1. INTRODUCTION

Swiss law plays an important role in international contracts in general and in contracts for construction projects in particular. The reason is not a particularly international orientation of the Swiss construction industry or of Swiss Employers. Rather, foreign contracting parties often opt for Swiss law to govern their contracts, because, the parties to the Contract and the project have no link with Switzerland. Swiss law is chosen because it is considered “neutral” with respect to the parties to the Contract and with respect to the project; the choice of this law does not benefit one or the other party.

This choice of Swiss law as a “neutral” law is particularly frequent in combination with the choice of a Swiss forum, primarily arbitration in Switzerland. This choice of forum is driven in many cases by considerations of “neutrality”, but also by the appreciation of the Swiss arbitration infrastructure, legal and practical, which provides the services for foreign litigants where necessary but also allows parties and their lawyers from abroad to play their role in an international arbitration in Switzerland without any restriction.

Finally, the choice of Swiss law for international contracts is attractive also for reasons in the law itself. The Swiss Code of Obligations, the principal source of law for contracts, is a concise and relatively easily accessible legal text. At the crossroads of several legal systems and drafted in several original languages (French, German and Italian), Swiss law is particularly suitable for cross-cultural relations.

In the field of international construction projects the contracts for which Swiss law is chosen most frequently are the subcontracts for construction services and for supplies, as well as those regulating the cooperation of the companies involved in the project in the form of joint venture or consortia. When it comes to the

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main contract, the Employer in most cases succeeds in providing for the application of its own law; but occasionally one can also find main contracts governed by Swiss law.

In these circumstances, the interface between Swiss law and the FIDIC Conditions considered here is of particular interest, not just with respect to the main contracts to which these conditions normally are applied directly, but also with respect to the subcontracts which normally depend in a variety of fashions on the main contract.

In the following chapter, we will examine some of the most common pitfalls and problems of interpretation, which contracting parties should be aware of when a FIDIC-based contract is governed by Swiss law (by choice of the parties or decision of the arbitrators). We assume that such contracts, as will normally be the case, are performed outside Switzerland. We will provide a general overview of Swiss construction law, its sources and principles of interpretation; we will then outline the sequence of performance in the FIDIC contracts and will discuss a selected number of specific clauses, which give room for interpretation under Swiss law and/or will have limited application because of Swiss mandatory rules. Our focus is on the 1999 FIDIC Red Book and, unless otherwise stated, the reference to the FIDIC Clauses refer to those found in the Red Book. In para. 4 below we have made some specific comments on the clauses in the 1999 Silver Book concerning the allocation of risks onto the Contractor.

2. SWISS CONSTRUCTION LAW

2.1. Sources of Swiss law relevant to the FIDIC Conditions

When the parties to a contract choose Swiss law to govern their contract, this choice concerns the substance of their contractual relations but normally does not extend to other aspects that may be relevant to the parties’ rights and obligations. Other aspects such as the personal status, capacity and powers, bankruptcy, taxation, public regulations are not directly affected by this choice and may be subject to a different law. Many of these matters are subject to a separate law as per the Contract, e.g. environmental laws (Sub-Clause 4.18), procurement law, safety regulations (4.8), laws on fossils/treasures, notification duty (4.24), design and standards (5.3, 5.4).

A contract for the construction of civil engineering works, such as those for which the FIDIC Civil conditions provide, under Swiss law is characterised as a contract for Works ("Werkvertrag", "Contrat d’entreprise"). It is regulated by the Swiss Code of Obligations ("CO"). In addition to the provisions of the Code dealing with contracts in general (Art. 11–20 CO, as well as some provisions in the Swiss Civil Code ("CC"), in particular Art. 1 et seq. CC), the specific provisions in Book 11, i.e. Art. 363–379 CO are applicable.

Contracts for Works are defined as contracts whereby the Contractor is obligated to perform the Works and the Employer to pay for the Works (Art. 363 CO). The object of the Contract is the work itself, not merely performance of some service. Thus, the Contractor owes a result to the Employer, not mere
efforts. The distinction is important, as it affects in particular the manner in which failure to perform and remedies are determined.

In the context of the FIDIC Conditions, the contract for works must be distinguished from the Contract with the Engineer which contains some elements of a works contract (in particular the preparation of the design) but which is a contract for services when it comes to the supervision of the Contractor's performance. This relationship will be characterised as a mandate ("Auftrag", "mandat") and Art. 394–406 CO apply. The distinction is not merely academic but of great practical relevance. Contrary to the Contractor, the agent (i.e. the Engineer) owes to the principal not a duty to produce a result but a duty of best efforts at professional standards. Moreover, according to the mandatory provision of Art. 404 CO, a mandate can be terminated at any time.

In practice, many contracts in the construction industry, including those between engineers and employers or between the latter and contractors are "mixed" in that they contain elements of both contracts for works as well as mandates. Features characteristic of sales contracts may also be found if the Contractor delivers certain machinery or, in general, if the Works are of a generic nature. The Engineer may provide designs and supervise the Works.

**Mixed contracts**, i.e. contracts featuring elements of different contracts, for instance sale, mandate and works will be subject to the provisions governing the relevant parts. If the different elements are too closely intertwined or if one element is preponderant, the rules on the main element may prevail.¹

Treaties to which Switzerland is a party may also form part of Swiss substantive law. In the field of construction contracts the UN **Sales Convention**² should be mentioned. According to Art. 3 "contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture of production". The Convention does not apply to contracts "in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

In practice this means that contracts in which the Contractor only provides the construction services are not covered by the Convention. Contracts where, as it is normally the case, the Contractor also supplies the materials or machinery, equipment, or an entire plant, fall in the scope of application of the Sales Convention to the extent that the pre-requisites of Art. 1 and 2 are fulfilled, unless in terms of value of remuneration the labour and services part prevails.³

The value of the works and goods for the Employer will also have to be considered.⁴ In turn-key contracts and plant delivery contracts the value of

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¹ Dr. Peter Gauch, "Der Werkvertrag", Zürich 1996 ("Gauch") para. 57 ff. criticizes the case law of the Federal Tribunal in relation to Global Engineering contracts (where the Engineer supplies project preparation, execution and supervision). The Federal Tribunal applies the Employer's right to terminate at any time (specific to mandates) to the whole Contract. See also Jean-Samuel LEUBA, "Le Contrat de Vente avec Obligation de Montage", University of Lausanne, 1995.


³ Gauch para. 361 ff.

⁴ Dr. Peter Gauch, Dr. Jörg Schmid and Dr. Theodor Bühler, "Kommentar zum Schweizerischen Zivilgesetzbuch", Vol. V2d, Zürich 1998, ("Zürcher Kommentar"), p. 21, para. 38.
services and labour will almost always be higher than that of the equipment. In case of highly sophisticated and expensive machinery the ratio may be altered (although it may be assumed that the value of servicing, installing and testing such equipment will increase accordingly). Also, if the supply obligations and the erection of the equipment are in distinct contracts, only the supply contract will fall under the Convention. The erection contract remains governed by the Code of Obligations. In any event, the Code of Obligations applies to issues not governed by the Convention, e.g. the formation or the validity of the Contract (Art. 4).

In light of the above, the Red, Yellow and Silver Book contracts must be considered as general conditions\(^5\) for work contracts in the sense of Art. 363 CO. Under the Silver Book, the Contractor will not merely supply construction Works but deliver an entire plant or infrastructure project on a turn-key basis. If the value of the plant delivered is higher than that of the services and labour provided by the Contractor, the UN Sales Convention applies to the issues where it supersedes national laws. This, however, will be the case in exceptional situations only.

The parties may exclude the application of the Convention or derogate from its provisions (Art. 6). Given the differences in the nature of sales and construction contracts, the parties will normally be well advised in providing such an exclusion. It is generally considered that an explicit exclusion of the Convention is necessary to render it inapplicable. A clause merely stating that Swiss law applies is not considered as sufficient in this regard, since the Convention forms part of Swiss law. Uncertainty as to the applicability of the Convention might arise, if the choice of law clause refers explicitly to the Swiss Code of Obligations.

In addition to statutory law and treaties applicable in Switzerland, mention should also be made of relevant general conditions of contract. The most prominent conditions for construction contracts in Switzerland is the SIA Standard 118,\(^6\) issued by the Swiss Engineering Association. However, these conditions are not considered as usages according to Swiss case law\(^7\) and will therefore not be treated here. Usages may become relevant in case of a dispute according to Clause 20 since Arbitrators bound by the ICC Arbitration Rules must take account of them (Art. 17.2 ICC Rules). The relevant usages in this context are not specifically Swiss usages, but usages as between the parties and usages commonly accepted in the industry concerned.

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\(^7\) Gauch para. 268 and 282. Swiss Supreme Court Decision ("SCD") 118 II 296 (Entscheidungen des Schweizerischen Bundesgerichts (BGE), or Arrêts du Tribunal Fédéral Suisse (ATF), the official collection of decisions by the Federal Supreme Court).
2.2. Interpreting the FIDIC Conditions under Swiss law

Under Swiss law, general contract conditions (such as the FIDIC Conditions) are interpreted in the same way as conditions in individual contracts. Accordingly, the interpretation of the FIDIC Conditions can vary from case to case depending on the individual circumstances.  

