

Construction - Switzerland

International Construction Contracts under Swiss Law: An Outline

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Swiss law frequently applies to international construction contracts. It is concise and easily accessible, and is often chosen as 'neutral' law to govern the main contract in a construction project and, more frequently, ancillary contracts - in particular, subcontracts. In the absence of a choice of law, the Swiss conflict of law rules point to the law of the party that is providing the characteristic service - in other words, the construction contractor. In construction contracts, the provisions of Swiss law are normally completed by reference to standard contractual conditions: in international projects, these would in particular be the standard conditions issued by the Geneva-based International Federation of Consulting Engineers (*Fédération internationale des ingénieurs conseils* (FIDIC)).

Legal Framework and Definition of Construction Contracts

The Code of Obligations is the principal source of Swiss contract law. The code is published in three languages (French, German and Italian), and both the law and its application by the courts take account of developments in neighbouring civil law countries. It is drafted in clear language, as a key priority of the Swiss legislators was that it be comprehensible to the layman; this also facilitates understanding by foreign users. As a result, the Swiss law of contracts - despite some differences from other legal systems, especially in the common law world - is relatively easy to understand by users familiar with other systems and using other languages. There are many cases, especially in international arbitration, where the Swiss law of contracts is applied in English in proceedings with common law participation. Decisions in such proceedings are frequently published, creating a body of international case law on the Swiss law of contracts.

The Code of Obligations first sets out the rules applying to obligations and contracts in general; this section is followed by chapters on specific contractual relations. Chapter 11 (Articles 363 to 379 of the code) concerns contracts for works. Article 363 of the code defines this type of contract as "a contract whereby the contractor obligates himself to produce a work and the employer to pay compensation". The chapter also contains some provisions which are specific to immovable works; such contracts for immovable works are referred to as construction contracts.

A contract for works must be distinguished from a contract for services, where the contractor must provide efforts of a defined standard but does not owe a specific result or work product.⁽¹⁾

While contracting practices and specific rules may vary, the provisions of the code apply without distinction to contracts for civil engineering work, mechanical and electrical work, process plant work and so on, as well as to different forms of delivery (eg, turn-key, multiple contracts, delivery and erection). The provisions of Articles 363 and following of the Code of Obligations also have universal application to the relationship between the employer and the contractor, and to that between the contractor and its subcontractors.

However, a distinction must be made with respect to contracts with suppliers and other relationships governed by the law of sale, regulated in a separate chapter of the code (Articles 184 and following). In international sales contracts which are subject to Swiss law, the United Nations Convention on Contracts for the International Sale of Goods applies. Care must be taken concerning the convention's scope of application: its Article 3(1) provides that contracts for the supply of goods to be manufactured are regarded as sales, and hence subject to the convention, unless the buyer supplies a substantial part of the materials required for the manufacturing process. Contracts for the manufacture of machinery or equipment - and in some circumstances possibly also certain construction contracts - are therefore subject to the convention, unless materials for the manufacturing process are supplied by the buyer. Convention case law would suggest that a design provided by the buyer meets the condition for this exclusion; but a recent report of the convention's advisory council criticized this approach and indicated that the convention does cover contracts if the buyer supplies only drawings or the design.⁽²⁾

Most building contracts, however, would seem to fall under the ambit of Article 3(2) of the convention, which provides that the convention does not apply if the preponderant part of the obligation of the party that furnishes the goods involves the supply of labour or other services. In practice, the distinction is not always easy to make, since international construction contracts are not limited to the performance of work on site, but include a multitude of other obligations; manufactured goods often comprise a large part of the contractor's obligations. The question of whether it is the supply of labour and services which predominates or that of manufactured goods depends on the individual circumstances of the case. Such uncertainties may be avoided by clarifying the matter in the contract; since the convention is not particularly suited to construction work, the neatest solution would appear to be the exclusion of its application to construction contracts.

Contracts concluded with engineers or architects may have different objects. If they are limited to the preparation of the design, the object is a product to be delivered and they are treated as contracts for works. However, if the object is to assist the employer in awarding the construction contract, and in directing and supervising its implementation, the contract is normally treated as a contract for services and thus may be terminated at any time. In many cases the contract involves a combination of both and is thus treated as a 'mixed' contract, to which elements of both chapters of the Code of Obligations apply as appropriate.

