



Construction

in 34 jurisdictions worldwide

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Switzerland

Matthias Scherer, Michael E Schneider and Nathalie Bigler

Lalive

1 Joint ventures

Must foreign designers or contractors enter into a joint venture with a local contractor to design, build and be paid for their work? Does the law require that the local contractor control the joint venture?

Foreign contractors frequently enter into joint ventures or consortia with local Swiss contractors for the purpose of joint bidding and performance. However, there is no requirement for the foreign contractor to do so, or for the local contractor to control the joint venture. In federal projects the adjudicating authority may exclude bids by joint ventures and require bidders to adopt a specific corporate form, for example, a Swiss limited company. Such requirements must be notified in the tender documents (article 21 of the Regulation on Public Procurement (Collection of Federal Laws RS 172.056.11)).

2 Foreign pursuit of the local market

If a foreign designer or contractor wanted to set up an operation to pursue the local market what are the key concerns they should consider before they took such a step?

Public tenders in Switzerland are regulated by federal, cantonal and municipal laws. Methods are adapted to WTO standards. Relevant information about the legal framework can be found on the following website: www.simap.ch. Useful material for foreign bidders can also be found on the website of the Swiss Society of Contractors, including a checklist for tender proceedings: www.baumeister.ch/html_sbv/1home/_pdf/Checkliste_Submission.pdf.

For sizeable projects, foreign contractors regularly participate in Swiss public tenders, mainly in joint ventures with local Swiss contractors or engineers. In the largest infrastructure project (the longest railway tunnel in the world – the 57km Gotthard tunnel through the Alps) numerous foreign contractors were awarded contracts.

Public procurement by federal and cantonal (state) authorities is subject to distinct rules. The Federal Law on Public Procurement (RS 172.056.1) governs federal projects exceeding certain value thresholds. It complies with the WTO Government Procurement Agreement of 15 April 1994 that has been incorporated into Swiss law (RS 0.632.231.422). Foreign bidders are admitted provided that they are established in countries that grant reciprocity to Swiss contractors (article 4). As a rule, all bidders must be treated equally. According to article 8 I/a, 'the Federal authority launching the tender ensures the equal treatment of Swiss and foreign bidders throughout the tender process'.

Projects on a cantonal (state) level are subject to a treaty among the cantons: the Intercantonal Treaty on Public Procurement (AIMP). Equal treatment applies. Access to the market is further addressed by the Federal Law on the Domestic Market (RS 943.02) and numerous other regulations.

Bilateral treaties between the European Union and Switzerland extend the WTO treatment to procurement by municipalities, to private companies exercising public functions in the areas of water, electricity and gas, as well as to procurement by Swiss state-owned telecoms and railway operators.

Foreign contractors who wish to establish themselves in the Swiss market usually tie up on an ad hoc basis with a local contractor. Possible obstacles for the acquisition of a Swiss contractor by a foreign contractor include the Swiss legislation restricting the acquisition of Swiss real estate by foreign parties. As major Swiss contractors sometimes have a large real estate portfolio, the acquisition of control in the Swiss contractor may be subject to restrictions.

Foreign contractors wishing to set up a more stable organisation usually establish a limited liability corporation – normally a share company. The rules governing corporations are federal and thus no driving factor for the choice of location within Switzerland. The minimum share capital is 100,000 Swiss francs, at least half of which needs to be paid in at the time of the establishment of the corporation. As of 1 January 2008, the nationality and residence requirements of members of the board of a Swiss limited company have been abolished. As a result, the board of directors of a Swiss limited company may be composed entirely of foreigners not resident in Switzerland. The only requirement is the new article 718, section 3 of the Code of Obligations (CO), providing that at least one individual (director or manager) with residence in Switzerland must be in a position to bind the company without requiring a co-signature of one or more non-Swiss residents. This Swiss resident signatory may, but does not have to be, a board member.

Geographic factors usually play a role in the selection process. Switzerland has three linguistic areas (German, French and Italian). The major cities are Zurich, Geneva, Basel and Bern.

