1. What is your jurisdiction?
Switzerland.

2. Are the FIDIC forms of contract used for projects in your jurisdiction? If yes, what amendments are required?
No, there are no amendments required in order for the FIDIC Conditions to be operative.

3. Do FIDIC produce their forms of contract in the language of your jurisdiction? If no, what language do you use?
Yes, the FIDIC forms are available in French, one of the official languages of Switzerland. Certain forms are available in German and Italian, which are also official languages. Given the international nature of some construction projects in Switzerland, the English-language version is also frequently used.

4. Are any amendments required in order for the FIDIC Conditions & Contract to be operative in your jurisdiction? If yes, what amendments are required?
There is no available case law with respect to the interpretation of Sub-Clause 2.5 under Swiss law. That being said, Swiss law recognises contractual provisions concerning notices of defaults as conditions precedent, as long as they are in line with the true and common intention of the parties (see the response to question 7).

5. Are any amendments common in your jurisdiction, albeit not required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what (non-essential) amendments are common in your jurisdiction?
No, there are no common amendments to the FIDIC Conditions.

6. Does your jurisdiction treat Sub-Clause 2.5 of the 1999 suite of FIDIC contracts as a precondition to Employer claims (save for those expressly mentioned in the Sub-Clause)?
There is no available case law with respect to the interpretation of Sub-Clause 2.5 under Swiss law. That being said, Swiss law recognises contractual provisions concerning notices of defaults as conditions precedent, as long as they are in line with the true and common intention of the parties (see the response to question 7).

7. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money arising from Variations?
No, there are no amendments required in order for the FIDIC Conditions to be operative. Most Swiss statutory provisions governing construction contracts are not mandatory. Exceptions include, for example, Article 570 of the Swiss Code of Obligations, pursuant to which the contractor may not exclude liability for defects intentionally concealed from the employer, or Article 163(3) of the Swiss Code of Obligations, which provides that a court or arbitral tribunal must reduce contractual penalties if deemed to be excessive. However, such mandatory provisions of Swiss law are not in conflict with the FIDIC Conditions.

8. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money arising from Variations?
Dispute boards are commonly used in contracts for international construction projects in Switzerland and, as per the Court's recommendations, was successfully used to resolve several disputes concerning the construction of the Gotthard Base Tunnel, one of the largest infrastructure projects in Switzerland.

9. Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction? If yes, how are board decisions enforced in your jurisdiction?
Dispute boards are not (yet) widely used for domestic construction projects in Switzerland, and Swiss law does not include specific provisions governing adjudication mechanisms, such as dispute boards. However, parties may agree that, before initiating court or arbitral proceedings, disputes must be submitted to an alternative dispute resolution mechanism, such as an institutional or informal mediation procedure, including such a procedure led by mediators specialised in construction or real estate matters.

10. Is arbitration used as the final stage for dispute resolution for construction projects in your jurisdiction?
Arbitration is the preferred means of dispute resolution for international construction projects in Switzerland. Both institutional arbitration (under the arbitration rules of institutions such as the International Chamber of Commerce (ICC), the Swiss Chambers' Arbitration Institution (SCAI) or the SIA, whose revised rules entered into force on 1 January 2018) and ad hoc arbitration are used. The seat would typically be in one of the major cities in Switzerland, in particular, Bern, Geneva, Lugano or Zurich. In the real estate sector, a specialised local arbitration tribunal has been created by the Swiss Association of Real Estate Trustees (Schweizer Verband der Immobilienverwalter (SVI)). In addition, numerous international construction contracts governed by Swiss law and with the seat in Switzerland, for the introduction of the FIDIC Conditions, which provide for arbitration under the ICC Rules.

11. Are there any notable local court decisions interpreting FIDIC Contracts?
In an important judgment dated 7 July 2014 (case no 4A_124/2014), the Swiss Federal Supreme Court (the 'Court') analysed whether a dispute adjudication board (DAB) proceedings were a precondition for resorting to arbitration under Clause 20 of the FIDIC Conditions. The Court determined the issue in the context of the appeal of a partial award in which the arbitral tribunal had found that it had jurisdiction to hear a case under Clause 20, despite the fact that all DAB proceedings had not taken place. Disagreeing with the arbitral tribunal, the Court found that DAB proceedings were a prerequisite for the initiation of arbitration under Clause 20. According to the Court, the use of the term 'shall' in Sub-Clause 20.2 indicated that such proceedings were a requirement rather than an option; further, the term 'may' in Sub-Clause 20.4 did not qualify the mandatory nature of the precondition, and only meant that it is open to either party to initiate DAB proceedings. The Court recognised, however, that there were exceptions to the precondition, arising notably under Sub-Clause 20.8 and 9, which are peculiar to the nature of good faith. In determining whether these exceptions were applicable, the Court recalled that the raison d'être for the introduction of the DAB in the FIDIC Conditions was to allow for an efficient resolution of disputes arising during the construction works, in a manner that would not put the works into jeopardy. In the case before the Court, the procedure to constitute the DAB had begun after the completion of the works, at a time when the parties' positions were undoubtedly already irreconcilable. Moreover, the Court ruled that where an ad hoc DAB had not been constituted 18 months after it was requested, the respondent could no longer rely on the mandatory nature of the DAB procedure to prevent the resolution of the dispute by arbitration. Given the particular circumstances of the case, the Court concluded that the fact that no DAB proceedings were initiated did not affect the arbitral tribunal's jurisdiction.
A recent decision of the Swiss Federal Supreme Court dated 16
March 2016 (case no 4A_628/2015) is also particularly important for international construction contracts, although the case did not concern a FIDIC contract. In this decision, the Court confirmed the finding that pre-arbitration steps can be mandatory if so agreed by the parties and addressed for the first time the consequences of non-compliance with a prerequisite of arbitration. The Court ruled that an arbitral tribunal should suspend arbitration to allow the parties to comply with the pre-arbitral condition, rather than merely awarding damages for breach of contract, declaring the claim inadmissible or dismissing it on the merits.

12. Is there anything else specific to your jurisdiction and relevant to the use of FIDIC on projects being constructed in your jurisdiction that you would like to share?

Under Swiss law, general terms and conditions (GTCs) agreed between businesses are subject to two stages of review: the review of the validity of the GTCs and their interpretation (Geltungskontrolle and Auslegungskontrolle). These stages of review, as developed in Swiss jurisprudence, provide some protection for businesses that agree to GTCs proposed by their counterparty. Parties agreeing to GTCs in construction contracts subject to Swiss law (including FIDIC forms) should be aware of the special rules of interpretation applicable to GTCs in addition to the general rules of interpretation applicable to all contracts.

Laura Azaria is an associate and China Irwin is Counsel at LALIVE, Geneva. They both specialise in international arbitration in the construction and infrastructure sector. They can be contacted at lazaria@lalive.law and cirwin@lalive.law.