche aus diesem Willen zu ihren Gunsten eine Rechtsfolge ableitet.”;

\textsuperscript{40} Gauch, supra note 20, at paragraph 3(b).

\textsuperscript{41} DFT 117 II 621; DFT 122 III 121; DFT 4C.397/1999 dated 18 July 2000 [paragraph 9(d)]: “Les disposition contractuelles préétablies doivent en principe être interprétées de la même manière que les clauses d’un contrat élaborées de façon individuelle.”; Peter Gauch, Der Werkvertrag, 5th Edition (Zurich: Schulthess, 2001) (hereafter “Gauch, Der Werkvertrag”), N 201, 291–294 (dealing in particular with the SIA Norm 118, a standard form which is widely used for domestic construction projects in Switzerland); Winiger, supra note 9, at N 54.
of whether they negotiated or modified it. This approach was confirmed in the context of the FIDIC Conditions of Contract in a recent decision of the Supreme Court, in which it noted that while the FIDIC Conditions resemble rules of law, which could justify an objective approach that could notably take into consideration the guidance provided by FIDIC itself, they should be interpreted in an individualised manner taking into account the circumstances of each case. Nevertheless, those circumstances may include the fact that the parties were aware that the standard form was drafted with a view to its uniform application, which may call for a more objective approach.

The interpretation of standard form contracts under Swiss law may also be subject to special rules of interpretation which apply to general terms and conditions (“GTCs”). These include the rule that GTCs which deviate from the default rules of the applicable law must be interpreted restrictively, at least in so far as they are less favourable to the party accepting the GTCs than the default rules of law. They also include the so-called “ambiguity rule” (“Unklarheitsregel”), according to which an ambiguous clause will be interpreted against the party which proposed the GTCs (“in dubio contra stipulatorem”). A standard form contract will not, however, be characterised as GTCs under Swiss law if its clauses were subject to serious negotiations between the parties. In addition, it is likely that these rules would not apply where both parties are part of the construction industry and are familiar with the standard form contract.

3.5. A few examples of interpretation of common clauses

The operation of the Swiss rules on contract interpretation in the context of international construction contracts can be illustrated through an analysis of how a court or tribunal applying them would approach certain types of commonly used clauses. This section briefly addresses the interpretation of four such clauses, namely: (1) “best” or “reasonable efforts” clauses; (2) clauses excluding liability for indirect or consequential damages; (3) multi-tier dispute resolution clauses; and (4) claim notification clauses.

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42 See Gauch, supra note 20, at paragraph 3(e).
43 DFT 4A_124/2014 dated 7 July 2014 [paragraph 3.4.1].
45 Wiegand, supra note 6, N 3, referring to DFT 115 II 474 [paragraph 2(d)]; DFT 117 II 609 [p 621]; DFT 5C.271/2004 dated 12 July 2005.
46 DFT 4C.215/2002 [paragraph 2(e)].
48 Gauch, Der Werkvertrag, supra note 41, at N 202, 294 (dealing in particular with the SIA Norm 118, a standard form which is widely used for domestic construction projects in Switzerland).
3.5.1. Best or reasonable efforts clauses

It is not uncommon for international contracts governed by Swiss law, including construction contracts, to contain a best or reasonable efforts clause. Such clauses are, however, transplants from common law contracts, and are not usually found in contracts between Swiss parties. This is attributable to the fact that Swiss law already imposes a general duty on parties to perform their contractual obligations conscientiously and diligently. The duty of care, which arises out of the general duty of good faith in Article 2 of the Swiss Civil Code, imposes a relatively high, objective, standard, namely to do all that can be reasonably expected of a diligent and prudent professional in similar circumstances. Although it is a general duty applying to all contractual obligations, it has particular relevance in the context of an obligation of means (as opposed to an obligation of result), as it constitutes the obligation’s “very object”, and defines its content.