In the Swiss legal tradition, engineers and architects are representatives of the employer and their powers are granted to them by the employer. Like most other civil law systems, Swiss law does not recognize the specific function of 'certification', nor the role of the engineer or architect as a neutral administrator of the contract.⁽³⁾

Conclusion and Interpretation of Construction Contract

Construction contracts, like most other contracts in Swiss law, are not subject to particular formal requirements (Article 11 of the Code of Obligations).⁽⁴⁾ In order for the contract to be valid, it is sufficient that the parties define the works to be supplied by the contractor and the compensation to be paid by the employer.⁽⁵⁾ In practice, construction contracts are invariably executed in writing. Parties frequently use model contracts and general conditions. In Swiss domestic contracts, the construction conditions prepared by the Swiss Society of Engineers and Architects (*Société suisse des ingénieurs et des architectes*) are widely used.⁽⁶⁾ In international construction projects, the most frequently used conditions of contract are the various sets of conditions issued by FIDIC, which are often modified as appropriate.⁽⁷⁾

General conditions or model contracts apply only when specifically agreed by the parties. In some respects, they might be considered to reflect industry practice. To that extent, the parties may be deemed to have accepted them tacitly.⁽⁸⁾ Under the International Chamber of Commerce (ICC) Rules of Arbitration, for instance, arbitral tribunals must take into account relevant trade practices (Article 17.2).

With regards to interpretation, the basic rule requires the arbitral tribunal or court to give effect to the parties' 'true' and 'common' intent. Both words are equally important, as it is not the subjective intent of a party which is decisive, but rather what the parties have agreed upon - their shared or common intent.

As in other civil law countries, the court or arbitrator must go beyond the literal meaning of the words used in a contract to determine what the specific parties in the specific circumstances intended by using those words. In doing so, the judge or arbitrator will normally start with the wording of the contract, but need not end there. In Swiss law, there is no prohibition against parole evidence. A Swiss judge will expect that in a dispute over the proper interpretation of a contract clause, the parties will rely on evidence outside the four corners of the contract (eg, drafts of the disputed provisions, testimony of individuals involved in the negotiation and elaboration of the contract, evidence of the conduct of the parties during implementation of the contract and once the dispute arose). Parties to construction contracts are therefore well advised to retain relevant documentation for evidentiary purposes and to review post-execution correspondence carefully, as it may be taken as evidence of the parties' understanding of their contractual commitments.

There is no 'clarity rule': even if a contractual clause appears clear at first glance, it may be subject to interpretation.⁽⁹⁾ However, the court will not depart from the literal meaning of the text adopted by the parties where there is no serious reason to believe that it does not coincide with their intent.⁽¹⁰⁾

In the event that the true and common intent of the parties cannot be established, or if it appears that there was no common intent, the court or arbitrator will determine how a statement or the conduct of a party could reasonably have been understood in good faith by the other party.

Arguably, it makes a difference whether Swiss law is used in a domestic context or in an international contract by parties unrelated to Switzerland.⁽¹¹⁾ Such situations arise primarily where the parties have chosen Swiss law as a 'neutral' law without being familiar with its particularities. In such cases the law should not be applied strictly if this would lead to a result which none of the parties anticipated or, worse, which is contrary to the parties' common expectations. In other words, a party might argue that the real and shared intent of the parties differed from the solution under Swiss law if it were applied strictly as it might have to be applied by a Swiss court.

Contractor's Obligations

The contractor must perform the works as specified in the contract and deliver them at the agreed time and free of defects. In addition, it has a number of ancillary obligations.

Performance of the works

The contractor owes a concrete result: the works as defined in the contract. Where the design for the works is provided by the employer, as frequently occurs in building contracts, this definition of the works is normally contained in contract specifications and other documents which describe in detail the output that the contractor must deliver. In turn-key contracts, where the contractor also provides the design, the functions and parameters of the works must be defined, while the specification need not be as detailed as in contracts that include the employer's design.