When interpreting a contract governed by Swiss law, the judge or arbitrator will first of all seek to find the common contractual intention of the parties in accordance with Art. 18 CO, which inter alia provides as follows:

"18. Interpretation of contracts. Simulation. 1. The form and content of a contract shall be interpreted in accordance with the real and common intention of the parties. Terms or expressions used by the parties in error or in order to conceal the real content of the Contract shall be disregarded." (Free translation, emphasis added).

In Swiss law, the Contract is the starting point, not the end of the interpretation. There is no prohibition of parole evidence. Accordingly, a judge or an arbitrator will want to look behind the Contract, to see drafts of the relevant provision, will accept and even call for testimony of individuals involved in its negotiation and elaboration to find the real contractual intention of the parties. If their intentions at the time they entered into the Contract are unclear, they will be established in accordance with the principle of good faith (see below).

This represents one of the most important differences between Swiss law (and other civil law systems), on the one hand, and common law systems, on the other hand. The civil law judge must go beyond the mere terms of the Contract in order to determine the real and common intention of the parties, whereas the common law judge will to a much further extent interpret the Contract literally.

Case law provides for a number of techniques and guidelines for Swiss arbitrators and judges called upon to interpret a contract. Among these rules are the following:

Statutory interpretation: It has been established in Swiss case law that if a contract clause in a set of general conditions repeats a provision found in the legislation, then the Contract clause will be interpreted in accordance with the legal provision, unless the circumstances of the case call for the application of a different principle of interpretation.

Contra proferentem Rule: According to this rule an unclear provision is construed against the party that proposed it (see, e.g. SCD 110 II 146). In practice, the rule applies to consumer contracts and general conditions rather than to carefully negotiated agreements between corporations. In regard to the FIDIC Conditions it will rarely be appropriate to apply this principle of interpretation.  

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9 SCD 108 II 149 and Gauch para. 201.
10 See Gauch para. 202 and 294 regarding the application of the contra proferentem rule in relation to the SIA-118 Norm.
Trade usages: If there are usages in an industry it is presumed that the parties intended the Contract to reflect these usages (Art. 9 Vienna Sales Convention). In any event, an arbitral tribunal sitting under the auspices of the ICC must take into account relevant trade usages (Art. 17 ICC Rules).

No “clarity” rule: Even apparently “clear” contract terms may require interpretation. The principle which generally is referred to in its Latin expression, “in claris non fit interpretatio”, is somewhat misleading. The Swiss Supreme Court indeed found against the automatic application of the principle that clear terms do not call for interpretation: the conclusion that a term was clear can only be reached after proper construction of the clause. There is a presumption, however, that the terms reflect the agreement.11

Good faith rule: All declarations of intention must be construed in light of good faith. A party is entitled to understand a statement from the other party in accordance with the sense that a party acting in good faith would attribute to such a statement ("principe de la confiance"). A party is bound by the objective sense of its statements as the other party was entitled to understand them in good faith.12

Gap filling interpretation: It is important to note that the FIDIC Conditions are drafted and structured in the common law tradition, in that the clauses are in general more detailed than the provisions found in Swiss contracts. Although the FIDIC Conditions are more exhaustive than the Code of Obligations, it is impossible for a contract to deal exhaustively with all issues and events that may arise. The judge or arbitrator interpreting a FIDIC contract under Swiss law will turn to the statutory provisions found in Art. 363–379 CO for those aspects of the Contract which the Conditions or other parts of the Contract do not regulate.13

The FIDIC Books contain rules for the interpretation of the Contract which need to be brought in line with Swiss law. Sub-Clause 1.2 confuses form requirements and contract interpretation. The parties to a FIDIC contract may reserve the written form, which they are allowed to do (Art. 16 CO). For the interpretation of a FIDIC contract governed by Swiss law, however, the judge/arbitrator must rely on any document, even outside the Contract, such as contemporaneous correspondence, drafts, minutes and oral evidence, which permits to establish the parties’ intentions. Sub-Clause 1.5, which establishes a hierarchy of contractual documents, is not a rule of interpretation either. If there are conflicting provisions, a Tribunal applying Swiss law has to look at the Contract as a whole.

Sub-Clause 1.5 also entitles the Engineer to issue clarifications if discrepancies or ambiguities are found in the Contract. It should be emphasized that the parties are not bound by such “clarification”. If controversial, the content and

12 Art. 2 CC.
13 See Thévenoz and Werro, para. 145 citing SCD 122 III 118 and para. 158ff. re. gap filling interpretation.
scope of the Contract will have to be established in accordance with the rules of interpretation pointed out above.

3. INTERFACES BETWEEN THE FIDIC CONDITIONS AND SWISS LAW

3.1. Time for the Performance of the Works in FIDIC Contracts

Before turning to the specific issues concerning the interface between the FIDIC Conditions and Swiss law, it is useful to outline briefly the FIDIC provisions that regulate questions concerning the time for the performance of the work as this will allow the reader to better understand the background for the questions that may arise when submitting a FIDIC contract to Swiss law.

Clause 8 deals with the sequence of the performance of the works. Typically, the following schedule will apply. The Engineer notifies the Commencement Date to the Contractor who will then start the execution of the works as soon as reasonably practicable (Sub-Clause 8.1). Within 28 days after receiving the notice, the Contractor shall submit a detailed programme to the Engineer. The programme indicates the order in which the Contractor undertakes to carry out the Works, inspections and tests. A supporting report accompanying the programme specifies the major stages of the execution of the Works, the methods to be adopted and the personnel and equipment required at each stage (Sub-Clause 8.3).

Within the Time for Completion specified in the Appendix to Tender, the Contractor shall complete the Works including achieving the passing of the Tests on Completion and completing all work required for the purpose of the taking-over under Sub-Clause 10.1 (Sub-Clause 8.2).

The Contractor is entitled to an extension of the Time for Completion if the Works are or will be delayed by any of the causes listed in Sub-Clause 8.4, namely: (a) Variations or other substantial changes, (b) causes entitling as per a Sub-Clause of the Conditions (see, e.g. Sub-Clause 8.5: Delay caused by authorities\(^4\)), (c) exceptionally adverse climatic conditions, (d) Unforeseeable\(^5\)

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\(^4\) Sub-Clause 8.5 sets three conditions which must be met if delay caused by authorities should give rise to an extension of time: (a) the "Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Country", (b) these authorities delay or disrupt the work, and (c) delay or disruption was unforeseeable (Sub-Clause 1.1.6.8: not reasonably foreseeable by an experienced Contractor by the date for submission of the Tender). While, with some reservation, we can agree with the first and the last of these requirements, the second seems problematic. If the interference by authorities of the "relevant legally constituted public authorities" falls in the Employer’s sphere of risk, delay caused by the interference of other authorities would all the more entitle the Contractor to an extension. As to the foreseeability, it is hardly justified to let the Contractor alone bear the risk of interference by public authorities. In any event, the principle of good faith may bar reliance of the Employer against the Contractor on interference by a state authority if the Employer itself is a state or a state-controlled entity (fait du prince). (See also Sub-Clause 13.5 concerning adjustments for Changes in Legislation).

From the wording of Sub-Clause 8.5(a), it would seem that the drafter had in mind regulatory bodies or authorities, which regulate the construction or construction related work. Court orders, however, can also be the cause of delay.

See also Sub-Clauses: 1.9, 2.1, 4.7, 4.12, 7.4, 8.9, 9.2, 10.3, 13.7, 16.1, 17.3, 17.4 and 19.4, which entitle the Contractor to time extensions in certain circumstances.

\(^5\) See Sub-Clause 1.1.6.8.
shortages of personnel or Goods caused by epidemic or governmental actions, or (e) delays attributable to the Employer or third parties, e.g. the Engineer, for which the former is responsible. See further detail below under 3.3 concerning delays.

The Contractor who considers himself entitled to an extension of time must give notice to the Engineer of the event or circumstance giving rise to the claim no later than 28 days after he became aware, or should have become aware, of such event or circumstance (Sub-Clause 20.1). See further detail below under 3.4.

As to the remedies available to the Employer in case of the Contractor’s delay or failure to comply with the time programme, Sub-Clause 8.7 provides that the Employer is entitled to receive delay damages in the amount stated in the Appendix to Tender, and up to a maximum amount indicated therein, for every day which elapsed between the Time for Completion and the date stated in the Taking-Over Certificate.

If, as a consequence of the Contractor’s delay, the Employer terminates the Contract according to Sub-Clause 15.2, the Employer is entitled to recover the costs of completion (Sub-Clause 15.4) in addition to delay damages. See further detail below under 3.3 and 3.8.

If the actual progress of the works lags behind the programme or is insufficient to comply with the Time for Completion, the Employer may request an acceleration of the works at the risks and costs of the Contractor and in accordance with revised methods to be submitted by the latter. The Contractor shall also bear any additional costs incurred by the Employer due to the adoption of these revised methods (Sub-Clause 8.6). Such costs must be borne in addition to any delay damages due under Sub-Clause 8.7. (See further detail below under 3.3 re. interim delays.)

For all claims for damages or costs, the Employer must abide by the proceedings set forth in Sub-Clause 2.5.

