

# Five points to look out for when signing construction contracts governed by Swiss law

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## Introduction

**Employers can seek liquidated damages only if they can prove that they have suffered loss**

**Contractors may be entitled to extension of time that exceeds duration of relevant delay**

**Contractors are not entitled to extension of time for *force majeure***

**Employers' taking over of works may release contractors from liability for all discoverable defects**

**Contractors may refuse to rectify defects if cost of rectification would be disproportionate**

## Introduction

Swiss law is commonly used for construction contracts and is generally considered to be a safe option for good reason. In particular, parties enjoy extensive freedom under Swiss law to structure their contract as they see fit, and the system does not impose any mandatory provisions that would be inconsistent with frequently used standard forms for international projects (eg, the FIDIC Conditions). Swiss law is also accessible in several languages and perceived as a neutral option for parties from different jurisdictions.

But Swiss law does have some particularities that international parties might not expect. With some forethought, however, parties can opt to contract out of these particularities or adequately address the allocation of risk that they entail.

This article sets out five points that international parties should look out for when signing a Swiss law construction contract.

## **Employers can seek liquidated damages only if they can prove that they have suffered loss**

Unlike many other systems, Swiss law requires parties seeking liquidated damages to first prove that they have suffered a loss (although they do not have to quantify that loss), which in some circumstances may be difficult to do. However, proving a loss is not necessary if the relevant clause is construed as a penalty clause, the main purpose of which is to penalise rather than compensate for non-compliance.

Parties might, therefore, want to clarify in their contract whether any pre-determined payments for non-compliance – for instance, delay damages – are penalties or liquidated damages, or expressly exclude the requirement that the employer prove a loss before it is entitled to liquidated damages.

## **Contractors may be entitled to extension of time that exceeds duration of relevant delay**

Unless the parties have agreed otherwise in their contract, Swiss law provides that where the contractor is entitled to an extension of time, it has a right to an 'adequate' extension. This means that a contractor may be entitled to an extension that is longer than merely the duration of the delay, as a court or arbitral tribunal must consider all of the circumstances, including:

- the possible fault of the employer and its severity;
- the concrete operations of the contractor – in particular, its workload from other projects (eg, whether the contractor has had to move its resources to another project); and
- the fact that the parties were in a state of uncertainty before the extension is fixed.

The doctrine also suggests that if the delay is caused by the employer, a court or tribunal should be

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generous in determining the extension of time to grant the contractor (for further details please see "[What should be included in an extension of time clause?](#)").

An employer might, therefore, have an interest when negotiating the contract in trying to rein in a court or tribunal's discretion in determining an extension of time in the contract. A contractor, on the other hand, will want to keep the default standard for determining the duration of an extension of time in mind when negotiating extensions with the employer.

### **Contractors are not entitled to extension of time for *force majeure***

Unlike the laws of other civil law jurisdictions (eg, Germany and France), Swiss law does not entitle a contractor to an extension of time for delays caused by *force majeure* or unforeseeable events such as strikes or natural events of an abnormal nature absent a contractual provision to that effect (for further details please see "[What should be included in an extension of time clause?](#)").

In addition, it can be unclear what falls under the employer's sphere of risk if it is not clearly defined in the contract. For example, commentators suggest that a demonstration preventing the contractor from accessing the site would be within the employer's sphere of risk, but that the contractor could not seek an extension of time for delays caused by a general strike.

It is therefore often a good idea to try to define in the contract the grounds for an extension of time and the parties' respective spheres of risk.

### **Employers' taking over of works may release contractors from liability for all discoverable defects**

Under Swiss law, the approval by the employer of the works releases the contractor from liability for defects that were discoverable through an appropriate inspection, regardless of whether an inspection was actually performed. Therefore, it is possible that even if a contract provides for a defects notification period after the employer takes over the works – as the FIDIC Conditions do – an employer may lose any right to seek rectification of any defects that were discoverable at the time of taking over.

Accordingly, it may be useful for the parties to a Swiss law contract to clarify whether any provisions on taking over and the notification of defects are intended to exclude the relevant rules under Swiss law.

### **Contractors may refuse to rectify defects if cost of rectification would be disproportionate**

Swiss law confers upon the employer the right to demand rectification of defects at the contractor's expense. However, it also provides that the contractor may refuse to rectify defects if the costs of the rectification measures would be disproportionate to the benefit that the employer would derive from the rectification. It is unclear whether this disproportionality exception would apply to a contract setting out the general rule that a contractor must rectify defects at its own expense, as the FIDIC Conditions do. Therefore, parties wishing to avoid the exception may want to expressly exclude its application.

*For further information on this topic please contact [Sam Moss](#) or [Matthias Scherer](#) at LALIVE by telephone (+41 58 105 2000) or email ([smoss@lalive.law](mailto:smoss@lalive.law) or [mscherer@lalive.ch](mailto:mscherer@lalive.ch)). The LALIVE website can be accessed at [www.lalive.ch](http://www.lalive.ch).*

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