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Construction Law 2023

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Switzerland: Law & Practice

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Walder Wyss Ltd

SWITZERLAND

Law and Practice

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Walder Wyss Ltd has around 250 legal experts and is one of the most successful and fastest-growing Swiss commercial law firms, with offices in Zurich, Geneva, Basel, Berne, Lausanne and Lugano. Walder Wyss has one of Switzerland's biggest teams of real estate and construction lawyers. Clients include national and international companies, publicly held corporations and family businesses, as well as public law institutions and private clients.

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1. General

1.1 Governing Law

The construction market in Switzerland is mainly governed by the Swiss Code of Obligations (see Articles 363 et seq and 394 et seq of the Swiss Code of Obligations and www.fedlex.admin.ch).

1.2 Standard Contracts

The use of certain standard contracts is not mandatory in Switzerland. However, the parties to a construction contract frequently use the general terms and conditions provided by the Swiss Engineers and Architects Association (ie, SIA 118:2013).

2. Parties

2.1 The Employer

The Swiss construction industry features the following different types of employers:

- institutional investors such as real estate funds;
- private owners; and
- contractors assigned to construction projects by the government.

For the execution of the construction work, the owner enters into a contract with a contractor who, in turn, uses subcontractors.

Rights and Obligations

The rights and obligations of the employer are determined by the specific contract, by the Swiss Code of Obligations (usually within the section about contracts for work and services – Article 363 et seq) and frequently by the SIA 118:2013. The employer's primary duty is the payment of the price within the specified timescale. The agreement may also cover other duties, such as the duty of loyalty and intellectual property rights.

2.2 The Contractor

All kinds of companies act as constructors, with larger listed companies typically acting as contractors in the Swiss construction industry.

General and total contractor models are often used.

In the general contractor model, the owner uses an architect and an engineering team for the planning. The owner either enters into a single planning contract with a consortium of planners/designers (often in the form of a simple partnership) or concludes individual contracts with each architect or engineer involved. For the execution of the construction work, the owner enters into a contract with a contractor who, in turn, uses subcontractors.

In the total contractor model, the owner contracts with a single company that assumes full responsibility for the planning and realisation of a project.

Rights and Obligations

The rights and obligations of the contractor are again determined by the specific contract, by the Swiss Code of Obligations and frequently by the SIA 118:2013. The contractor's primary duty is to carry out work in person, unless the nature of the work does not require its personal involvement. The agreement may also cover other duties, such as the duty of loyalty and intellectual property rights, and supervision and insurance duties.

2.3 The Subcontractors

In Switzerland, subcontractors are typically rather small companies that specialise in a particular field. There is usually only a contract between the total/general contractor and the subcontractor, but not between the subcontractor and the employer. This contract is typically a contract for work and services in which the contractor assumes the role of the employer and the subcontractor takes the place of the contractor, meaning the same rights and obligations as listed in **2.2 The Contractor** apply.

2.4 The Financiers

Typically, construction projects are financed by banks, insurance companies or real estate funds. For this purpose, the builder takes out a mortgage loan with the respective bank and undertakes to repay it in instalments by means of mortgage interest. If the builder defaults on the payment, the financier has the right to pledge the property.

3. Works

3.1 Scope

In Switzerland, the scope of the works in construction contracts is typically determined from a detailed list of construction works, which is usually based on the element-based cost classification for building construction (*Baukostenplan*–BKP), on functional definitions of the works or on combinations of the two.

3.2 Variations

Contracts usually contain specific provisions for change orders. SIA Rule 118:2013 typically applies to construction contracts and contains specific provisions in this regard (Article 84 et seq). As a general principle, the cost changes compared to the initial cost base are the determining factor.

Where labour rates or prices undergo an increase or decrease compared to the initial cost base, the consideration owed by the employer shall similarly be subject to an increase or a decrease. However, this does not apply for fixed flat-rate prices or "time and materials works" that are subject to an agreed quotation where no reservation for price adjustments was stipulated.

3.3 Design

As a kind of standard model in construction projects, architects are responsible for all design works and construction management. However, there are also various other models.

General Contractor Model

In the general contractor model, the owner uses an architect and engineering team for the planning. The owner either enters into a single planning contract with a general planner or a consortium of planners/designers (often in the form of a simple partnership) or concludes individual contracts with each architect or engineer involved. For the execution of the construction work, the owner enters into a contract with a contractor who, in turn, mandates subcontractors.