When faced with a best or reasonable efforts clause, a court or tribunal applying Swiss law will assess whether the parties intended to strengthen or weaken the duty of care under Swiss law. In following the two-tiered approach to interpretation, which is set out in sections 3.1 and 3.2 above, the court or tribunal will take into account the circumstances in which the contract was concluded. In particular, the parties’ legal and linguistic backgrounds might indicate that they intended, or should have understood, a best or reasonable efforts clause to have the meaning it has under English law or under the law of another common law jurisdiction. If that is the case, the court or tribunal would then have to determine what that meaning is, which may not be an easy task given the varying approaches to, and evolving case law on, such clauses in different common law jurisdictions.

49 Some jurisdictions, such as the UK and Australia, also refer to such clauses as best or reasonable “endeavours”, rather than “efforts”, clauses.
51 Swiss Civil Code, Article 2(1): “Jedermann hat in der Ausübung seiner Rechte und in der Erfüllung seiner Pflichten nach Treu und Glauben zu handeln.”
52 Chappuis, supra note 50, at p 290.

This duty of care could be understood, if there are no specific difficulties or risks associated with the obligation, to require an obligor to take all reasonable courses of action to achieve a particular outcome, even if they may be contrary to its interests: Marie-Noëlle Zen-Ruffinen & Pascal G Favre, “Best efforts clauses in Swiss law: a few considerations in the light of selected examples” in Lara Hammond et al (eds), Concerto arbitral en trois mouvements pour Pierre Tercier (Zurich: Schulthess, 2013) p 125, at p 138.
53 Zen-Ruffinen & Favre, ibid, at p 129.
54 See eg, recent case law on such clauses in England (Jet2.com v Blackpool Airport Ltd (CA) [2012] EWCA Civ 417) and Singapore (K&F Energy Services Ltd v BR Energy (M) Sdn Bhd [2014] SGHC 16), which suggest a stricter approach to “best” or “all reasonable efforts” clauses that may require a party, depending on the nature and terms of their contract, to take steps which are contrary to its own commercial interests. The Australian courts appear to have taken a more lenient stance, with the prevailing view being that “best” and “reasonable” endeavours “impose substantially similar obligations” (Wayne Jocic & Matthew Bell, “Endeavouring to Solve a Contracting Puzzle: Verve Energy”, Opinions on High blog, Melbourne Law School, 14 March 2014), and a recent High Court decision suggesting that a party may not be required under such a clause to take steps contrary to its commercial interests (Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7).
In the absence of circumstances which would warrant looking to a common law definition, and in particular if the parties are Swiss or were advised by Swiss lawyers, a court or tribunal would likely try to interpret a best or reasonable efforts clause by reference to Swiss law. While there does not appear to be any directly relevant jurisprudence from the Swiss courts, commentators have argued that a reference to “best efforts” should be understood to heighten the obligor’s default duty of care under Swiss law, requiring it to make “first class efforts” and to “sacrifice [its] own interest as well as to invest and take the risk of success or failure … at least where there is a reasonable prospect of commercial success.” By contrast, the terms “reasonable efforts” might be understood as a simple reference to the default duty of care, although this would have to be determined on a case-by-case basis, in light of the specific circumstances of each case.

3.5.2. Limitation of liability clauses

Limitation of liability clauses referring to “indirect” and “consequential” damages, which are frequently found in common law contracts, are also often transposed to Swiss law contracts. While the concepts of “direct”, “indirect”, and “consequential” damage are not entirely alien to Swiss law, they are only used in specific areas, such as in respect of civil responsibility, corporate governance, and the sale of goods. As a general rule, Swiss law does not define whether damage is compensable by categorising it as direct or indirect, or as consequential or not. Instead, Swiss law requires that damage have an “adequate” causal link to the breach in order to be compensable. According to the jurisprudence of the Swiss courts, such a link exists if the breach is, in the normal course of events and in light of “general life experience”, of a nature to (in French, “proprié â”) cause that type of damage. Depending on whether the test of adequate causation is met, compensable damage under Swiss law can include lost profits.