While the work product which the contractor must deliver is defined in the contract, it is left to the contractor to decide what methods to use to achieve this result, as long as these are safe and suitable for the purpose. This notwithstanding, however, certain qualities of the works are normally defined by the method of construction or manufacture.⁽¹²⁾

Article 364(2) of the Code of Obligations provides that the contractor:

"is obligated to carry out the work personally or to have it carried out under his personal direction, except in cases where, due to the nature of the work, the personal qualities of the contractor are not important."

This provision establishes the principle of personal performance of the works by the contractor; subcontracting is the exception. Subcontracting is permitted where the contractor has not been selected for its personal qualifications (which is rare in international construction contracts),⁽¹³⁾ or where the contractor directs and controls the subcontractors as if they were its own employees. In most international construction contracts, performance by subcontractors is subject to the express consent of the employer and lists of approved subcontractors are included in many such contracts. In some cases the employer will nominate certain subcontractors which it requires the contractor to use for the performance of certain works or for certain supplies.⁽¹⁴⁾

Except where subcontractor guarantee and warranty obligations are assigned to the employer, as required under some main contracts, the employer normally has no direct contractual relationship with the subcontractors. The contractor is responsible for their work as part of its own performance (Article 101 of the Code of Obligations). As in many other countries, however, Swiss law grants subcontractors a statutory right, comparable to a mechanics' lien, allowing the unpaid subcontractor to require the registration of a lien in its favour on the works for unpaid compensation under the subcontract (Articles 837 and 839 of the Code of Obligations).⁽¹⁵⁾ Such liens on the works are considered a defect for which the contractor is liable.⁽¹⁶⁾ In view of this risk, employers can require proof from the contractor that payments to the subcontractors are actually made or, under certain circumstances, may make direct payment to them.

Duty to inform

The contractor is presumed to be a specialist and thus expert in matters concerning the construction project. Therefore, it has a continuing obligation to advise the employer of all circumstances that are important to the performance of the contract (Articles 364 and 365 of the Code of Obligations). If the contractor fails to do so, it may be liable for damage that could otherwise have been avoided.

If the contractor believes, or could reasonably be expected to know, that a nominated subcontractor is not in a position to perform the works required, the contractor must inform the employer clearly of this fact. Failing a clear reservation, the contractor might become liable to the employer.⁽¹⁷⁾

Delivery of the works

Once the contractor has completed the works, it must deliver them to the employer.⁽¹⁸⁾ In construction contracts, delivery takes place by notice of completion addressed to the employer or its representative.⁽¹⁹⁾ Delivery in the sense of Article 372(1) is the transfer from the contractor to the employer of all parts of the works completed in conformity with the contract. The presentation of final accounts may amount to delivery.⁽²⁰⁾

Completion under Swiss law corresponds to some extent to the term 'substantial completion' as it is frequently used in international construction conditions: it does not require that the works be free from defects. The contractor's liability for defects in principle arises only upon completion and delivery.

Delivery of the works by the contractor has other important effects, particularly with regards to responsibility for the works and the passing of risk, and as a starting point for the period of limitation. In addition, many contracts provide that some partial payment is due at the time the employer takes over the works.

Employer's Obligations

The employer's principal obligation is payment of the contract price. The employer may also have a number of additional duties, the nature of which is subject to discussion.

Price and payment

The parties are free to agree on the price and the manner of determining it.

The parties can agree on a fixed price, either for the works as a whole (lump sum, Article 373 of the Code of Obligations) or on a per-unit basis.⁽²¹⁾ Occasionally, contracts also contain day work rates. Cost reimbursement contracts are rare. When a fixed price is agreed the contractor cannot request additional payment, even if its actual costs are higher than foreseen (Article 373(1) of the Code of Obligations). On the other hand, the employer must pay the lump-sum price even if the contractor's actual costs are lower than initially expected (Article 373(3) of the Code of Obligations).

Article 373(2) of the Code of Obligations provides for an exception to this rule:

"[If] extraordinary circumstances which could not have been foreseen or which were excluded by the assumptions made by both parties impede the completion or render it exceedingly difficult, the judge may, in his discretion, authorize an increase of the price or termination of the contract."