Pursuant to Sub-Clause 15.2 (c) (i) the Employer may, upon a 14 day-notice, resort to the termination of the Contract if the Contractor does not proceed with the works in accordance with Clause 8. The Employer can recover losses, damages and additional costs of completion from the Contractor (Sub-Clause 15.4).

The Contractor is liable for delays caused by Sub-Contractors (Sub-Clause 4.4). The Conditions do not exclude the Contractor's liability in case delay is caused by Nominated Sub-Contractors but permit the Contractor to reject the nomination unless the subcontract specifies that the Nominated Sub-Contractor shall hold the Contractor harmless for the consequences of any failure to perform the Contract (Sub-Clause 5.2). The Contractor may consider insisting on shifting the risk of delay caused by a Nominated Sub-Contractor to the Employer by including appropriate language in the Contract. Alternatively, the Contractor would be well-advised to request appropriate performance guarantees from all Sub-Contractors.

Sub-Clause 8.8 entitles the Employer to order the suspension of the works at any time. He is liable to the Contractor for costs and damages due to the suspension. If the suspension continues for more than 84 days without the Employer giving permission to proceed within 28 days, the Contractor may treat
the suspension as an omission or, if the whole of the Works is affected, terminate the Contract.

Clause 8 does not deal with the Employer's delay in respect to Employer's obligations. According to Sub-Clause 16.1, the Contractor may suspend work or reduce the rate of progress in case of a breach by the Employer of his payment obligations. These remedies should also be available (non adimpleti contractus) in case of a breach of other obligations by the Employer, for instance failure to give access to the site, to provide permits, tax exemptions, transferability of funds for which the Employer is responsible under the Conditions (Sub-Clause 1.13.a, Clause 2), to the extent that such failures actually prevent performance of the works.

3.2. The Engineer

A particular feature of the FIDIC Civil Works Conditions relates to the role attributed to the Engineer. This role follows the model developed in England, especially in the conditions for civil engineering construction of the ICE and for building work of the JCT, and to some extent also in the USA. In this role the Engineers (or, in the JCT form, the Architect) are not merely the representative of the Employer but also have functions in which they act as an administrator of the Contract and of the relations between the Employer and the Contractor. This function is particularly prominent with respect to certification and dispute settlement.16

The role of the Engineer in Anglo-American contract practice implies Engineer's obligations not only towards the Employer, by whom he is engaged and paid, but also towards the Contractor. Indeed, he is required to administer the Contract reasonably between the parties.17

In the FIDIC Conditions, the Engineer is “the person appointed by the Employer” (Sub-Clause 1.1.2.4) and “shall be deemed to act for the Employer” (Sub-Clause 3.1.a). At the same time, he certifies payments and must make a “fair determination” in disputes between the Employer and the Contractor (Sub-Clause 3.5) e.g. in relation to the Contractor’s claims for time extensions, extra payments for variations, etc.18

This role as an independent Contract administrator has often been misunderstood by practitioners outside those familiar with the Anglo-American tradition. As the FIDIC Conditions are often applied by Employers and Engineers unfamiliar with this tradition, the system has received severe criticism and in international practice has fallen into disrepute.

This criticism has led the authors of the 1999 FIDIC Conditions to make

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substantial changes in the role of the Engineer. The Red and the Silver Books, while retaining as a matter of principle the traditional ICE/FIDIC role of the Engineer, introduced many inroads in his prerogatives. In the Short Form of the conditions, a merely bilateral approach is adopted, omitting the Engineer's role altogether.

Applying a contract form with the Engineer as an independent contract administrator under the rules of a legal system which is not familiar with this concept can give rise to some difficulties. This applies not only to Swiss law but in general to civil law systems. The differences in this respect have been explained by other authors in this book (Rosener/Dorner). We refer to their remarks and supplement them by some comments on the situation under Swiss law.

Under Swiss law, the construction contract is concluded between the Employer and the Contractor; an Engineer, if he is named at all, merely acts as a representative of the Employer. The Engineer has the powers which the Employer confers to him. His acts bind the Employer if they are covered by a power. Notices made to the Engineer are deemed to be received by the Employer ("Zurechenbarkeit"). Typically, the scope of the Engineer's powers is large. According to Art. 33.1 of SIA Norm 118 (1977/1991), for instance, unless the Contract provides otherwise, the Engineer represents and binds the Employer in his relation with the Contractor. Vis-à-vis the Contractor, the Employer cannot rely on limitations of the Engineer's powers in the Contract between the Engineer and the Employer unless the Contractor has been notified of such limitations or was aware of them (Art. 33.2 CO).

What is the effect of applying a civil law system, such as Swiss law, to the provisions concerning the Engineer in a FIDIC contract? Are the provisions of the FIDIC Conditions defining the role and authority of the Engineer applicable and, if so, to what extent? As a matter of principle, Swiss law gives great freedom to the parties in regulating their contractual relationship (Art. 19 CC). There would seem to be no fundamental inconsistencies which would prevent the parties from effectively appointing a person to the role of Engineer. Indeed, third party determination of contractual obligations, or even determination of the obligation by one of the parties, is known under Swiss law and can for instance be found in tailor-made arbitration agreements nominating an ad-hoc sole arbitrator, in trust deeds and in some shareholder agreements.

If one applies Swiss law to the FIDIC provisions concerning the Engineer's role in certification and other functions of independent contract administration, one would presumably have to assume a contractual relationship not only between the Contractor and the Employer but also between the Contractor and the Engineer. Under this relationship, the Engineer would assume a duty of fair and equitable determination towards the Contractor. However, as far as we are aware, the question has not been tested in Swiss law.

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19 For a general discussion of the contracts of architects and engineers see Gauch and Tercier, "Das Architektenrecht", Freiburg 1995; Zürcher Kommentar, p. 74; Gauch, para. 47, each with further references.

20 In practice, the notion "Engineer" encompasses work supplied in Switzerland by both, "architect" and "ingénieur".

21 Note, however, that in SCD 109 II 457 the Federal Tribunal stated that the provisions (Art. 154.3 and 155.1) authorising the Engineer to represent the Employer for the examination and acceptance of the final accounts is unusual ("geschäftsfremd", "unüblich").
Different issues arise in those situations where the Contract provides for an Engineer but none has been appointed. This occurs occasionally in the relations under the main contract and more frequently in sub-contracts. In such situations, if the project does not involve a "common law" Engineer, the provisions in the FIDIC Conditions which are tailor-made to fit this role are not directly applicable.22

Whatever the contract between the Employer and the Contractor may provide, the Engineer’s relation with the Employer is also defined by his own separate contract with the Employer. This contract is not necessarily governed by the law applicable to the construction contract nor will it in all cases reflect the Engineer’s powers under the FIDIC Conditions. The Engineer’s contract may grant him fewer powers than the FIDIC Conditions. If the Engineer goes beyond his powers, the question may arise as to whether the Contractor can rely on such acts arguing that the Engineer had apparent authority to the extent that his acts are covered by the wider FIDIC Conditions. Under Swiss law, the Employer would be bound by the acts of the Engineer beyond authority, unless he had previously informed the Contractor of any limitations in the scope of the Engineer’s powers.

If there is no Engineer in the sense of the FIDIC Conditions, the question is what other regime replaces the one based on the Engineer. While it is sufficient in many cases to read Employer instead of Engineer (for instance in case of termination following an event of force majeure), it is doubtful that this would be the adequate solution in cases where the Engineer’s role is that of a neutral certifier or the person to which disputes are referred in the first instance. The key provision in this context is Sub-Clause 3.5. If there is no neutral Engineer, disputes could directly be submitted to the Dispute Adjudication Board (the “DAB”).

3.3. Delays

The key provision governing the Contractor’s delay is found in Art. 366(1) CO, according to which “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.”

There are some differences with respect to completion, delivery, acceptance and related concepts between Swiss law and legal systems of similar orientations and the model underlying the FIDIC Conditions. These differences relate primarily to the questions of when the Contractor is deemed to have completed his obligations, passing of risk and liability for defects. In the context of the present discussion, it suffices to point out these differences, noting that the model applied in the FIDIC Conditions does not necessarily correspond to that underlying Swiss law.

22 For further decisions concerning FIDIC Clause 69 see Christopher R. Seppala in the May and November 1998 issues of the ICC International Court of Arbitration Bulletin (reprinted in ICLR 1999 Vol. 3).
The parties may agree on a programme stipulating intermediary dates either as binding dates or merely for guidance. The stipulation of such dates for the progress of the works does not necessarily imply that the works concerned need to be delivered at that time. The parties may, however, agree on partial deliveries (Art. 372(2) CO). In this event, 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 neither been agreed explicitly, e.g. by including a work programme, nor implicitly in light of a good faith interpretation of the Contract, the Contractor will be granted the time necessary for an experienced Contractor who commences the works in a timely fashion and performs the works in steady progress deploying the normal resources and manpower.

If a specific time for delivery has been determined, or can be determined in light of the Contract, the Contractor, as a matter of principle, will be in default if he does not deliver at the agreed time (Art. 102 CO). Under general rules of contract, if delivery is delayed, the Employer needs to serve notice on the Contractor in delay, requesting performance and granting a final period for curing the defective performance. No such notice is necessary if the Contractor's unwillingness to perform is manifest, or if a fixed date for delivery had been stipulated (Art. 108 CO). In these cases, the Employer may terminate the Contract forthwith.