Taxes are levied on federal, cantonal and municipal levels. Some cantons are well known for investor-friendly tax regimes. Tax deals are available in most cantons, though, usually subject to the creation of sustainable employment in the region.

3 Licensing procedures

Must foreign designers and contractors be licensed locally to work and, if so, what are the consequences for working without a licence?

There is no general need for a local licence. However, the adjudication authority will evaluate the professional capacities of the bidders. To this end, the production of the relevant certificates and licences of the bidders' key personnel may be required (annex 3 to the Regulation on Public Procurement, RS 172.056.11).

Local licences may be required for applications for construction permits. For this reason, foreign contractors or design professionals usually tie up with local professionals to liaise with the authorities.

4 Labour requirements

Are there any laws requiring a minimum amount of local labour to be employed on a particular construction project?

There is no obligation to employ a certain amount of local labour. For contractors established in Switzerland and hiring locally, the Swiss legislation on foreigners applies. Non-Swiss employees must obtain

permits (work and residency) which are subject to regulations. The future employer must show that no Swiss national or national of a state with which Switzerland has treaties guaranteeing the free movement of workers (for example, EU, with some exceptions for new member states) is available for the position.

5 Local labour law

If a contractor directly hires local labour (at any level) for a project, are there any legal obligations towards the employees that cannot be terminated upon completion of the employment?

The Federal Labour Act (RS 822.11) and the Federal Act on Dispatched Employees (RS 823.20) provide general provisions on working conditions. The Act aims at preventing salary-dumping by foreign contractors seconding employees to construction projects in Switzerland. Most individual employment contracts in the construction industry are governed by collective contracts of employment jointly elaborated by employers' associations and trade unions. They contain provisions on minimal hours and wages which prevail over the Labour Act if they have been declared applicable to the relevant industry by the federal authorities (see the website of the Ministry of Economy for a listing of collective contracts: www.seco.admin.ch/themen/00385/00420/00430/index.html?lang=fr). The Federal Act on Dispatched Employees also extends the social benefits (contributions to pension funds, to continuous education programmes) in such collective contracts or Swiss employment legislation to dispatched employees. The foreign-based contractor must guarantee the dispatched employees accommodation that is in line with local standards of comfort and hygiene. Prior to dispatching its employees to Switzerland, the contractor has to notify to the competent Swiss authority of the location and nature of the works and identify the seconded personnel.

Irrespective of their domicile, contractors that use subcontractors are obliged to obtain a contractual undertaking from the subcontractors to the effect that they will comply with the Federal Act on Dispatched Employees. Without such an undertaking, the contractor is jointly and severally liable with the subcontractor for the latter's failure to abide by the Act.

6 Health and safety regulation

Are there any specific health and safety rules regulating the construction industry?

There are many such regulations, including in the Federal Labour Act (RS 822.11), the Federal Law on Accident Insurance (RS 832.20), the Regulation on Accident Prevention (RS 832.30) and collective contracts of employment. In federal projects, the adjudicating authority is duty-bound to ensure that the contractor who is awarded the contract abides by employee safety regulations (article 6 of the Regulation on Public Procurement RS 172.056.11).

7 Close of operations

If a foreign contractor that has been legally operating decides to close its operations, what are the legal obstacles to closing up and leaving?

Notice periods applicable to employment contracts of terminated employees must be respected. If the contractor is a company with more than 20 employees on its payroll, special provisions governing mass layoffs apply (article 335d of the CO). If the company is dissolved by means of a voluntary liquidation, statutory rules must be observed (article 739 et seq of the CO). Pension funds legislation may also be relevant. Small severance payments may be due if individual employment contracts that are governed by Swiss law and are not limited in time (by the duration of the project, for instance) are terminated.

8 Standard forms of construction contracts

What standard-contract forms are used for construction and design?

In Swiss domestic contracts, the construction conditions prepared by the Swiss Society of Engineers and Architects (SIA) are widely used. General conditions only apply if specifically agreed by the parties. As an exception, the Swiss Supreme Court ruled (Decision 4C.261/2005 of 9 December 2005) that two Swiss companies active in the construction business were deemed to have tacitly accepted the SIA standards.