This exceptional ground for adjustment of a fixed price is comparable to claims for '*imprévision*' in French administrative contracts. However, as this regime is not mandatory, the parties are free to extend, restrict or even exclude its application.⁽²²⁾

The lump-sum price applies only to the works as they have been defined in the contract. The code does not foresee the possibility of unilateral variations to the works; but international construction contracts normally reserve to the employer the unilateral right to vary the works and contain provisions for the pricing of such variations. Such provisions also apply to modifications in the programme, in particular to acceleration orders. When claiming compensation for variations, the contractor must normally prove that the work requested is a variation and not simply a confirmation of the contractually required work. Contracts providing for the employer's right to vary the work normally require the contractor to notify the employer immediately, making clear that in its opinion the works ordered are not covered by the scope of the contract.

If the parties have not agreed on a price, the contractor's compensation will be determined pursuant to the actual value of the work and the contractor's costs/expenses (Article 374 of the Code of Obligations). International construction contract rarely omit prices for the works; the principal scope of application of this provision, therefore, is where variations occur and there are no applicable prices in the contract.

This also applies if the parties have agreed only on a cost estimate, based on quantities estimated by the contractor. Nonetheless, the contractor's estimate is not without legal effect. If the actual costs substantially exceed the estimate (case law indicates that this would involve an excess of more than 10%), the employer may request a price reduction or may even terminate the contract (Article 375(1) of the Code of Obligations).

Ancillary obligations of the employer

The employer normally has a variety of obligations to facilitate performance of the works. These often relate to:

- timely availability of and access to the site on which the works are to be performed;
- building permits and other authorizations for the works to be performed;
- utilities (water, energy);
- the design, as well as approvals and instructions that may be necessary for the contractor to proceed with the works;
- coordination with other contractors retained directly by the employer; and
- supply materials which the employer has undertaken to deliver.

There is some debate in Switzerland as to the nature of these duties. Traditionally, they were understood as incumbencies - that is, actions which the employer must take so as to be able to require performance from the contractor. If the employer failed to meet its incumbencies, it was treated as a creditor in default and the contractor could refuse performance (Article 91 of the Code of Obligations); the contractor was excused for the delay in the works attributable to the employer's failure or delay in fulfilling its obligations, but had neither a claim for performance with respect to those obligations nor a claim for damages if the employer failed to fulfil them. However, it is now increasingly recognized that the employer's promise to meet these obligations, and in particular their timing, can be contractual undertakings, capable of breach and claims for damages.

Another basis for claims by the contractor in such cases is Article 2 of the Civil Code (which enshrines the good-faith principle). The employer must avoid damage to the contractor and its employees. It is also accepted that there is a general duty of cooperation do to everything that is necessary to allow the contractor to perform its obligations by fulfilling the agreed obligations.

Taking over

If the works have been completed and the contractor has delivered them, the employer must take them over. Under Swiss law, taking over by the employer corresponds to the contractor's delivery of the works. The two terms - 'delivery' and 'take over' - designate the same operation, seen from

the perspective of the contractor and the employer, respectively.

Taking over does not require a specific form and can occur by conduct of the parties or by operation of law. If the employer's refusal to issue the taking over certificate is incompatible with the requirements of good faith (eg, if the plant operates normally),(23) the employer is deemed to have taken the plant over.

The concept of taking over the works differs from that of their acceptance. The employer is bound to take over the works once they are completed and have been delivered, even if there are defects. (24) If, at taking over, the employer fails to control the works or expressly accepts them with their defects, it acknowledges that the works meet its expectations and loses the right to claim damages for defects.

Time for Completion and Delay

Programming

The contractor must complete the works by the agreed time. Normally, it must propose a schedule against which its progress can be monitored.

The contract, or the schedule provided by the contractor or agreed between the parties, may include intermediary dates, declaring them as binding or merely guidelines. The stipulation of such dates does not necessarily imply that the works must be delivered at these times,(25) although the parties may agree on partial deliveries (Article 372(2) of the Code of Obligations). In such case the existence of delay, and the employer's remedies, will be determined with regard to each partial delivery.