As a consequence of its delay, the Contractor is liable for damages for impossibility to perform and the Employer is entitled to terminate the Contract (Art. 103–109 CO and Art. 366 CO).

Damages encompass loss of profit (lucrum cessans) and costs incurred (damnum emergens), including damages or penalties which the Employer must pay to a third party due to the delayed availability of the works. This is particularly relevant in relations between the main Contractor (taking the role of the Employer, and Sub-Contractors).

The parties may agree on the payment of fixed sums which can be construed as either damages in an agreed fixed amount or penalty. It is not clear whether under Swiss law the delay damages provided for in Sub-Clause 8.7 of the FIDIC Conditions should be considered as liquidated damages or penalties. While both are admissible, liquidated damages are due only if there is a liability of the Contractor for the delay, and if the injured party shows the existence of a damage (which does not require showing its precise amount). Penalty provisions stating lump sum payments for a defined period of delay also require the liability of the Contractor for the delay. On the other hand, the Employer need not have incurred any loss. If he has, and if the loss is higher than the amount of the penalty, the amount beyond the penalty can be claimed in addition to the latter.

In practice, the distinction may not be very important since, under the FIDIC

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23 Gauch, para. 108.
24 Gauch, para. 649.
25 Gauch, para. 665. SCD 116 II 443.
26 Gauch, para. 692 ff.
Conditions, delay damages are only due in case of liability of the Contractor for the delay, but this liability may be presumed, if the Contractor does not complete the works within the contract period and does so without a justified reason. The question is of relevance, however, where the Contract schedule is divided into sections with binding intermediary deadlines (milestones), cf. Sub-Clause 8.2. Here a dispute could arise in regard to the question of whether the Employer can claim liquidated damages when the works are delayed between interim milestones but the final completion date is nevertheless met due to the Contractor's acceleration efforts.

The purpose of the project schedule setting out milestones for interim completion dates is normally to provide the Employer with a control instrument. In cases where the objective of the Employer is limited to this effect, it would appear that it is not the intention of the parties to deprive one of them of the revenues from the project, unless there were serious grounds. In such situations one would not expect that the parties intended to give to the Employer the right to claim liquidated damages if interim milestone dates are not met, in particular in situations where, despite the delay that occurred during the progress of the works, but where the final completion date, nevertheless, is met due to subsequent acceleration efforts of the Contractor. Instead, interim delays will give the Employer the right to demand acceleration. Where the FIDIC contract is governed by Swiss law, the Employer should therefore not expect to be automatically entitled to liquidated damages for interim delays unless this is specifically stated in the special conditions to the Contract.

In some projects, interim milestones mark deadlines for partial deliveries, e.g. stages in the project where the Employer expects to take possession of part of the project, be it part of a road, of a building complex or a unit of an industrial plant. This may be the case in a power plant composed of several units, where the Employer may wish to receive each unit as soon as it is ready and to operate it before the other units are completed. Here the Employer may be able to prove that the interim delay has caused a loss of profit, that this was known to the Contractor, and that the parties therefore intended that interim delays would trigger liquidated damages. On this basis, the Employer could be entitled to claim liquidated damages for the interim delay despite the fact that the final completion date might be achieved by the Contractor.

It should be noted that, under Sub-Clause 8.7, delay damages are the only damages due. No additional damages can be claimed (unless the Contract is terminated). Moreover, it is admitted under Swiss law that both liquidated damages and penalties can be reduced if they are excessive. 28

There is some controversy among Swiss legal writers as to the question of whether it is necessary to serve a reminder on the debtor as a pre-requisite for the Employer's entitlement to the penalty in case the Contract fails to address the issue. 29 The notice which the Employer must serve on the Contractor according to Sub-Clause 2.5 is not constitutive of the entitlement but only for the exercise of the claim. The Employer's claim for delay damages arises as soon as delay occurs for which the Contractor is responsible. In order to exercise his

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28 Art. 163 CO; Werz para. 345 ff.; Gauch para. 711.
29 Gauch para. 696.
claim, the Employer must, however, give notice as soon as practicable. Under Swiss law, the Employer must notify the Contractor at the latest at Taking Over that he intends to claim delay damages. It is argued by one of the leading specialists of Swiss construction law that in a case where the Employer unilaterally takes possession of the works, he cannot claim delay damages anymore.

3.4. The Contractor's Claims for Variations and Other Changes in the Circumstances Concerning the Performance of the Works

One of the most important provisions in the FIDIC Conditions is found in Sub-Clause 20.1, providing that the Contractor must give notice of claims for extra payment and/or time extensions for variation works ("variation claims") no later than 28 days after he became aware, or should have become aware, of the event or circumstance giving rise to his claim. If the Contractor fails to comply with this provision "the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim".

No such clause is found in Swiss construction law where the problem concerning the Contractor's failure to give notice or secure a written agreement with the Owner in regard to variation works is usually treated as a question of burden of proof as to whether or not the parties have in fact agreed to change the works.

Under Swiss law, the question of variations is closely linked to the provisions in the CO concerning the Contract price. Art. 373(1) CO provides the principal rule in this respect: if the Contract is for a lump sum, then the Contractor cannot claim extra payment if he has to carry out more work than what was expected.

Art. 373(2) does, however, provide for the effect of delay and obstruction due to extraordinary circumstances that could not have been foreseen. In such cases, the judge has discretion to increase the lump sum price or free the Contractor from his obligations. Three additional, important exceptions to the main rule should be mentioned:

First, if the Employer directly orders a variation to the scope of work, the Contractor has a variation claim. Under Swiss law, as in the FIDIC E&M Conditions, the parties must agree on the price increase and the time extension. However, the Employer may, in the Contract, reserve his right to order variations at a fixed price.

Second, if the works are varied, be it as a result of the Employer's change of mind or because a need has arisen to change the works due to circumstances

30 Gauch, para. 700; SCD 97 II 350.
31 Gauch, para. 701.
32 See footnote 14 listing the FIDIC clauses where the Contractor can make a variation claim.
33 See Gauch para. 774 ff. concerning the Employer's right to change the Contract unilaterally.
34 See Gauch para. 785 and Pierre Tercier, "Introduction au droit privé de la construction" ("Tercier") p. 125
35 Ibid, p. 120.
for which the Employer is responsible (e.g. unforeseeable soil conditions, cf. Art. 365(3) CO), the Contractor has a claim for additional payments.36

A third exception is found in the SIA-Norm 118, Art. 45(2),37 which regulates the Contractor’s right to extra payment in relation to necessary variations, which are carried out by the Contractor without a prior agreement with the Employer. Outside the scope of the SIA-Norm (which, as mentioned above, is not a binding text unless agreed by the parties), the Contractor will under certain circumstances be able to support a variation claim on the general principle of negotium gestio or based on the rules concerning unjust enrichment.38 In case of doubt as to whether or not a variation has been ordered (or whether it is necessary) the burden of proof rests with the Contractor.39 If the variation has become necessary due to circumstances for which the Contractor is responsible, he cannot claim extra payment or time extensions.40

In regard to the Contractor’s duty to give notice of any claims, the Swiss Civil Code contains a general notice provision in Art. 365(3) CO41 concerning the Contractor’s duty to give immediate notice in certain situations where the construction works are obstructed and provides that failure to give such notice has a prejudicial effect on his claim.

According to one of the leading Swiss authors,42 the Contractor’s failure to give notice in a situation where the need to carry out a variation arises does not, however, automatically result in a loss of the right to claim extra payment and time extensions under this provision. Indeed, a “drop dead” provision such as FIDIC Sub-Clause 20.1 is not common in Swiss construction contracts, and it is thought that Sub-Clause 20.1 will not always be applied strictly under Swiss law if a strict application would lead to unfair results – in particular in cases where the Contractor has carried out necessary works that evidently amount to variations.

For instance, under Swiss law, by application of the principle “venire contra factum proprium”, the Employer could be deemed to have waived his right to

37 Gauch para. 1312: “L’entrepreneur a néanmoins le droit, sans attendre l’ordre de la direction, d’exécuter en régie les travaux urgents indispensables pour prévenir un danger ou un dommage. Il en informe aussitôt la direction des travaux. Celle-ci a, en tout temps, le droit de les faire interrompre. L’entrepreneur qui les poursuit néanmoins n’a pas droit à une rémunération”.
39 See Gauch p. 233: “Si le droit à la rémunération supplémentaire est litigieux, le fardeau de la preuve (art. 8 CC) de la modification de commande et de l’augmentation de dépenses qui en résulte incombe à l’entrepreneur qui s’en prévaut.”
40 Tercier p. 125.
41 “Si, dans le cours des travaux, la matière fournie par le maître ou le terrain désigné par lui est reconnu défectueux, ou s’il survient telle autre circonstance qui compromet l’exécution régulière ou ponctuelle de l’ouvrage, l’entrepreneur est tenu d’en informer immédiatement le maître, sous peine de supporter les conséquences de ces faits”.
42 Gauch, p. 234: “Le droit à une rémunération supplémentaire tombe dans la mesure où l’entrepreneur y a renoncé ou doit assumer lui-même les conséquences de la modification de commande parce que la modification a été rendue nécessaire par une violation du contrat qu’il a lui-même commise (p.ex. une violation de son obligation d’informer, art. 365 al. 3 CO [...]. Si l’entrepreneur omet de notifier l’augmentation, cela n’exclut pas d’entrée de cause son droit à la rémunération supplémentaire (n. 785): il peut cependant résulter des circonstances concrètes du cas d’espèce que le le sens, interprété selon le principe de la confiance, soit compris comme une renonciation de sa part, ce qui libère le maître de son obligation de rémunération supplémentaire”. (Emphasis added).
reject claims submitted after the elapse of the 28-day notice-period, if the Contractor can show that the Employer has not clearly insisted on a strict adherence to the rule in a consistent manner. Such a decision could be based on the mandatory rule in Art. 2 of the Swiss Civil Code (Good Faith Rule).