In international construction projects outside Switzerland the most frequently used conditions of contract are the various sets of conditions issued by FIDIC, often combined with Swiss law.

9 Price escalations

In typical construction contracts, who assumes the risk of material price escalation and shortages?

In fixed-price contracts (unit-price or lump-sum), the contractor bears the risk of cost increases (article 373 of the CO). If the contract does not determine the price for the works, it will be calculated by the courts based on the value of work performed and the contractor's actual expenses (article 374 of the CO). In such instances, as well as in cost-plus contracts, the owner carries the risk of price escalation and of cost increases due to shortages. There are few exceptions to the rule that the price remains fixed:

- In extraordinary circumstances (which are admitted only very rarely by case law), impossible to foresee or excluded by both parties, the contractor may be entitled to an increase of the lump sum under the doctrine of *clausula rebus sic stantibus* (article 373(2) of the CO).
- If the owner directly orders a variation in the scope of work, the contractor has a variation claim. In Swiss law, as in the FIDIC (the International Federation of Consulting Engineers) E&M Conditions, the parties must agree on the price increase and the time extension. However, the owner may, in the contract, reserve his right to order variations at a fixed price.
- If the works are varied, either as a result of the owner's change of mind or because a need arose to change the works due to circumstances for which the owner is responsible (for example, unforeseeable soil conditions, see article 365(3) of the CO), the contractor has a claim for additional payments.

Another exception is found in the SIA Norm 118, article 45(2), 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 owner. 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 *negotiorum gestio* or based on the rules concerning unjust enrichment. 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. If the variation has become necessary due to circumstances for which the contractor is responsible, it cannot claim extra payment or time extensions.

10 Competition

Do local laws provide any advantage to domestic contractors in competition with foreign contractors?

According to the Federal Law on Public Procurement, all bidders must be treated equally (see question 2).

11 PPP and PFI

Is there a formal statutory and regulatory framework for PPP and PFI contracts?

Forms of cooperation between public and private entities has become common in many countries, in particular in the UK, but are rare in Switzerland. However, federal authorities and municipalities observe international developments closely and it is expected that PPP and PFI projects may become more frequent in the future.

12 Payment of fees

How may a contractor secure the right to payment of its costs and fees from an owner? May the contractor place liens on the property?

If the owner does not comply with its obligation to pay the contractor, the contractor may terminate the contracts or insist on payment before continuing the works (article 82 of the CO). Liens can be placed by all contractors (including subcontractors) in accordance with article 839 of the Federal Civil Code, for the value of material and works.

13 Tort claims and indemnity

Do local laws permit a general contractor to be indemnified against all acts, errors and omissions arising from the work of a subcontractor, even when the general contractor is negligent?

As a rule a party is liable for any damages resulting from non-performance unless it shows that it has no fault at all in the non-performance (article 97 of the CO). Negligence is sufficient to trigger liability. Absence of fault or of negligence of the injured party which is entitled to compensation is not a prerequisite for its entitlement. A concurring fault of the injured party does not limit the non-performing party's liability, but may result in damages not being fully recoverable (for tort claims see article 44 of the CO).

In its relationship with the owner, the contractor is solely liable for the performance of the contract, and thus for the work of the subcontractors (article 101 of the CO).

Liability for gross negligence and wilful intent cannot be excluded (article 100 of the CO).

If instructions by the owner risk causing delay or defects, or increasing the costs of the work, the contractor is duty-bound to immediately and specifically notify the owner of such risk. Failing such notice, the contractor may be liable for any consequences (article 369 of the CO). The same principle applies in the relationship between contractor and subcontractor, with the subcontractor being obliged to notify the contractor.

14 Liability to third parties

Where a contractor constructs a building that will be sold or leased to a third party, does the contractor bear any potential responsibility to the third party? May the third party pursue a claim against the contractor despite the lack of contractual privity?