If a specific time for delivery has not been agreed either explicitly (eg, by including a works schedule) or implicitly in light of a good-faith interpretation of the contract, the contractor will be granted the time necessary for an experienced contractor that commences the works timely to perform the works in a regular fashion, as may be expected with the resources usually used to perform the relevant type of works.(26)

Delay

Where the contractor's only obligation with respect to time is expressed in the form of a completion date, the question of whether the contractor is in delay must be determined by reference to that date. However, if serious delay occurs during the performance of the works, it may not be reasonable to require the employer to wait until the completion date before seeking remedies. As a solution in case of delay, Article 366(1) of the Code of Obligations provides as follows: "

"If the contractor does not commence the work on time, or if he delays its execution contrary to the contract terms, or if, in the absence of the employer's fault, he is so far behind schedule that, in all probability, timely completion can no longer be achieved, the employer may terminate the contract without awaiting the delivery date."

To exercise this anticipated right to terminate the contract, the employer must have served notice on the contractor requesting due performance and granting a final period for curing the defective performance (Article 107 of the Code of Obligations).(27)

Remedies

The remedy provided by Article 366(1) of the Code of Obligations is termination: if a specific time for completion has been fixed or can be determined in light of the contract terms, the contractor will be in default if it fails to complete by that time (Article 102 of the Code of Obligations). The employer can serve notice on the contractor and grant it a grace period before terminating the contract. No such notice is necessary if the contractor's unwillingness to perform is manifest or if a fixed date for delivery had been agreed (Article 108 of the Code of Obligations). In such cases the employer may terminate the contract forthwith.

As a consequence of its delay, the contractor is liable for damages and for impossibility to perform. These remedies exist in addition to the employer's right to terminate the contract (Articles 103 to 109 and 366 of the Code of Obligations).

Under Swiss law, 'damages' encompasses loss of profits and costs incurred, including liquidated damages or penalties which the employer must pay to a third party due to the delayed availability of the works.⁽²⁸⁾ If the completion of a plant is delayed, the employer may incur a production loss or may be unable to honour delivery contracts with third parties. However, claims for loss of revenue and profit are excluded in many international construction contracts.

In practice, claims for loss of production or profit are often replaced by payments due by the contractor for each day (or other unit) of delay. Such clauses may be construed as either liquidated damages or a penalty.⁽²⁹⁾ While both are admissible under Swiss law,⁽³⁰⁾ liquidated damages aim only to facilitate the quantification of damages and are hence due only if (i) there is a liability of the contractor for the delay, and (ii) the injured party shows the existence of damage (which does not require showing its precise amount). Penalty provisions, on the other hand, apply even if the employer has incurred no damage. If the employer has suffered damage in excess of the penalty, the excess amount can be claimed in addition to the penalty (Article 161(2) of the Code of Obligations), provided that the damage is due to a fault of the contractor.⁽³¹⁾

Dispute Resolution Mechanisms

Most international construction contracts provide for arbitration, often with pre-arbitral dispute settlement provisions (eg, Clause 20 of FIDIC). Even if the contract is governed by Swiss law, the scope and effect of the arbitration agreement are generally governed by the arbitration law in force at the place of arbitration. If the place of arbitration is in Switzerland (which is frequently the case given that, alongside France and the United Kingdom, Switzerland is the most popular venue for ICC arbitrations), the arbitration is subject to Swiss arbitration law (Chapter 12 of the Swiss Private International Law Act).

A number of problems arise within the framework of construction arbitrations, including

- the enforceability of a multi-tiered dispute resolution mechanism (involving pre-arbitral expert determination, dispute boards, settlement negotiations);
- the time limits to commence arbitration (eg, Clause 20.4 of FIDIC);
- multi-party disputes (eg, employer-contractor-subcontractor; consortium members); and
- conflicting dispute resolution clauses within the contract documents designating, for instance, two different seats of arbitration, or two different arbitral institutions.

In a recent ICC arbitration, for instance, an arbitral tribunal sat in a dispute between an Italian construction company and an African state relating to the construction of a dam. The construction contract was based on the 1987 FIDIC Conditions. When a dispute arose, the contractor relied on Clause 67.3 of the general contract conditions, which provided for ICC arbitration. The respondent state objected and argued that there was no agreement to ICC arbitration since the special conditions provided that the place of arbitration would be the capital of the respondent state and that the rules for arbitration shall be the arbitration provisions of its Civil Code.