If the Employer intends to rely on his right to reject claims under Sub-Clause 20.1 in a FIDIC contract governed by Swiss law, it is advisable that he be consistent in the application of the 28-day notice-period throughout the project. If the Employer honours claims despite the expiration of the notice period, he should clearly specify that this is done without renunciation to the contractual periods and with a clear reservation of the rights under the contractual procedure.

An arbitrator applying Swiss law and construction practice may also place a heavy burden of proof on the Employer to show when the Contractor “should have become aware” of his claim and thereby allow a claim for variation works to be tried on its merits. As in all construction disputes the parties’ record keeping will prove to be of paramount importance in this regard.

The purpose of Sub-Clause 20.1 is to secure the Employer’s control over the project finances and schedule. Compliance with the notice provision is of importance because it allows the Employer to assess the impact of a variation on the contract price and the time schedule before the variation is carried out, and allows the Employer to raise objections or suggest alternative solutions to a proposed variation that might reduce or eliminate the impact on price and time.

Accordingly, the arbitrators would be more likely to apply Sub-Clause 20.1 and reject the Contractor’s untimely claim if the Employer could show that his legal or financial position has been prejudiced due to the Contractor’s non-compliance with the 28-day notice-period. In other words, the Employer should not count on being able to depend solely on the 28-day deadline in Sub-Clause 20.1 in its defence against untimely claims when the FIDIC contract is governed by Swiss law.

3.5. Limited Liability and Gross Negligence

According to Sub-Clause 17.1, the Contractor is liable to and shall indemnify the Employer for any bodily harm or damage to the Employer’s property resulting from the performance of the works (including any negligence) unless attributable to the Employer. Inversely, the Employer is liable to the Contractor only in case of bodily harm of the Employer or his Personnel, but not for property.

According to Sub-Clause 18.3(a), the insuring party, usually the Contractor, needs to maintain insurance coverage for damage resulting from his performance and occurring before the issue of the Performance Certificate.

Sub-Clause 17.3 lists a series of events which are within the Employer’s sphere of risk, e.g. war, warlike situations, design supplied by the Employer, unforeseeable forces of nature. The Employer shall indemnify the Contractor for damages due to such events and, if the Works are delayed, grant an extension of time.

Sub-Clause 17.6 limits the liability of the Contractor to the Employer to a sum stated in the Particular Conditions or, if none is stated, to the Accepted Contract Amount. Indemnities under 4.19, 17.1 and 17.5 remain reserved. Neither party is liable for loss of profit or any indirect or consequential damage
other than under Sub-Clause 17.1 or 16.4 (termination by Contractor due, in essence, to the Employer’s delay, default or insolvency). The liability is not limited in case of fraud, deliberate default or reckless misconduct by the defaulting party.

The FIDIC Regime is not at variance with Swiss law. Damage to property or personal injuries can be claimed under tort and contractual rules. The qualification as a tort claim may jeopardize the (subject-matter) arbitrability of a dispute in certain jurisdictions, but not in Switzerland. A limitation on the maximum amount is possible unless for gross negligence or intent (Art. 100 CO), which are reserved in Sub-Clause 17.6.

Gross negligence is often argued (and often with very little success) by the Employer, who carries the burden of proof, in an attempt to defeat contract clauses limiting the Contractor’s liability. As mentioned above, a FIDIC Contract will usually contain a clause setting a maximum amount of liquidated damages, which can be claimed by the Employer for the Contractor’s delays. Such “caps” are often inserted to allow the Contractor some means of risk control, however, they can be abused by the Contractor to tilt the balance of power in the Contract. Once the cap has been exceeded, the Employer alone suffers the financial consequences of further delays and the Contractor can use this situation to force the Employer to accept variation orders and pay extra costs for having the Contractor accelerate the works and/or implement alleged variations in order to mitigate the delays. Here the Employer is caught in the difficult dilemma between accepting the Contractor’s unreasonable variation claims or terminating the Contract, which will cause even further delays and disruption. The only way out of this dilemma will often be to tolerate the delays, let the Contractor complete the works and then attempt to defeat the contract clauses limiting the Contractor’s liability in arbitration in order to recover the actual profit loss which the delays have caused. To do so, the Employer must show that the Contractor’s misconduct amounts to gross negligence according to the law governing the Contract.

According to Swiss legal theory and case law, a person acts ‘grossly negligent’ when he gravely departs from elementary imperatives of precaution and thus disregards what would make sense to every conscientious and judicious human being in the same situation and under the same circumstances (see decision of the Swiss Federal Supreme Court published in SCD 119 [1993] II 443 at 448 with references).

When distinguishing gross negligence from simple negligence, emphasis is frequently placed on the following aspects of the Contractor’s misconduct:

The fundamental condition, which must be met in order for a breach of

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43 In Switzerland, arbitration clauses are interpreted widely and also cover tort claims, if they are related to the Contract. See P. M. Patocchi, “Demandes et exceptions de nature célèctuelle dans l’arbitrage international”, Mélanges Rusconi, Lausanne 2000, p. 237 ff.


45 “Commis une faute grave celui qui viole un devoir élémentaire de prudence dont le respect s'impose à toute personne raisonnable placée dans la même situation.”

contract to be regarded as gross negligence is that there is a breach of an essential obligation under the Contract.

If the Contractor advertises as being a specialist within his field, he is usually under a higher duty of care than other professionals within the same field who do not claim to be specialists. It is thus easier for a specialist to commit a breach of contract amounting to gross negligence than it is for a normal professional.

The damage resulting from the breach of contract must be considered as probable (and not just possible) in order for the breach to amount to gross negligence.

Finally, a breach of contract will more easily be regarded as grossly negligent if the breach could affect people’s health or lives.

The Contract might contain examples of misconduct which the parties regard as amounting to gross negligence. The Contractor’s failure to comply with such contractual provisions could be qualified as an act of gross negligence. The failure to comply with applicable legal regulations, e.g. as to safety of the site, may have the same effect.

3.6. Force Majeure

Sub-Clause 19.1 defines an event of force majeure as an event (a) which is beyond a party’s control, (b) which such party could not reasonably have provided against before entering into the Contract, (c) which could not reasonably have been avoided or overcome, and (d) which is not attributable to the other party. By way of illustration only, Sub-Clause 19.1 lists a number of events, such as war, warlike events and natural catastrophes, which are considered to be force majeure events if the four pre-requisites are met.

If such event permanently prevents the party from performing all or part of its contractual obligations, the party is released from further performance of the obligations concerned and, if the impossibility affects the entirety of the Works for more than 84 days, either party may terminate the Contract (Sub-Clause 19.6). In such case, the Contractor is entitled to be paid its demobilization costs, the price for works carried out and liabilities and costs incurred with a view to the completion of the Works (Sub-Clause 19.6).

If the event of force majeure causes delay (which supposes that performance is still possible), the Contractor who is temporarily prevented from performing is entitled to an extension of time (Sub-Clause 19.4). In general, it will be noted that Clause 19 also deals with events which only temporarily affect performance (Sub-Clause 19.3, 2nd par.). There may therefore be interfaces between Clause 19 and Clause 17 which place a number of events in the Employer’s sphere of risk which are also defined as events of force majeure (See Sub-Clauses 17.4 and 19.1). According to Sub-Clause 17.4 the Employer who requests the Contractor to rectify losses or damage to the Works due to an event which is in the Employer’s risk must pay to the Contractor the costs of rectification. Sub-Clause 19.4 obliges the Employer to hold the Contractor harmless for the

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48 See for instance SDC 112 II 137, 93 II 352 and SCD 72 [1946] II 311.
Contractor's own costs due to the event of force majeure (in addition to costs of rectification).

Sub-Clause 19.2 (last par.) embodies the principle that lack of funds is never an excuse for not performing ("Geld muss man haben").

According to the catch-all Sub-Clause 19.7, the parties are discharged from further performance following any event which either renders performance of the Contract impossible or unlawful, or under the law governing the Contract releases a party from further performance. (The margin note "Release from Performance under the Law" is somewhat ambiguous, since it only addresses this last hypothesis).

The term "force majeure" is not defined as such under Swiss law. The concept that certain extraordinary events or circumstances may have an impact on the parties' original contractual obligations, however, is well known under Swiss law in general as well as in the provisions governing contracts for work. Thus, events of force majeure are taken into account by Swiss law in two instances: in case of destruction of the Works before their delivery to the Employer, Art. 376 CO provides that the Contractor is not entitled to receive any payment or reimbursement for costs. Excepted are cases where the destruction of the Works is due to a fault of the Employer, or, provided that the Contractor has pointed out the risks related thereto, to a defect of material delivered or the ground designated by the Employer or to a method of construction imposed by him. In contrast, under the FIDIC Conditions, an event of force majeure will release the Contractor whenever it occurs throughout the performance of the Works and not affect his right to be paid for work already performed.