No contract claims against the contractor are possible as no contract exists between the third party and the contractor. The contractor has a contract only with the owner of the building. If the owner sells the building, he can assign existing warranty rights to the new owner, who can in turn assert them against the contractor. In the event of third party damages, if indirect damages are not excluded, the contractor may also face a claim from the owner trying to recoup damages he was obliged to pay. If construction defects cause injuries the contractor might be held liable under criminal law, or article 41 of the Code of Obligations, or both.

15 Insurance

To what extent may a contractor obtain insurance to cover its contractual risks?

Workers must be insured against work and private accidents. Cars must be insured against civil liability claims. Both the contractor and

the owner of the construction site typically take insurance coverage for civil liability relating to damages resulting from the construction works or the site.

Tender conditions may require that the bidders show proof of such insurance and maintain coverage throughout the project.

16 Statutory payment protection

Where major projects have been interrupted or cancelled, do the local laws provide any protection for unpaid contractors who have performed work?

Under Swiss law, the parties are free to agree in their contracts that insolvency is a ground for termination. In any event, the solvent party is entitled to request security for performance from the insolvent party. According to article 83 of the CO, the solvent party may withdraw from the contract if no such security is provided within a reasonable time.

In any event, the owner may terminate the construction contract for convenience at any time before completion of the works against full payment of works and damages (article 377 of the CO). If the works are delayed the owner can also avail itself of the remedies of article 366 of the CO. If the contractor does not cure the situation upon request, the owner can withdraw from the contract and have a third party perform the works at the contractor's cost and risk. If the owner chooses to terminate for convenience, without giving the contractor a chance to cure, the owner must compensate the contractor in full.

As a practical matter, owners should ensure that the contractor pays its subcontractors, since the latter have a right to place a lien (article 839 of the CC) on the property for any unpaid work. Payment by the owner to the contractor does not avoid the risk of a lien, even if the funds are earmarked for payment to subcontractors. Unless the payment reaches the subcontractor, a lien can be registered.

17 Contracting with government entities

Can a government agency assert sovereign immunity as a defence to a contractor's claim for payment?

All contract claims against agencies can be pursued in court or, if so agreed, in arbitration. A state agency cannot assert immunity from jurisdiction to escape arbitration (article 177.2 of the Federal Act on Private International Law (PIL Act)). However, it can resist enforcement of an arbitral award or a court judgment based on its immunity from enforcement, if it has such immunity and if the assets against which enforcement is made are covered by it.

18 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable?

Bribery of Swiss and foreign public servants is a criminal offence that will trigger criminal prosecution (article 322ter et seq of the Criminal Code). Contracts that cover the payment of bribes are null and void (article 20 CO). Individuals who have accepted bribes can be dismissed forthwith. Contracts obtained through bribery are not automatically void, but can be voided only if their content has also been affected by the act of corruption (Supreme Court Decision 129 III 320).

19 Arbitration

What is the prevailing attitude towards arbitration of construction disputes? Is it preferred over litigation in the local courts?

Under Swiss law, most disputes are arbitrable (article 177 of the PIL Act; article 5 of the Concordat for domestic arbitration). Compulsory jurisdiction of the courts exists in a few limited areas, such as lease and employment contracts. Commercial contracts are, as a rule, arbitrable. Outside these cases, government agencies are allowed to commit to arbitration (but rarely do). Once it consents to arbitrate

disputes with a foreign contractor, the agency cannot renege on its undertaking. Article 177(2) of the PIL Act prohibits a state or state organisation from relying on its own law to contest its capacity to be a party to an arbitration or the arbitrability of the dispute.

20 Foreign corruption

Does local legislation prohibit corrupt practices carried out abroad by persons domiciled in your jurisdiction?

Corruption of foreign officials is specifically prohibited by article 322 septies of the Federal Criminal Code. The provisions cover any person who offers, promises or grants an undue advantage to a person acting for a foreign state or an international organisation, as a member of a judiciary or other authority, public servant, expert, translator, arbitrator, or member of the military, in favour of such person or of third parties in relation to his official capacity. Likewise, the person who accepts or solicits such undue advantage is punishable under the Criminal Code.