Total Contractor Model

In the total contractor model, the owner contracts with a single company that assumes full responsibility for the planning and realisation of a project.

Project/Development Manager

The project/development manager manages all planners.

3.4 Construction

The responsibilities regarding the construction process depend on the model used in the construction process.

The total and general contractor is solely responsible for all works, as there is no contractual relationship between the employer on the one hand and the subcontractors and suppliers on the other. If the work is individually allocated, the employer enters into direct contracts with the contractors. The contractor is responsible for the construction process, and the employer has to supervise the project.

If the contractor is managed by the architect, the architect is responsible for the management of all works and each contractor for its division of work (resulting in the joint liability of the architect and the contractor for certain defects, as the case may be).

3.5 Site Access

Responsibility for the Status of the Construction Site

The responsibility for the status of the construction site (eg, regarding pollution, underground obstacles, geotechnical conditions, archaeological finds) again depends on the specific model.

The total contractor is solely responsible for the status of the construction site. The architect is responsible for the management of all risks. All contractors must notify the employer and the architect if they become aware of any such risks.

Risk Allocation

According to the "polluter pays" principle (*Verursacherprinzip*), the site owner is responsible for the management of such risks by law. However, risk allocation can be subject to the agreement of the parties. Typically, the risk management is transferred to the planners and contractors. Statutory law provides for additional specific obligations for contractors (eg, correct handling of decontamination works).

3.6 Permits

With only few exceptions, all construction works are subject to building permits. If additional permits are required (eg, based on the Water Protection Act), the authority must co-ordinate all permit procedures and include all additional permits in the building permit. For large-scale projects, an environmental impact assessment might be required.

By law, the landowner is responsible for ensuring that all necessary building permits for the construction measures have been issued. However, typically, the architect and/or the contractor is contractually responsible for obtaining the necessary permits, but this depends on the individual agreement.

3.7 Maintenance

There are basically no specific maintenance provisions under Swiss law. The employer is free to mandate any contractor of its choice for maintenance works. However, certain contractors typically agree to extend guarantee periods (eg, for the roof or facade), provided that the employer enters into a maintenance agreement.

3.8 Other Functions

Employers typically mandate project/development managers for large-scale projects, who manage the entire project and take over the administration of tasks.

Furthermore, as subcontractors have the mandatory right to register a contractor's lien on the property if they are not paid by the contractor, it is recommended that the payment of the subcontractors is monitored (eg, by a bank).

3.9 Tests

In Switzerland, there are no general testing obligations for construction processes. Typically, testing is part of the acceptance procedure and must be prepared, organised and performed by the architect and/or the contractor.

However, certain acceptance procedures (eg, fire protection, elevators) may be subject to prior testing by the authorities. Furthermore, an official inspection of the project is undertaken by the competent authority of the local community before the project can be inhabited or used for its intended purpose.

3.10 Completion, Takeover, Delivery

Typically, the acceptance procedure proceeds as regulated in Article 157 et seq of the SIA 118:2013, whereby the contractor invites the employer to a joint acceptance. In the case of major defects, the acceptance fails. Minor defects have to be reported and repaired within a reasonable period of time.

Takeover can also take place before acceptance. However, this involves risks regarding defects, as it may be construed as a waiver in relation to defects and may, from a technical point of view, complicate the allocation of responsibility for defects.

3.11 Defects and Defects Liability Period

Defects Liability Period According to the Swiss Code of Obligations

According to the Swiss Code of Obligations (Article 367 et seq), the employer must inspect the quality of the work after delivery and inform the contractor of any defects. If the employer fails to carry out the inspection, it implicitly approves recognisable defects. The inspection period is not defined by law; according to the Federal Supreme Court, it is a few days or, in the case of complex works, several months. It is advisable to either contractually agree on an inspection period or to jointly perform the inspection. The defects must then be reported to the contractor "immediately" after their discovery (within approximately seven days). A planned revision of the Swiss Code of Obligations provides that a new deadline of 60 days shall apply to the notification of defects in immovable works. The parties may, however, provide for other notice requirements in their contracts.

Defects Liability Period According to the SIA 118:2013 Rule

The SIA 118:2013 rule is based on the principle of joint inspection, whereby the work is to be inspected within one month upon notification by the contractor (Article 158 of the SIA 118:2013). Thereafter, the employer must notify the contractor of defects within two years from the date of acceptance of the work. Obvious defects must be notified at the time of acceptance. Defects that are discovered after the notification period of two years (hidden defects) must be notified immediately after their discovery.