55 Zen-Ruffinen & Favre, supra note 52, at p 139.

In the context of sales contracts, indirect damage is defined as damage of which the breach is not the only cause, while direct damage is caused directly by the breach, without the intervention of any other cause (ibid, at paragraph 33). In the context of liability for defects arising from a contract for works, the term “consequential” damage (“Folgeschäden”) is understood in the jurisprudence and doctrine to refer to any financial loss, such as loss of profit, or other damage caused by the defect, other than the defect itself (Thomas Siegenthaler & Joseph Griffiths, “Indirect and Consequential Loss Clauses under Swiss Law”, [2003] ICLR 446, at pp 452–453). Both indirect and consequential damages in this sense can be compensable under Swiss law provided that there is an “adequate” causal link (Marchand, ibid, at paragraph 39).

57 DFT 129 II 312 [paragraph 3.3]. An adequate causal link will notably exist even if the breach is not the only cause of the damage. It is only if the concurrent cause is of such importance that it overshadows the breach as the most probable and immediate cause of the damage that the chain of adequate causation will be broken: DFT 6B.646/2009 dated 6 January 2010 [paragraph 6.2]; Marchand, supra note 56, at paragraphs 18 to 20.
58 DFT 4C.397/1999 dated 18 July 2000, [paragraph 11(a)].
A court or tribunal applying Swiss law which is faced with a limitation of liability clause referring to “indirect” or “consequential” damages would interpret it in the same way as any other contractual clause, following the two-tiered approach set out in section 3 above. In doing so, it would in particular take into account the parties’ legal backgrounds.

If the parties have a Swiss legal background, or were advised by Swiss lawyers, it may be appropriate to interpret the terms “indirect” or “consequential” in accordance with the rules of Swiss law. This is indeed what the Swiss Supreme Court did in a case in which it was called upon to interpret a clause in a commonly used Swiss standard form contract for architects. The clause at issue provided that the architect was liable for any “direct damage” caused by his or her defective or faulty performance. The Supreme Court considered whether the clause was meant to exclude the architect’s liability, for example for lost profits, but ultimately found that, in the absence of a definition of “direct damage”, the clause was too ambiguous to be interpreted as a departure from the default rules of Swiss law. It therefore concluded that it was merely a repetition of those rules, and in particular of the requirement of an “adequate” causal link.

Swiss courts or tribunals applying Swiss law would not, however, necessarily reach the same conclusion when faced with a similar clause in the context of a dispute between foreign parties arising from an English language contract. In such circumstances, an interpretation which is strictly in line with Swiss law may not be appropriate, despite the parties’ choice of applicable law. Depending on the circumstances, courts or tribunals may look to how the relevant terms are interpreted in common law jurisdictions, although such inquiries may be of limited help, given that the terms “indirect” or “consequential” do not appear to have clearly defined meanings even in common law systems.

3.5.3. **Multi-tiered dispute resolution clauses**

The Swiss Supreme Court recently rendered an important decision in which it was faced with the question of whether Dispute Adjudication Board ("DAB") proceedings were a mandatory precondition for arbitration under clause 20 of the FIDIC Conditions. The decision not only provides some insight into how a court or tribunal applying Swiss law would interpret

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59 Ibid, at paragraph 9(b).
60 Ibid, at paragraph 9(c–d). The decision has been criticised by some commentators for not taking into consideration the definition of “direct” damage that exists in Swiss law (Marchand, supra note 56, at paragraphs 36 to 39). However, as mentioned above in fn 56, the concept has only been defined in respect of specific areas.
61 Some authors have taken the position that it will only be appropriate to do so in exceptional circumstances, and that as a general rule, such clauses should be interpreted pursuant to Swiss law. (Marchand, ibid, p 545, at paragraph 60). Marchand recognises, however, that Swiss law is “sufficiently flexible” to incorporate foreign concepts contained in contracts of “anglo-saxon inspiration” (ibid, at paragraph 61).
62 See generally Siegenthaler & Griffiths, supra note 56, at pp 448–449.
a multi-tiered dispute resolution provision, but also more generally how it would interpret an international construction contract, in particular a standard form contract, between non-Swiss parties.\(^{63}\)