While Art. 376 CO governs the performance risk, Art. 378 CO deals with the payment risk if the performance of the Works becomes impossible because of extraordinary circumstances ("suite à un cas fortuit survenu chez le maître"), which lie in the Employer's sphere of risk the Employer must pay the Contractor for the work already performed (in other words, if such circumstances are in the Contractor's sphere of risk, he is not entitled to any compensation). If the impossibility is due to his fault, the Employer shall in addition pay damages (Art. 378 CO).

The CO does not determine the respective sphere of risk of the parties. The parties are free to allocate them in the Contract. If no contractual regime has been stipulated, the risk allocation in Sub-Clause 17.3 should apply by analogy if the Works become impossible to perform. It is submitted that this provision is not exhaustive since, in light of the interpretation of the FIDIC Conditions, other events are placed within the Employer's sphere of risk, e.g. in light of Sub-Clause 2.2 the risk of expropriation, condemnation or the protection of a site as cultural property by the authorities, or unforeseeable sub-surface conditions (Sub-Clause 4.12).

Art. 378 CO only applies if there is no contributing liability of the Contractor

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49 Impossibility in the sense of the Code of Obligations means an "objective" impossibility which prevents the performance by any party, not only by the Contractor at hand. If a third party could perform, then performance is not impossible. (For this reason, lack of money is never an event of impossibility).

50 Gauch para. 725.
for the impossibility, for instance for having omitted to draw the Employer’s attention to certain risks as it is his duty under Art. 365(3) CO.

An important distinction from the FIDIC Conditions is the fact that the latter also consider mere temporary or partial impossibilities due to force majeure. Under the CO, force majeure events are taken into consideration only if they render performance of the (entirety of the) Works permanently impossible for anybody. Since neither Art. 376 nor Art. 378 are mandatory, the regime established by the FIDIC Conditions will prevail.

In both cases, the Contract is deemed to be terminated by operation of law. A specific notice of termination is not required.\(^{51}\)

Clause 14 (Contract Price and Payment) does not address the impact of force majeure events on the contract price. Under Swiss law, force majeure events are a ground to increase the contract price in case of lump sum contracts. According to Art. 373(2) CO, the judge can in his discretion increase the contract price or allow the termination of the Contract in case of circumstances which are extraordinary and unforeseeable or excluded in the minds of the parties and which prevent performance of the Works or render it excessively difficult ("si l'exécution de l'ouvrage est empêchée ou rendue difficile à excès par des circonstances extraordinaires, impossibles à prévoir, ou exclues par les prévisions qu'ont admises les parties"). Case law is restrictive.\(^{52}\) An Arbitral Tribunal to which a claim under Clause 20 is submitted will also have the power to adjust the contract price.

3.7. Remedy of Defects

The FIDIC Conditions contain in Clauses 7, 11 and 17 provisions concerning the Contractor’s obligation/right to repair defects identified by the Engineer. According to Sub-Clause 7.6, the Engineer can instruct the Contractor to remove and re-execute any parts of the works, which are not in accordance with the Contract.

Sub-Clause 4.1 concerning the general obligations of the Contractor specifically provides that the remedying of defects in the Works is part of the Contractor’s obligations under the Contract. By contrast, Art. 364 CO does not mention the remedying of defects as being part of the Contractor’s fundamental contractual obligations. The detailed regulation in the FIDIC Conditions of the Contractor’s obligations and duties in regard to the remedying of defects (see in particular Sub-Clauses 4.1, 7.5, 7.6, 11 and 17.2) reflect the parties’ clear and common contractual intention that defects as a predominant main rule must be rectified by the Contractor or on the Contractor’s expense.

According to Sub-Clause 15.2.c.ii, the Employer is entitled to terminate the Contract if the Contractor does not comply with such instruction. Art. 368 CO contains a similar provision, entitling the Employer to terminate the Contract in case of severe defects. Art. 368(2) CO, however, provides that the Employer

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\(^{51}\) Gauch para. 732.

can only demand that the Contractor rectifies defects if this can be done without disproportionate costs. This principle (sometimes referred to the “limit of sacrifice”) is not reflected in the FIDIC Conditions.

When a FIDIC contract is governed by Swiss law, the question of whether or not the limit of sacrifice in Art. 368(2) CO could apply might in particular arise in a situation where the Employer instructs the Contractor to rectify substantial parts of the works, which are not as such functionally defective (i.e. amounting to deviations from “performance specifications”), but are perhaps merely deviations from “design guidelines” or “recommendations” (impacting on the aesthetic appearance of the building). If from an objective point of view, no harm or damage occurs, can the Employer insist on rectification, whatever the costs?

First of all, it should be noted Art. 368(2) is not a mandatory rule. If the Contractor has given a guarantee, he is bound to perform the works as guaranteed regardless of the costs. If there is no guarantee and if the parties have not clearly excluded the application of Art. 368(2), a Tribunal in Switzerland is likely to apply the statutory provision through “gap filling” interpretation. As mentioned above, if an issue is not explicitly or implicitly addressed in the Contract, the general provisions of Swiss law will apply.

The detailed regulation in the FIDIC conditions of the Contractor’s obligations and duties in regard to the remedying of defects (see in particular Clauses 4.1, 7.5, 7.6, 11 and 17.2) reflect the parties’ clear and common contractual intention that defects as a predominant main rule must be rectified by the Contractor or on the Contractor’s expense.

Therefore, it will be difficult for a Contractor to escape the duty to rectify defects in a FIDIC contract, even if the costs would be very high compared to the utility value of rectifying the works. In our opinion, if the parties have not explicitly excluded the application of Art. 368 (2) and provided that the Contractor has not given the Employer an actual guarantee, the principle of a “limit of sacrifice” will apply in some cases, where the Employer’s demand for rectification would be tantamount to an abuse of a contractual right, cf. Art. 2 CC, and lead to disproportionate costs.

To reduce the risk of disputes arising in regard to these questions, the parties may wish to insert a provision in the special conditions to their FIDIC contract, which either exempts it from the application of Art. 368(2) CO or identifies an appropriate “limit of sacrifice”, e.g. by a percentage of the total contract sum.

### 3.8. Termination of the Contract

#### 3.8.1. Termination by the Employer under the FIDIC Conditions

Sub-Clause 15.2 lists the grounds on which the Employer is entitled to terminate the Contract. Failure to carry out an obligation in spite of a notice to correct (Sub-Clause 15.1), delay, insolvency, corruption. In the two last mentioned events, the Employer may terminate immediately, otherwise upon a 14 day-notice. Suspension by the Employer is dealt with by Sub-Clauses 8.8 – 8.12.

54 See footnote 13.
Although on the face of Sub-Clause 15.2 the existence of a delay seems sufficient to trigger the right to terminate the Contract, it is submitted that to the extent that the Contractor is entitled to an extension of time according to Sub-Clause 8.4, the Employer cannot terminate the Contract.

The fault of the Contractor, on the other hand, is not a pre-requisite for the Employer’s right to terminate, nor is the absence of any fault a hindrance.

In the context of Sub-Clause 8.3, if delay has not yet occurred, but the rate of progress is at variance with the programme or such that the Time for Completion cannot be met, it may be doubtful whether the Employer is entitled to termination under Sub-Clause 15.2, the wording of which is very wide.

Note, however, that the Employer is in any event entitled to terminate the Contract at any time upon a 28 day-notice. The Employer would not, in this hypothesis, be entitled to delay damages nor to reimbursement of completion costs (in fact, the Employer is prevented from executing the works after the termination).

The Contractor’s obligations upon termination are set forth in Sub-Clause 16.3.

3.8.2. Termination or Suspension by the Contractor under the FIDIC Conditions

Sub-Clauses 16.1 and 16.2 list the events which entitle the Contractor to suspend and to terminate the Contract. Essentially, these are events where the Employer failed to pay the Contractor or can no longer assure that he will be able to do so.

3.8.3. Termination by the Employer under Swiss law

According to Art. 377 CO, the Employer may terminate the Contract at any time before the completion of the Works. After completion, termination is not possible anymore because all contractual works have been executed. It will be noted that the Works can be completed even if they are defective. The FIDIC Conditions do not limit in time the right to terminate. In principle, the Employer could terminate even after completion (in the sense of Sub-Clause 8.2). Under Swiss law, however, completion is a factual situation rather than a legal concept. Completion is not to be confused with acceptance. Under Swiss law, tests on completion are not a pre-requisite for completion, as in Sub-Clause 8.2, but may be a condition precedent to acceptance. If all the Works defined in the Contract are executed, the Works are completed. While the parties may contractually subject the acceptance of the Works to certain conditions, they cannot dissociate the occurrence of completion from the actual completion of the Works.

It is therefore submitted that once the Works have been completed, in the sense of Swiss law, the Employer is no longer at liberty to terminate the Contract under Sub-Clause 15.5. If the works are defective, the remedies available to the Employer are those in Art. 368 CO (in case of substantial defects: rejection, otherwise: reduction of price or correction, in case of a fault of the Contractor, in both cases, damages).