The arbitral tribunal rejected the respondent's argument.⁽³²⁾ It held that the two provisions, rather than being in conflict, supplemented each other, so that the reference to the arbitration rules of the Civil Code as local procedural rules supplemented the choice of ICC arbitration in Clause 67.3.

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Endnotes

(1) A leading work providing an introduction to these issues is by Pierre Tercier, now president of the ICC Court of International Arbitration, *Les contrats spéciaux*, Third edition, Zurich 2003, No 3840, p 560.

(2) CISG Advisory Council Opinion No 4 - Contracts for the Sale of Goods to Be Manufactured or Produced and Mixed Contracts, October 24 2004 (posted at www.cisg.law.pace.edu/cisg/CISG-AC-op4.html). For a recent discussion see Christoph Brunner, *UN-Kaufrecht*, Berne 2004, pp 28 and following.

(3) Peter Gauch, *Le contrat d'entreprise*, Zurich 1999, Nos 47-64, pp 15-21; Michael E Schneider/Matthias Scherer, "Swiss Country Report", in *FIDIC contracts*, R Knutson, Kluwer 2005, pp 315 and 322; Tercier, No 3896, p 569.

(4) Tercier, No 3978, p 582.

(5) Tercier, Nos 3835-3839, p 559.

(6) SIA Standard 118, for details see Gauch, No 265, p 85.

(7) Other international conditions that can be found in particular in contracts for mechanical and electrical works are those of the United Nations Economic Commission for Europe (188 series) and of ORGALIME.

(8) In Swiss Supreme Court Decision (SCD) 4C.261/2005 of December 9 2005 the Swiss Supreme Court admitted that two companies active in the construction business were deemed to have tacitly accepted the SIA standards even though their contract did not provide for them specifically.

(9) Supreme Court Decision 129 III 118, c 2.5.

(10) Supreme Court Decision 4C.23/2005.

(11) Gauch, N 1133 who advocates, as a supplementary interpretation method, that the arbitrator may consider the understanding of foreign parties which reflects their respective legal tradition. See also Supreme Court Decision of February 4 2005, 4P.236/2004, English translation in *ASA Bull* 3/2005, 508, 517

(12) Tercier, No 4000, p 585.

(13) Tercier, No 4007, p 586; François Chaix, in: *Commentaire Romand, Code des Obligations I, Art 1-529*, Basel 2003, Nos 18 and 20, Art 364, p 1880.

(14) *Commentaire Romand*, Nos 24-25, Art 364, p 1881.

(15) Tercier, No 4008, p 586 and No 4384, p 634.

(16) Supreme Court Decision 104 II 348.

(17) Supreme Court Decision 116 II 305.

(18) Supreme Court Decision 115 II 456.

(19) Supreme Court Decision 115 II 459.

(20) Supreme Court Decision August 18 2005, 4C.34/2005.

(21) Tercier, Nos 4272 and 4277, pp 620 and 621.

(22) Tercier, No 4323, p 627.

(23) Supreme Court Decision 129 III 738; SCD 115 II 456.

(24) Tercier, Nos 4034-4035, p 590.

(25) Gauch, No 108, p 33.

(26) Gauch, No 649, p 195.

(27) Tercier, No 4068, p 595.

(28) Supreme Court Decision 116 II 443; Gauch, No 665, p 199.

(29) Gauch, Nos 692-711, pp 207-212.

(30) Penalty: Art 160 CO, Supreme Court Decision 97 II 350; Liquidated damages: Gauch, No 709, p 211; Jean-Claude Werz, *Delay in Construction Contracts - A comparative study of legal issues under Swiss and Anglo-American law*, 1994, No 347.

(31) Schneider/Scherer, p 324.

(32) ICC Arbitration No 10,623, award of December 7 2001 (Emmanuel Gaillard (chair), Piero Bernardini and Nael Bunni, arbitrators), ASA Bull 1/2003, p 100, par 179 ff.

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