In interpreting clause 20 of the FIDIC Conditions, the Supreme Court methodically began by setting out the two-tiered approach to the interpretation of contracts under Swiss law. The court also noted that even though the FIDIC Conditions are a standard form contract, it had to interpret them in an individualised manner in light of the circumstances of each case, and could not therefore take a strictly objective approach. The court’s interpretation of clause 20 was nevertheless largely focused on its wording, although the court considered its sub-clauses as a whole, taking into account their purpose. In particular, the court looked closely at the use of the terms “shall” in sub-clause 20.2 of the FIDIC Conditions, and “may” in sub-clause 20.4.\(^{64}\) Reading the sub-clauses together, it concluded that, contrary to the findings of the arbitral tribunal, sub-clause 20.4 did not suggest that DAB proceedings were optional but rather only meant that it was open to either party to initiate them. DAB proceedings were, therefore, a precondition to arbitration.

The court also found, however, that the precondition was not an absolute one. It interpreted the exceptions to the precondition in light of the reasons behind the introduction of the DAB procedure in the FIDIC Conditions, namely to allow for an efficient resolution of disputes arising during the construction works, in a manner that would not put the works into jeopardy. The court found that the parties had only begun the constitution of the ad hoc DAB, which ultimately failed, after the completion of the works, at a time when their positions were undoubtedly already irreconcilable. It was therefore unlikely, according to the court, that DAB proceedings would prevent the dispute from subsequently being submitted to arbitration. The court also noted that the DAB was still not operational fifteen months after the contractor had attempted to initiate DAB proceedings.\(^{65}\) In the circumstances, the court considered that the contractor was not prevented from initiating arbitration.

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\(^{63}\) DFT 4A_124/2014 dated 7 July 2014. The case arose from a request for annulment of an arbitral award rendered under an international construction contract incorporating the FIDIC Conditions, which provided for Geneva as the place of arbitration. In its award, the arbitral tribunal had found that it had jurisdiction over the dispute between the parties, a French contractor and the highway authority of an unnamed country, despite the fact that it had not been submitted to a DAB pursuant to clause 20 of the FIDIC Conditions. The contract was not governed by Swiss law. However, the Swiss Supreme Court applied Swiss law in accordance with Article 178 of the Swiss Private International Law Act, which defines the law applicable to arbitration agreements.

\(^{64}\) FIDIC Conditions of Contract, sub-clause 20.2 (“disputes shall be adjudicated by a DAB in accordance with sub-clause 20.4”) and sub-clause 20.4 (“either Party may refer the dispute in writing to the DAB ...”).

\(^{65}\) The failure of the constitution of the DAB was in particular due to the parties’ failure to sign the Dispute Adjudication Agreement required by sub-clause 20.2 of the FIDIC Conditions.
The Supreme Court’s decision illustrates a number of features of the interpretation of contracts under Swiss law. On the one hand, it emphasises the fundamental two-tiered approach, and the importance of not adopting a literal or strictly objective interpretation. On the other hand, it illustrates the importance in practice of the wording of the contract, which the court focused on, albeit in light of the purpose of the provisions at issue. The weight given to the wording will, however, vary from case to case, and will in particular depend on whether there is any evidence which would suggest that it does not reflect the intention of the parties. Finally, the decision illustrates how the distinction between the two tiers of interpretation can, in practice, be blurred. Indeed, the court’s reasoning and conclusions as to the interpretation of clause 20 did not clearly identify which tier of analysis they related to.