21 Force majeure and acts of God

Under local law are contractors excused from performing contractual obligations owing to events beyond their control?

The contractor remains liable for non-performance unless it demonstrates that performance is no longer possible because of reasons that are not its fault (article 97 of the CO). If performance of the works becomes impossible due to circumstances for which the contractor is not responsible, the contractor's obligation to perform is extinguished (article 119 of the CO). If the works are temporarily delayed for reasons within the contractor's sphere of risk (which include force majeure events affecting the contractor's performance), the rules on delayed performance will apply (article 366 of the CO). These mechanisms are not mandatory law, and the parties can agree on different solutions (for instance, by adopting the SIA model contract).

Under article 376 of the CO, the contractor carries the risk for the destruction of the works prior to taking over due to a fortuitous event (which includes but is not limited to force majeure). In such event the contractor will not be reimbursed for its costs.

22 Dispute resolution mechanisms

What dispute resolution procedures are successfully used to solve construction disputes?

Contrary to many common law states, there is no court-ordered adjudication regime in place in Switzerland. Domestic construction disputes are usually referred to the local courts, and less frequently to arbitration (see question 28). However, Switzerland is a major seat for international arbitration, including many arbitrations involving infrastructure projects outside Switzerland. The most frequently used arbitration rules in Switzerland are the uniform arbitration rules of the Swiss Chambers of Commerce (Swiss rules) and those of the International Chamber of Commerce (ICC rules). Switzerland regularly ranks first or second in the annual statistics of arbitration seats published by the ICC.

23 Courts and tribunals

Are there any specialised tribunals that are dedicated to resolving construction disputes?

The construction industry has established arbitration rules whereby disputes may be referred to specialised tribunals (see www.sia.ch/download/rd_sg_reglement_f.pdf). There are no state courts specialising in construction disputes. There are state commissions dealing with public procurement disputes.

24 Dispute review boards

Are dispute review boards (DRBs) used? Are their decisions treated as mandatory, advisory, final or interim?

Dispute boards are not widely used but were established with success in one of the largest infrastructure projects: the ongoing construction of the railway tunnels through the Alps (see question 2).

25 Mediation

Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where are the mediators coming from?

There is no federal law on mediation defining the mediation process. Mediation is not commonly used yet, although recently industry associations have adopted mediation and arbitration rules. For an overview of dispute resolution proceedings in Swiss construction projects, see Dominique Brown-Berset and Matthias Scherer, 'Les modes alternatifs de règlement des différends dans le domaine de la construction', *Journées suisses du droit de la construction JDC*, 2007, pp 265-87.

26 Confidentiality in mediation

Are statements made in mediation confidential?

There is no statutory federal law on confidentiality in mediation. The parties are free to adopt institutional or ad hoc mediation rules that address confidentiality. For instance, articles 7 and 18 of the ICC ADR Rules and the Mediation Rules of the Swiss Chambers of Commerce provide that statements made in the mediation are confidential at all times, even in subsequent litigation or arbitration.

27 Arbitral award

Is there any basis upon which an arbitral award issued by a foreign or international tribunal may be rejected by your local courts?

Enforcement of foreign arbitral awards in Switzerland is governed by the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which considerably limits the grounds on which enforcement may be refused.

Switzerland has a good track record of abiding by the Convention's terms and spirit.

28 Governing law and arbitration provider

If a foreign contractor wanted to pursue work and insisted by contract upon international arbitration as the dispute resolution mechanism, which of the customary international arbitration providers is preferred and why?

Contracts for domestic construction projects usually provide for the jurisdiction of the local courts, especially if the owner is a public entity. In recent years, arbitration has become more popular, as illustrated by a new set of arbitration and mediation rules adopted by a number of leading industry associations (see www.sia.ch/download/rd_sg_reglement_f.pdf).

Foreign contractors should note that arbitration among Swiss entities (which include local project companies of foreign contractors) is subject to domestic Swiss arbitration law, whereas contracts to which at least one foreign contractor is a party, are subject to the Swiss PIL Act.