55 Gauch para. 101.
56 Gauch para. 524.
The Contractor is entitled to full payment of works already performed and full compensation for damages (Art. 377 CO). In case of termination for just motives for which the Contractor is responsible, the Employer is released from its obligation to pay damages.\(^7\) Art. 377 CO is not mandatory. The parties can provide a different set of rules governing termination, for instance submitting it to conditions such as the condition set forth in Sub-Clause 15.5.

The Employer’s right to terminate the Contract for convenience, without just grounds is indeed subject to an important limitation: it cannot be exercised in order for the Employer to perform the works himself or through another Contractor. The rationale of this provision may be to protect the Contractor, but the prohibition to perform the works is not an appropriate means. If the Employer is granted the right to terminate at any time, the protection of the Employer should be on the payment level. The Employer should pay the Contractor for all works already performed and hold the Employer harmless for any reasonable expenses made with a view to performance in accordance with the approved programme.

Sub-Clauses 15.5 and 19.6 to which it refers are silent about the Contractor’s right to compensation for damage. In the drafters’ mind this silence means that damages are excluded unless explicitly provided. Indeed, the Guidance for the Preparation of Particular Conditions at Sub-Clause 15.5 suggests that “unless inconsistent with the requirements of the Employer and/or financial institutions, a further sentence may be added: The Employer shall also pay to the Contractor the amount of any other loss or damage resulting from this termination”. However, since under Swiss law, the Employer is by operation of law obliged to fully indemnify the Contractor, the mere absence in Sub-Clause 15.5 of a mention of the Contractor’s entitlement to recover damages is irrelevant. Art. 377 CO may not be mandatory, but unless there is an explicit exclusion or limitation of the Contractor’s rights in the Contract, this provision will apply.

Income which the Contractor was able to earn by using the workforce and machines in other projects will be deducted from the damages due to him. The principle of good faith and its derivate principle, the duty to mitigate damages, furthermore command that income which the Contractor could reasonably have been expected to earn (e.g. by allocating manpower to other projects) but did not earn because he left his resources idle will also be deducted from the damages.\(^8\)

Termination for just grounds is addressed by Sub-Clause 15.2. Not all of the grounds mentioned would qualify as just grounds and not all grounds that would qualify are mentioned in this Clause. Under Swiss law, the parties are entitled to contractually determine motives which trigger a right to terminate.

Sub-Clause 15.2(f) is well intended but problematic:

“The Employer shall be entitled to terminate the Contract if the Contractor gives or offers to give (directly or indirectly) to any person any [...]

\(^7\) Gauch para. 568.

\(^8\) Gauch para. 549 and 555. Note, however, a recent Supreme Court decision which stated that Swiss international public policy does not encompass a duty of an injured party to mitigate its damages (SCD of 10 December 2002, ASA Bull 3/2003, p. 585, 590).
of value, as an inducement or reward for (i) doing or forbearing to do any action in relation to the Contract, or (ii) for showing or forbearing to show favour or disfavour to any person in relation to the Contract, or if any of the Contractor’s Personnel, agents or Sub-Contractors gives or offers to give (directly or indirectly) to any person any such inducement or reward [...] However, lawful inducements and reward to Contractor’s Personnel shall not entitle termination.”

If bribery is shown, the burden of proof for which rests with the Employer, the Contract can be terminated immediately.

The wording, on its face, encompasses payments to any person, irrespective of its position. Logically, however, only the bribery (in its largest sense), direct or indirectly, of any person who has an influence, directly or indirectly, on the awarding of the Contract or on the exercise by the Employer of its rights during its performance can be sanctioned. Bribery of a third person totally foreign to the Contract is at the outset a “délit impossible” or a “Versuch”.

The employing of agents or lobbyists to exercise influence on the persons who decide on the awarding of the Contract is prohibited in certain countries. Sub Clause 15.2(f) is ambiguous. Arguably, intermediaries fall in the ambit of (i) On the other hand, the second paragraph sanctions only the fact that agents of the Contractor's personnel themselves give undue rewards, which, a contrario does not include the hypothesis that the Contractor employs agents who do no give or promise undue advantages. In any event, lobbying or agency is perfectly valid under Swiss law. If Swiss law applies, using such agents would not entitle to termination of the Contract. Such broad provisions cannot be taken into account as such by Swiss arbitrators or judges, be it as public policy, be it under Art. 19 of the Swiss Private International Law (the “PIL Act”) that requests Swiss judges and arbitrators to apply foreign mandatory laws instead of the law applicable to the substance in certain circumstances. If the tender conditions prohibit to retain such intermediaries, however, a breach of this obligation may trigger a right to terminate the Contract.

3.8.4. **Termination or Suspension by Contractor under Swiss law**

The Contractor’s right in case of delay in payments or breach of other contractual obligations are governed by Art. 107 ff.61

The Contractor is entitled to suspend performance if payment by the Employer is late (exceptio non adimpleti contractus), cf. Art. 82 CO. In practice, the Employer will invariably explain his refusal to pay with defective performance of the Contractor. Does the Contractor’s right to suspend depend on determination

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60 In the matter “Hilmarton v. Omnium”, the Arbitral Tribunal had applied Algerian law, prohibiting any agency agreement, to an agency contract that was governed by Swiss law according to a choice of law clause. The Swiss Supreme Court set aside the award stating that a sweeping prohibition of agents was incompatible with the principle of freedom of contract prevailing in Swiss law (SCD 17 April 1993, in ASA Bull 1993, p. 253).

61 Gauch para. 1274.
by the DAB or Arbitral Tribunal? Sub-Clauses 20.4 ("Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract") and 20.6 ("The obligations of the parties [...] shall not be altered by reason of any arbitration being conducted during the progress of the Works") are ambiguous. They may be read as prohibiting suspension during the dispute. On the other hand, Clause 16 confers a contractual right on the Contractor to suspend in case of delay in payment. If the contractual obligations are not altered during a dispute, this should also apply to Clause 16. It is submitted that unilateral suspension is allowed subject to final determination by the Arbitrators, including damages for undue suspension. If the Contractor believed in good faith to be entitled to suspend, the Arbitrators may reduce damages. The Arbitral Tribunal or DAB should strive to find an interim regime permitting the Works to proceed. Thus, it could order the payment of the work in respect of which the execution is undisputed, or order that payments be made in an escrow account, or that the Employer issue a bank guarantee payable upon rendering of the final award.

In addition to the modalities set forth in Sub-Clause 16.1, like the exercise of any right, the right to suspension must be exercised in good faith. In particular, this may not be the case if it is manifestly a disproportionate sanction in view of the amount which is outstanding.62 On the other hand, if the Employer's solvency is not guaranteed or in case of repeated delays, even small amounts may entitle the Contractor to suspend the Works.

4. SOME COMMENTS REGARDING THE SILVER BOOK

We shall not omit here to make some comments on how the much debated63 FIDIC Silver Book would operate under Swiss law. We will, however, restrain ourselves to comment on the allocation of the risk for errors in information supplied by the Employer (Sub-Clause 4.10) and the risk for unforeseeable adverse physical conditions, including soil conditions (Sub-Clause 4.12) to the Contractor.

Some commentators have stated that because these risks are outside the Contractor's sphere of control, it is contrary to fundamental principles of contractual fairness to allocate the risk to the Contractor.64 Prima facie, the extreme allocation of risks to the Contractor provided for in the Silver Book does come across as unfair — in particular if the Contractor fails to factor the heavy risks,

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62 Gauch para. 1280.
64 See e.g. Sandberg.
which he is required to take over, into the lump sum contract price. On this basis, it is relevant to assess whether the risk allocation provisions in the Silver Book are valid under the mandatory rules of Swiss law and/or whether they will apply with modifications.

Sub-Clause 4.12 concerns "unforeseeable difficulties" and provides that the Contractor shall be deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Works; that, by signing the Contract, the Contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the Works; and that the Contract Price shall not be adjusted to take account of any unforeseen difficulties or costs.

The question to be examined in relation to this clause is whether the Contractor under Swiss law can validly waive his right to make variation claims due to any unforeseeable circumstances or difficulties having an adverse effect on the progress of the works.

Art. 373 (2) CO provides that if the works are obstructed due to extraordinary circumstances that could not have been foreseen, the judge has a discretion to increase the lump sum or free the Contractor from the Contract. The circumstances mentioned in Sub-Clause 4.12 are indeed the same as the ones mentioned in Art. 373 (2). However, Art. 373 (2) is not a mandatory rule of Swiss law and the Contractor can thus waive his protection under the provision by agreement.

Sub-Clause 4.12 makes it very clear that Art. 373 (2) cannot be invoked by the Contractor and that no variation claims can be made due to unforeseeable obstacles. In light of the clear wording of Sub-Clause 4.12, it is therefore in our opinion valid under Swiss law. Certain limitations nevertheless apply: Art. 27 (2) CC ("protection contre soi même") may in some (rare) cases be invoked with success by the Contractor to escape the inequitable hardship, which Sub-Clause 4.12 might lead to, and allow the Contractor an extension of time and/or extra payment. It must be stressed, however, that the courts are extremely reluctant to apply Art. 27 (2) in cases among professionals, and the provision cannot in general protect a company against its own decision to enter into an agreement which will threaten its economic survival.