3.5.4. Time limits for notification

There is little jurisprudence from the Swiss courts as to the interpretation of the types of strict time limits for notifying claims which are often found in international construction contracts, such as the 28-day time limits for a contractor to notify the engineer of a claim,\(^{66}\) or for a party to give a notice of dissatisfaction of the decision of a DAB, under the FIDIC Conditions\(^{67}\). In a 1995 decision, the Swiss Supreme Court annulled an arbitral award on the ground that the parties had failed to comply with a clause requiring arbitral proceedings to be initiated within 30 days after it was agreed that the dispute could not be resolved by negotiation\(^{68}\). According to the Supreme Court, the parties’ failure to comply with the requirement meant that the arbitral tribunal lacked jurisdiction. However, the actual enforceability of the strict 30-day time limit was not contested by either party, and therefore the Supreme Court considered only the question of when the 30-day period began\(^{69}\). When faced with such a strict time-limit, a court or tribunal applying Swiss law would take a case-by-case approach, consistent with the general approach to the interpretation of contracts under Swiss law, and would likely not assume lightly an intention on the part of the parties to a contract to conclude a peremptory time limit\(^{70}\). It may in particular look to the parties’ performance of the contract, notably whether they abided by the time limits or rather disregarded them, for indications as to their intention at the time it was concluded\(^{71}\).

\(^{66}\) FIDIC Conditions of Contract, sub-clause 20.1.

\(^{67}\) Ibid, sub-clause 20.4.


\(^{69}\) Commentators have criticized the decision, arguing that it is unlikely that reasonable contracting parties would have intended to conclude a clause providing for such strict consequences for a failure to comply with a time-limit (Schweitzer, supra note 68, at p 684).

\(^{70}\) Matthias Scherer, “Quelques remarques à propos de l’interprétation de la clause compromissoire et de son efficacité”, \textit{ASA Bull} 2000, p 356.

\(^{71}\) Scherer, Ehle & Moss, supra note 3, at paragraphs 25 to 27.
4. IS THE SWISS APPROACH TO INTERPRETATION BETTER SUITED TO INTERNATIONAL CONSTRUCTION CONTRACTS?

As is apparent from the overview in section 3 above, the Swiss law approach to interpretation is sufficiently flexible to take into consideration the particularities of international construction contracts identified in section 2. In particular, the Swiss approach is sensitive to the different cultural, linguistic, commercial, and legal backgrounds of parties, and to the circumstances in which the parties may have agreed to a standard form contract or to adopt Swiss law as the applicable law. It is, however, arguable whether Swiss law differs substantially in this respect from common law jurisdictions, and in particular from English law, which this paper will focus on for the purposes of the present analysis.

As will be demonstrated below, the Swiss and English rules of interpretation are more similar to each other than they appear to be at first glance (section 4.1). Despite these similarities, however, Swiss law’s simpler approach to the admissibility of evidence, in particular of the parties’ negotiations and of their conduct after the conclusion of the contract, may in fact make it better suited to the realities of international construction contracts (section 4.2).

4.1. The not so great divide between Swiss and English law

The starting point for contractual interpretation under Swiss law, namely the subjective real and common intention of the parties, is very different to that under English law. While the object of interpretation under English law is also to ascertain the common intention of the parties, its “methodology is not to probe the real intention of the parties but to ascertain the contextual meaning of the relevant contractual language.” It is therefore “based on an objective theory” aimed at establishing “what a reasonable person in the position of the parties would have understood the words to mean.” However, despite the seemingly fundamental divide between English and Swiss law, the two systems would rarely lead to different

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72 See section 3.1 above.
74 Beale, supra note 73, at paragraph 12-042.
75 Deutsche Genossenschaftsbank v Barnshope [1995] 1 WLR 1580, 1589.
76 Ibid.
outcomes in practice, as there are numerous principles and rules which operate in both to bridge the divide.

Under Swiss law, despite the primacy of subjective interpretation under Article 18(1) CO, normative (or “objective”) interpretation under the “principle of trust” is predominant from both a legal and practical point of view. As explained in section 3.3 above, the objective meaning of the text of the contract will be determinative unless and until a diverging intention is proven. In addition, while normative interpretation must take into account all the circumstances which preceded or accompanied the conclusion of the contract, the Swiss courts have recognised that the text of the contract has priority over other evidence, and that there must be a “serious reason” to move away from the literal meaning of the text (section 3.2 above). Normative interpretation is also predominant in practice, as proving a real and common intention of the parties is usually difficult. It is rare for parties to be able to establish such an intention, and therefore subjective interpretation is generally the exception rather than the rule.