29 International environmental law

Is your jurisdiction party to the Stockholm Declaration of 1972? What are the local laws that provide for preservation of the environment and wildlife while advancing infrastructure and building projects?

The environment is protected by a multitude of laws and regulation, mainly due to the Federal Law on Environmental Protection (RS

814.01). This law provides for compulsory studies to be prepared to assess the impact on the environment of projects of a certain size. Construction site waste needs to be separated into normal and hazardous or special waste (Regulation SR 814.600).

30 Other international legal considerations

Are there any other important legal issues that may present obstacles to a foreign contractor attempting to do business in your jurisdiction?

Federal legislation on public procurement explicitly guarantees the equal treatment of foreign bidders, but foreign contractors will be guided by general market opportunities rather than by legal considerations. As the Swiss market for low-margin work is fairly saturated, foreign contractors will usually only bid for large projects with higher margins. Most foreign contractors who regularly bid in Switzerland have acquired local Swiss contractors or entered into joint ventures with local partners.

Switzerland is a multilingual country. Depending on the project, the official language may be French, German or Italian. The bidding documents must be prepared in the applicable language.

Contractors from common law countries should be aware that Switzerland is a civil law country and that the rules governing contract interpretation may differ from common law. In the case of a dispute over the proper construction of a contract provision, the courts will establish the real and common intention of the parties. The wording of the contract is the starting point, not the end of the interpretation. Contrary to common law courts, civil courts will look at evidence outside the four corners of the contract to determine the parties' intentions. There is no prohibition on parol evidence. Oral witness evidence is an important feature in contract disputes.

31 International treaties

Is your jurisdiction a signatory to any investment agreements for the protection of investments of a foreign entity in construction and infrastructure projects? If so, how does your model agreement define 'investment'?

Switzerland has adhered to the ICSID Convention and has one of the largest bilateral investment protection treaty (BIT) networks, with over a 100 worldwide. There is no publicly available model BIT. Arbitration (mainly under UNCITRAL or ICSID rules) will be available to the investor in most instances. Each treaty will have to be looked at individually to assess whether infrastructure projects qualify as a relevant investment. ICSID precedents show that projects of a certain size and duration regularly qualify. ICSID arbitration is available in the event of a breach of protection granted in a BIT (eg, discrimination against or expropriation of a foreign contractor).

A mere contract violation will only exceptionally qualify as a treaty breach sufficient to establish jurisdiction of the ICSID arbitral tribunal (for instance by operation of an 'umbrella clause'. For a discussion see the awards in two ICSID cases based on a Swiss BIT: *SGS v Pakistan* and *SGS v Philippines*).

32 Tax treaties

Has your jurisdiction entered into double taxation treaties pursuant to which a contractor is prevented from being taxed in various jurisdictions?

Switzerland has concluded numerous income tax treaties to avoid double taxation. These treaties usually provide for reduced withholding rates on dividends, interest and royalties. To benefit from a reduced treaty withholding rate, the foreign recipient must generally apply to the Swiss tax authorities for a refund. Certain treaties may provide a direct reduction at source under certain conditions.

33 Currency controls

Are there currency controls that make it difficult or impossible to change operating funds or profits from one currency to another?

No, there are no currency controls in Switzerland.

34 Removal of profits and investment

Are there any controls or laws that restrict removal of profits and investments from your jurisdiction?

Taxes may apply to dividends as indicated in question 32, at rates varying depending on the jurisdiction of residence of the investor deriving a profit from an investment in Switzerland.

35 Contractual matrix of international projects

What is the typical contractual matrix for a major project in your jurisdiction in terms of the contractual relationships among the various construction project participants?

The owner will regularly appoint an engineer. Such engineers are the owner's representative. They do not function as certifier or 'neutral' administrator of the contract; nor do they decide disputes between the contractor and the owner, contrary to some common law jurisdictions. On the contractor's side, large-scale projects usually involve consortia or joint ventures, which may include foreign contractors. Often, the owners choose a general contractor, who retains subcontractors.

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