



SWITZERLAND

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For convenience, in this questionnaire, clause references are references to clauses in the 1999 FIDIC Red Book.

1. What is your jurisdiction?

Switzerland.

2. Are the FIDIC forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used and for what types of projects?

FIDIC forms are frequently used, primarily for international construction projects, with Swiss law chosen as the governing law for the contract and with Switzerland selected as the seat of arbitration, regardless of whether any Swiss party is involved in the project or whether the project otherwise has a link with Switzerland.

In purely domestic contracts for construction projects in Switzerland, the standard conditions prepared by the Swiss Society of Engineers and Architects (Schweizerischer Ingenieur- und Architektenverein or SIA) are more widely used. These cover a range of contractual relationships, including contracts between employers and contractors, architects and engineers.

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 of Contract to be operative in your jurisdiction? If yes, what amendments are required?

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 370 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.

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 defects 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 (not including Variations)?

The enforceability of multi-tiered dispute resolution mechanisms under Swiss law depends on the intention of the parties and must therefore be assessed on a case-by-case basis. Any arbitral tribunal or court applying Swiss law is duty-bound to seek the parties' real and common intention. If it is established that the parties intended a pre-arbitration or pre-litigation procedure to be compulsory, non-compliance is generally considered to deprive an arbitral tribunal or court of jurisdiction *ratione temporis*. A party might not be obliged, however, to follow a pre-arbitration or pre-litigation procedure, such as conciliation or mediation, if it is manifest that the opposing party will refuse to participate (see the response to question 11). Similarly, a Contractor may not be obliged to follow the procedure for referring claims to the Engineer for determination if a dispute arises at a time when the Engineer is no longer in place.

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?

See the response to question 7.

9. Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction? If yes, how are dispute 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.

A form of dispute review board issuing non-binding recommendations was successfully used to resolve several disputes concerning the construction of the Gotthard Base Tunnel, one of the largest infrastructure projects in Switzerland.

Dispute boards are commonly used in contracts for international construction projects, which are often governed by Swiss law and provide for Switzerland as the seat of arbitration (see the response to question 1).

Unlike an arbitral award, a decision by a dispute board does not have *res judicata* effect and would not be directly enforceable in Switzerland, even if binding on the parties as a matter of contract. A party may, however, bring a claim arising from the failure of the opposing party to comply with a decision that is contractually binding between the parties.

10. Is arbitration used as the final stage for dispute resolution for construction projects in your jurisdiction? If yes, what types of arbitration (ICC, LCIA, AAA, UNCITRAL, bespoke, etc) are used for construction projects? And what seats?

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 Immobilienreuhänder (SVIT)).

In addition, numerous international construction contracts governed by Swiss law and with Switzerland selected as the seat of arbitration are based on the FIDIC Conditions, which provide for arbitration under the ICC Rules.

Purely domestic disputes in Switzerland are more often resolved by courts than through arbitration. Article 37 of the widely used SIA Norm 118 provides for disputes to be submitted to courts, unless agreed otherwise by the parties.

11. Are there any notable local court decisions interpreting FIDIC contracts? If so, please provide a short summary.

In an important judgment dated 7 July 2014 (case no 4A_124/2014), the Swiss Federal Supreme Court (the 'Court') analysed whether dispute adjudication board (DAB) proceedings are a precondition

for resorting to arbitration under Clause 20 of the FIDIC Conditions. The Court determined the issue in the context of a challenge 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 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 the general principle 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 ad hoc 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 can 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

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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.

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