Interpretation under English law largely corresponds to the concept of normative interpretation. While the traditional literal approach focused, in the absence of ambiguity, on the “strict, plain, common meaning of the words” of the contract, to the exclusion of the surrounding circumstances, English law now adopts a “contextual approach.” The modern contextual approach is summarised in the first two principles of construction set out by Lord Hoffmann in the Investors’ Compensation Scheme Ltd v West Bromwich Building Society case (“ICS v West Bromwich”), which is said to be “one of the most cited contract cases of all time”.

“(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) … Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, [the background] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.”

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79 Gauch, ibid.
80 Shore v Wilson (HL) (1842) 9 Cl & Fin 355 at p 365.
82 This traditional approach “prevailed during most of the nineteenth century and the first six decades of the twentieth century.” (Vogenauer, supra note 2, at p 134.)
83 Burrows, supra note 81, at p 78.
84 ICS v West Bromwich Building Society, supra note 77, at p 912 (Emphasis added).
The broadly defined “background knowledge”\textsuperscript{84}, to which there is no “conceptual limit”\textsuperscript{85}, is similar to the set of circumstances which must be taken into account in normative interpretation under Swiss law. In addition, as under Swiss law, the text of the contract will have priority over any such circumstances: the “primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage …”\textsuperscript{86} The approach is therefore remarkably similar to Swiss law, in that “one begins with the words used by the parties and confers on them their meaning in conventional usage, unless there is anything in the ‘background’ to indicate that some other meaning would have been conveyed to the reasonable person.”\textsuperscript{87}

In sum, the modern, contextual approach to interpretation under English law is, to a large extent, indistinguishable from the predominant form of interpretation under Swiss law. The similarities on paper might, however, be attenuated in practice by the lingering influence on English lawyers of the traditional literalist approach. Indeed, the contextual approach summarised in \textit{ICS v West Bromwich} has not been uncontroversial,\textsuperscript{88} and “continue[s] to attract a hostile reception from commercial practitioners”,\textsuperscript{89} even though the principles set out in \textit{ICS v West Bromwich} reflect a shift in the law which can be traced back to the 1970s, and have been described by some commentators as “essentially quite conservative.”\textsuperscript{90} In addition, there remain important differences between English and Swiss law, in particular as to the admissibility of evidence.

4.2. A distinguishing feature of Swiss law: the admissibility of evidence

One of the most significant remaining differences between English and Swiss law concerns the admissibility of extrinsic evidence. Swiss law does not impose any restrictions on the types of evidence that can be adduced in aid of interpretation. In contrast, while the modern approach to interpretation under English law allows a judge or arbitrator to look to a broad range of circumstances, two important forms of extrinsic evidence remain “excluded

\textsuperscript{84} Lord Hoffmann later specified in \textit{Bank of Credit and Commerce International SA v Ali} ((HL) [2002] AC 251; [2001] 2 WLR 735; [2001] 1 All ER 961 at p 749 (“\textit{Bank of Credit v Ali}”) that the background only included circumstances which the reasonable person would consider to be relevant. See Johan Steyn, “The Intractable Problem of The Interpretation of Legal Texts” (2003) \textit{Sydney Law Review}, vol 25, no 1, p 5, at p 9 (hereafter “\textit{Steyn}”).

\textsuperscript{85} \textit{Bank of Credit v Ali}, \textit{ibid}, at p 749.

\textsuperscript{86} \textit{Ibid}.

\textsuperscript{87} \textit{Ibid}, supra note 77, at paragraph 6-010.

\textsuperscript{88} The approach was described by one English practitioner as one of “extreme liberalism”: Richard Calnan, “Construction of Commercial Contracts: A Practitioner’s Perspective”, in Andrew Burrows & Edwin Peel (eds), \textit{Contract Terms} (Oxford: Oxford University Press, 2007) p 17, at p 21.