However, parties are free to agree on different provisions.

Prescription

Defect rights prescribe even if the defects have been notified in good time. For construction works, the limitation period is generally five years from acceptance of the work (Article 371 Para 1 and 2 of the Code of Obligations; Article 180 Para 1 of the SIA 118:2013), subject to interruption of the limitation period (eg, by filing a claim).

4. Price

4.1 Contract Price

As consideration for the services performed by the contractor, prices are usually agreed on a time-spent basis or as unit prices (*Einheitspreise*) or fixed prices, such as a lump sum price (*Globalpreise*) or at a flat rate (*Pauschalpreise*).

Unit Prices

Unit prices determine the consideration for individual services that are listed as separate items in the schedule of services. They are defined for the individual units of quantity, so that the consideration owed for a service is computed after its completion. The quantities of services performed at unit prices are determined according to the terms of the contractor agreement, in accordance with their actual measure (by measurement, weighing or counting) or with their theoretical measure based on the underlying designs.

Lump Sum

A lump sum may be agreed for individual services, for part of the project or for the entire project carried out by the contractor. It shall consist of a fixed amount of money. Agreements on lump sum payments should only be made on the basis of complete and clear documentation (ie, detailed project specifications, designs, etc).

Flat Rate Prices

Flat rate prices differ from lump sum payments solely in that they are not subject to price adjustment clauses.

Milestone Payments

Milestone payments are typically agreed on by the parties, with payments on account.

4.2 Payment

There are various concepts to prevent late or non-payment in construction contracts. Typically, the parties agree on a payment schedule consisting of milestone payments, to be paid on account. There can also be advance payments, which are typically secured by a bank guarantee.

However, if the employer does not pay on time, the contractor has the right to stop the work and register a so-called contractor's lien.

4.3 Invoicing

Typical billing methods used in construction contracts in Switzerland are payments on account (milestones) and final payment. Invoices are then sent to, and reviewed by, a cost controller.

5. Time

5.1 Planning Programme

There are typically different planning phases in construction projects:

- strategic planning;
- preliminary studies;
- planning of the project;
- invitation to tender;
- implementation; and
- management.

In most cases, there is a construction schedule that sets specific dates indicating milestones that must be reached by certain dates. In this context, there is often a payment schedule based on the degree of completion. Contractual penalties are usually agreed to enforce compliance with the deadlines.

5.2 Delays

The construction schedule is often declared as binding.

In most construction cases, the contractor has the right to an extension of the contractual performance period for a reasonable period if the execution of the project is delayed with no fault on the part of the contractor (Article 96 of the SIA 118). The employer and the contractor are liable to each other for damage resulting from exceeding performance.

For cases in which contractual performance periods are exceeded, the contractor agreement typically provides for reasonable penalties which are, however, in general not owed where the contractor is entitled to an extension of performance periods (see Articles 98 and 96 of the SIA 118). Also, the contractor agreement typically provides that a contractually stipulated penalty shall not constitute a release from remaining contractual obligations but shall be accounted towards the payment of any damages owed.

In the event of delays caused by the contractor, where there is no longer any prospect of completing the work on time, the employer has the right to withdraw from the contract without waiting for the agreed delivery date (Article 366 of the Code of Obligations).

5.3 Remedies in the Event of Delays

Typically, default interest or contractual penalties are agreed in the event of delays. Furthermore, the parties are liable for damage resulting from exceeding performance.

5.4 Extension of Time

If it is likely that the execution of the project will be delayed through no fault on the part of the contractor, that contractor must make additional arrangements with the employer in order to prevent further delays, such as increasing the size of the workforce or putting on additional work shifts. If the execution of the project is still delayed, the contractual performance periods must be extended for a reasonable period.

Changes to construction procedures, faulty supplies or other causes of delay attributable to fault on the part of the contractor will, however, not give rise to an entitlement to the extension of any performance periods. If the contractor is not entitled to an extension of performance periods, the employer has the right of withdrawal.

5.5 Force Majeure

The Swiss Code of Obligations does not expressly regulate force majeure, but this principle is nevertheless recognised in case law and is subsumed under Article 119 of the Code of Obligations. If performance has become impossible due to circumstances for which the debtor is not responsible, the claim is considered extinguished under Swiss law in accordance with Article 119 of the Code of Obligations. The debtor must no longer perform.