As an exception to Sub-Clause 4.12, if the performance of the Works is objectively, physically and technically impossible, the Contractor can obviously not be forced to perform the Contract, cf. Art. 119 CO.

According to Sub-Clause 4.10, the Employer shall have no responsibility for the site data provided by him to the Contractor, who is fully responsible for verifying and interpreting the data.

This clause deviates from the above mentioned Art. 365(3) CO, which is not, however, a mandatory rule of Swiss law. In light of the fact that Sub-Clause 4.10 is drafted in very clear terms, it is in our opinion valid under Swiss law and will thus be given effect according to its wording.

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65. See for instance the following decisions: SCD 26 II 661; 104 II 316; 58 II 422.
66. Gauch para. 1128 with references.
It should be noted, however, that a clear condition for applying Sub-Clause 4.10 is that the Contractor has in fact been given a realistic chance of verifying the data provided to him. If the Contractor can show that the data was not made available prior to the Base Date and/or that he was not given adequate time to verify it, there are grounds for reconsidering the matter. Similarly, if the Employer supplies material or information knowing that it is wrong or misleading, it becomes questionable for the Employer to rely on a clause providing that the Contractor should have verified the information.

It is thus imperative that the program allows the Contractor an adequate period of time to perform the verification and interpretation of the data provided by the Employer.

5. DISPUTE ADJUDICATION BOARDS AND ARBITRATION

Unless otherwise agreed by the parties, disputes under the Contract are subject to arbitration under the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce (Sub-Clause 20.6). According to Sub-Clause 20.2, the parties are at liberty to set up a Dispute Adjudication Board ("DAB") when entering into the Contract. In that event, according to Sub-Clause 20.4, the proceedings before the DAB are compulsory. A dispute cannot be referred to arbitration immediately.

Sub-Clause 20.4 provides that, if a party is dissatisfied with the decision of the DAB, it shall issue a notice of dissatisfaction within 28 days and that "neither party shall be entitled to commence arbitration ... unless a notice of dissatisfaction has been given in accordance with this Sub-Clause."

Sub-Clauses 20.2 ff. are not necessarily governed by Swiss law alone: The scope and effect of the arbitration agreement is generally governed by the arbitration law in force at the place of arbitration. If the place of arbitration is in Switzerland (which is indeed frequently the case, Switzerland being with France and England the most popular venue for ICC arbitrations), the arbitration is subject to the Swiss arbitration law (chapter 12 of the PIL Act).

Under Swiss law, the enforceability of multi-tiered dispute resolution mechanism depends on the intention of the parties, as expressed in particular in the wording of the clause: the more specific and compulsory a clause is drafted, the more likely it will be given force by the courts. On the other hand, a party may not be obliged to refer a dispute to the DAB if it is manifest that a party is unwilling or unable to comply with any decision the DAB may render or if a party refuses to participate in settlement negotiations. In such hypothesis, it would make little sense to insist on DAB proceedings or settlement negotiations.

prior to arbitration. A party that fails to object immediately to a premature request for arbitration, however, cannot subsequently challenge the arbitral award for failure to comply with a duty to hold pre-arbitral conciliation proceedings. A contrario, a party can insist on exhausting the pre-arbitral conciliation proceedings, or DAB proceedings in the case of FIDIC, unless its conduct shows that it is not seriously seeking a conciliation or participating in the DAB proceedings. Such contradictory conduct would be prohibited by the general rule of Art. 2 CC, i.e. the duty to act in good faith.

It should be added that nothing in the FIDIC Conditions prevents a party from seeking interim measures for protection from a competent court. On the other hand, these courts may in fine take into account Sub-Clause 20.6 that provides that the obligations of the parties under the Contract remain in force pending an arbitration.

Another question is whether the time limits set in Sub-Clause 20.4 could in certain circumstances bar the right to resort to arbitration. It could be argued that arbitration is impossible if a party fails to issue a notice of dissatisfaction in a timely manner. An Arbitral Tribunal sitting in Switzerland would have to analyse all relevant circumstances to decide whether this was the intention of the parties. If the intention cannot be established, the Tribunal must interpret the clause with a view to finding an appropriate solution. Among the relevant criteria is the fact that if the arbitration agreement is not enforceable, the courts that would normally have jurisdiction will be competent. It is safe to assume that such result would hardly be in line with the parties' expectations. Moreover, in case there is no DAB, arbitration is possible without any time limit (Sub-Clause 20.8).

A danger of complex contractual relationships is the occurrence of conflicting clauses, especially if the Contract consists of a number of different documents. Particularly dangerous are conflicting dispute resolution provisions since they might entail the invalidity of the entire dispute resolution mechanism. While Sub-Clause 1.5 on the hierarchy of contractual documents may be a starting point for the analysis of the conflicting provisions, it may not be sufficient to establish the common intention of the parties, which is the yardstick to be applied by any court or Arbitral Tribunal in Switzerland.

In a recent ICC Arbitration, 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, its General as well as its Special Conditions, were based on the 1987 FIDIC Conditions. When a dispute arose, the Contractor relied on Sub-Clause 67.3 of the General Contract Conditions which provided for ICC arbitration. The respondent State objected and argued that there was no agreement on ICC arbitration since the Special Conditions provided

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[69] By analogy see also Art. 108.1 CO: no reminder necessary prior to termination if the debtor's conduct demonstrates that a reminder would be without effect.


[71] SCD of 17 August 1995, "Velnova v Maran", 125 III 322, ASA Bull 4.1996, p. 673, 677 f.: the Supreme Court found that in light of the applicable circumstances, a clause stating that the dispute shall be referred to either party within thirty days after the date was agreed that the difference or dispute cannot be resolved by negotiation" effectively barred arbitration commenced after that date. On the other hand, a party that proceeds with arbitration without objecting cannot challenge the jurisdiction of the arbitrators.
that the place of arbitration shall 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. It held that the two provisions, rather than being in conflict, supplemented each other. The Tribunal’s explanations regarding the proper meaning of the two clauses deserve to be quoted in full since they recall some basic tenants of contract interpretation:

“In the end, this is a question of interpretation of this Contract and this arbitration agreement. It is a generally accepted principle of Contract interpretation (also reflected in Art. [abc] of the Civil Code of State X) that contracts should be interpreted as a whole, so that their provisions make sense together. The Contract itself recognizes the same principle by stating, at paragraph 3 of the Contract Agreement, that the various parts of the Contract ‘shall be taken as complementary and mutually explanatory of one another’. The Tribunal is thus required to interpret Sub-Clause 67.3 and Sub-Clause 67.3.4, as well as other related provisions, as a whole. In particular, the Tribunal has the duty not to upset the parties’ bargain in this respect, and in the absence of any indication to the contrary, must give meaning to both Sub-Clause 67.3 and Sub-Clause 67.3.4. The Tribunal concludes that these two provisions must be read in a complementary way, so that the reference to the arbitration rules of the Civil Code of State X as local procedural rules supplements the choice of ICC arbitration in Sub-Clause 67.3.”

Consequently, the Arbitral Tribunal upheld its jurisdiction.

Another arbitration based on a construction Contract inspired by the FIDIC Model recently led to a judgment of the Swiss Supreme Court. The contract’s General Conditions referred in Clause 67 to “arbitration within the meaning of the Arbitration Law of Jamaica” and provided that the sole arbitrator was to be appointed jointly by the parties, or failing their agreement, by the Jamaican Institution of Engineers. On the other hand, Clause 67 of the Special Conditions of the Contract provided that disputes should be referred to UNCITRAL arbitration in case the Contractor and the Employer were of different nationalities, while the Jamaican Arbitration Law would be applied in the event that the Contractor was a national of the Employer’s country.

Subsequently, a dispute arose. The Contractor started the process of appointing an Arbitral Tribunal in conformity with the UNCITRAL arbitration clause. The Employer opposed the jurisdiction of an UNCITRAL arbitral tribunal and insisted on the application of the dispute settlement mechanism in the General Conditions, which provided for arbitration before a Tribunal selected by the Jamaican Institution of Engineers. The appointing authority (ICC Court, upon referral from the Secretary General of the PCA) appointed an Arbitrator

72 ICC Arbitration no. 10’623, Award of 7 December 2001 (Emmanuel Guillard (chair), Piero Bernardini and Nael Bunnin, arbitrators), ASA Bull. 1/2003, p. 100, para. 179 ff.
73 Award, ibid., para. 218.
74 SCD of 16 April 2002, ASA Bull. 1/2003, p. 120.
for the defaulting respondent. The UNCITRAL Arbitral Tribunal rendered a preliminary award on jurisdiction which was challenged by the respondent before the Swiss Federal Tribunal.

The Federal Tribunal had to examine whether the UNCITRAL Tribunal had jurisdiction. It interpreted the two arbitration agreements in accordance with general principles of contract interpretation. It concluded that the parties had, in good faith, understood at the time they executed the Contract that the mechanism in the Special Conditions did not merely complement or amend the one in the General Conditions but overruled it in the event that the Contractor was a foreign Company. Thus, the Federal Tribunal found that the Special Conditions prevailed entirely over the General Conditions.

Although rendered regarding the "old" FIDIC Conditions, the sound analysis made by the Tribunals in these two cases will doubtlessly also apply to the current form of the FIDIC Conditions.
FIDIC

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