\textsuperscript{90} \textit{Ibid}, at p 9.
from the admissible background … ”91 They are the “previous negotiations of the parties and their declarations of subjective intent,”92 and the parties’ subsequent conduct. Both types of evidence can sometimes be helpful in interpreting a contract, and this is particularly true of international construction contracts, given the particularities identified in section 2 above.

The exclusions of evidence of the parties’ negotiations and subsequent conduct have been described as “two sacred cows of English law.”93 The two main reasons of “practical policy”94 which are usually given for the exclusions are that admitting such evidence would lead to (1) uncertainty in the interpretation of contracts, and (2) to longer and costlier proceedings as a result of courts and tribunals being faced with large volumes of extrinsic evidence of little if any assistance95. However, the outcomes of contract interpretation cases are “notoriously difficult to predict,”96 and the exclusion of certain evidence may in fact promote uncertainty by allowing a party to “contend for a meaning he knows was not intended.”97 The floodgates argument is largely speculative, in particular given that evidence of the parties’ negotiations and subsequent conduct is already admissible for certain purposes under English law, and that the admission of such evidence for the purposes of interpretation is “perfectly workable” in civilian jurisdictions98. Even a number of prominent common law commentators argue that there are no convincing reasons for the exclusion of the parties’ negotiations and subsequent conduct, and recognise that such evidence can, in certain cases, “shed light on the meaning the parties intended to convey by the words they used.”99

Evidence of the parties’ negotiations and subsequent conduct can be particularly helpful in the context of international construction contracts, due to the often different cultural, commercial, and legal backgrounds of parties to such contracts, as well as to their frequently imperfect command

91 Vogenauer, supra note 2, at p 135. See Peel, supra note 77, at paragraphs 6-021–6-025.
92 This exception is summarised in the third principle set out by Lord Hoffmann in ICS v West Bromwich, supra note 77, at p 912: “The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.”
93 Steyn, supra note 84, at p 10.
94 ICS v West Bromwich, supra note 77, at p 912.
96 McLauchlan, supra note 89, at p 36.
98 Vogenauer, supra note 2, at p 138.
of the language of the contract (see section 2 above). For instance, when faced with a clause containing misused terms, it may only be possible to shed light on the parties’ intention, and therefore to avoid holding them to an interpretation which is contrary to their intention, by resorting to their negotiations. The utility of the parties’ negotiations in such a context is illustrated by a 2011 judgment of the English High Court, in which it had to interpret pursuant to German law an English-language contract which had been negotiated by representatives who were not native English speakers. Noting that the “evidence would not usually be admitted as a matter of English law,” the judge relied on the testimony of the German negotiators of the contract to establish the parties’ common intention, and in particular to clarify that the negotiators had misused a term due to their imperfect command of the English language. The case was even considered by the Scottish Law Commission as “food for thought as to how any reform to the Scots law of interpretation might be employed by the courts.” The complexity of international construction contracts, and parties’ frequent reliance on standard form contracts, also arguably make the parties’ subsequent conduct an even more important interpretative aid than for other types of commercial contracts (see section 2 above).

English law does provide for a number of exceptions to the exclusion of the parties’ negotiations and subsequent conduct. For instance, evidence of the parties’ negotiations is admissible if a party is seeking rectification of the contract or raising an estoppel argument, to establish that the parties had in mind a particular meaning of a word capable of several meanings, to “establish that a fact which may be relevant as background was known to the parties,” or to show the “nature and object of the contractual venture.” Evidence of subsequent conduct “may be admissible to show whether there was a contract and what the terms of the contract were, or that

Some commentators have expressed the view that the exclusion of the parties’ negotiations in English law “seems very unlikely to survive for much longer” (Burrows, supra note 81, at p 84), although others take the view that it “may for the moment be relatively safe.” (Steyn, supra note 84, at p 10.)

100 Nicholls, supra note 97, at p 586.


102 Ibid, [paragraph 35].

103 Ibid, [paragraphs 28 to 36].


105 Rectification is an equitable remedy by which a court can, in certain circumstances, alter the wording of the contract “to reflect the actual intentions of both parties … or one party.” (Burrows, supra note 81, at p 85.)

106 Burrows, ibid, at p 83.


109 MSC Mediterranean Shipping Company SA v Owners of Ship Tychy (The Tychy) (No 2) (CA) [2001] EWCA Civ 1198; [2001] 2 Lloyd’s Rep 403, [paragraph 29].
the written terms were ‘a mere sham’, or that the contract had been varied by subsequent agreement, or to raise an estoppel ...” 110 However, while it may “temper the rigidity” 111 of the exclusions, this myriad of exceptions creates its own difficulties.

In particular, the exceptions often require judges and arbitrators to make difficult and seemingly artificial distinctions to decide whether evidence is admissible or not. For example, they may be required to “distinguish between admissible background evidence relating to the nature and object of the contractual venture and inadmissible evidence of the terms for which each party was contending in the course of negotiations”, 112 which the English courts have recognised to be “a line so fine it almost vanishes.” 113 They also lead to disputes over the admissibility of evidence, potentially adding to the costs of proceedings, 114 which are exacerbated by the uncertain scope of many of the exceptions 115. In addition, the exceptions give rise to manoeuvres by counsel to raise additional arguments or claims with the sole aim of putting otherwise inadmissible evidence before the court or tribunal, in the hope that it will influence the judge’s or arbitrator’s thinking on interpretation 116. The exceptions therefore also raise the spectre that evidence may, in the same proceedings, be found to be admissible in respect of one claim or argument but not in respect of another. None of these difficulties arise under Swiss law, which simply leaves it to the judge or arbitrator to determine the relevance and weight of any evidence put forward by the parties.

5. CONCLUSION

While the fundamental starting point of contract interpretation under Swiss law is at diametrical odds with that in English law, a closer look at the doctrine and jurisprudence reveals a number of common features. In particular, the wording of a written contract, and how a reasonable person would interpret it, plays a far greater role in Swiss law than the usual perception of contract interpretation in civilian systems would suggest. Notwithstanding these similarities, the flexibility and relative simplicity of Swiss rules and

110 Peel, supra note 77, at paragraph 6-025.
111 Steyn, supra note 84, at p 10.
112 The Tychy (No 2) [2001] 2 Lloyd’s Rep 403, [paragraph 29].
113 Excelsior Group Productions Ltd v Yorkshire Television Ltd [2009] EWHC 1751 (Comm), [paragraph 24].
114 McLauchlan, supra note 89, at p 37.
115 See eg, McLauchlan, ibid, at pp 16-17.
116 Lord Nicholls indicated that in his days as an advocate, “the practice was that when the parties’ pre-contract negotiations furnished some insight into their actual intentions, one or other of the parties would include a rectification claim in the proceedings. By this means, whatever the outcome of the rectification claim, the evidence of the parties’ actual intentions would be before the court. The hope was that, either consciously or subconsciously, the judge’s thinking on the interpretation issue would be influenced by this evidence.” (Nicholls, supra note 97, at p 587.)
principles on interpretation, in particular as to the admissibility of evidence of the parties’ negotiations and subsequent conduct, are features which make them better suited to the particularities of international construction contracts than English law.

The parties’ negotiations and subsequent conduct can in certain cases be an important tool for the interpretation of international construction contracts. Indeed, the parties’ often different cultural, commercial, and legal backgrounds, their frequently imperfect command of the language of the contract, the complexity of such contracts, and the use of standard forms, can in certain cases make such evidence indispensable to shed light on the parties’ intention, and to avoid holding them to an interpretation which is contrary to that intention. While such evidence could in many cases be brought before a judge or tribunal applying English law, by relying on the myriad of exceptions to its exclusion, the complexity of the exceptions, and the uncertainty surrounding them, raises a number of difficulties which are avoided by the straightforward approach of Swiss law. More generally, the flexible Swiss approach to interpretation, which is unburdened by the heritage of a literalist approach, arguably allows for a greater sensitivity to the realities of international construction contracts, allowing for an interpretation which is more in line with the parties’ expectations.