As part of the contractual freedom prevailing in Swiss private law, the parties involved may contractually extend or restrict the statutory scope of the application of force majeure. Such clauses chosen by the contracting parties generally override the subsidiary provision in Article 119 of the Code of Obligations. Many contracts and general terms and conditions contain a force majeure clause, according to which, for example, pandemics, official restrictions or other unexpected occurrences are to be qualified (or not) as force majeure.

Contractual force majeure clauses usually also contain provisions on the legal consequences (termination, liability for damages or grace periods) of late performance or non-performance due to the event that has occurred, if there is a causal connection.

One of the most commonly used force majeure clauses is stated within Article 187 para 3 of the SIA 118:2013, according to which the contractor is entitled to full or partial equitable consideration for services performed prior to any loss or destruction of a project resulting from force majeure (eg, war, civil unrest, natural disaster). Where a dispute arises, the court decides at its discretion.

5.6 Unforeseen Circumstances

The unexpected extent of the COVID-19 pandemic raised not only the question of force majeure but also the principle of clausula rebus sic stantibus. The retrospective amendment of contracts caused by unforeseen circumstances is not regulated in mandatory or regulatory law. However, the Swiss doctrine acknowledges this so-called clausula rebus sic stantibus, which allows the court to change contracts if, due to a change of circumstances, the performance of the contract becomes unconscionable for at least one party. Often, unforeseen circumstances are also contractually agreed upon by the parties. In particular, the issues of pandemics and inflation have often been explicitly addressed in

contracts since the COVID-19 pandemic and the Russia-Ukraine war, respectively.

5.7 Disruption

Disruption understood as a loss of productivity due to a hinderance or interruption of the progress of the construction works which reduces the rate of efficiency is generally not acknowledged as a specific legal and/or contractual reason for extension of time and/or compensation. Such disruptions are normally treated the same way as delays (see Article 97 of the SIA 118:2013 and **5.2 Delays**).

6. Liability

6.1 Exclusion of Liability

According to the mandatory law provisions in Switzerland, agreements purporting to exclude liability for wilful misconduct or gross negligence in advance are void. Also, an advance exclusion of liability for minor negligence may be deemed void if the party excluding liability was in the other party's service at the time the waiver was entered into or if the liability arises in connection with commercial activities conducted under an official licence.

6.2 Wilful Misconduct and Gross Negligence

As stated in **6.1 Exclusion of Liability**, the exclusion of liability for wilful misconduct or gross negligence in advance is void. These concepts are governed by mandatory law (Article 100 of the Code of Obligations).

6.3 Limitation of Liability

Within the framework of Article 100 of the Code of Obligations (see **6.2 Wilful Misconduct and Gross Negligence**), the limitation of liability is possible. Consequently, liability for slight negligence can be excluded in a contract. The entire system of guarantees is dispositive; there is a broad scope for drafting contractual limitation of liability. However, in order to make the contract more attractive, liability is often not completely excluded, but rather limited to a certain amount, such as the total amount of the agreed costs or the sum insured of the service provider.

7. Risk, Insurance and Securities

7.1 Indemnities

Indemnities are generally used to limit risks in Swiss construction projects. Typical subjects would be damage/loss of profit due to delays and third-party claims (eg, damage to the neighbouring property due to the construction works).

Liability of contractors is often limited (eg, to the amount of the insured sum).

7.2 Guarantees

Employers are typically granted the following in the form of an abstract, irrevocable guarantee within the meaning of Article 111 of the Code of Obligations from a major Swiss bank or cantonal bank or insurance company:

- a performance guarantee securing all obligations of the contractor under the contract (reimbursement of excess payments, costs for substitute performance by the customer, reductions in price, consequential damages resulting from defects, contract penalties, release or securing any contractors' liens, consequences of early termination of a contract, etc);
- a warranty guarantee securing the contractor's liability for defects; and
- as the case may be, a prepayment guarantee securing the prepayments of the employer.

The warranty guarantee is often provided in the form of a surety (*Solidarbürgschaft*) from a major Swiss bank or cantonal bank or insurance company.

7.3 Insurance

In most cantons, there are mandatory insurance requirements relating to a building (eg, mandatory progressive building insurance).

Typically, the architect or the total/general contractor must ensure that the employer has sufficient insurance coverage. This includes insurance coverage for third-party damages and for defects of existing buildings and installations (*Bauwesenversicherung*).

All contractors must provide (and maintain) professional indemnity liability insurance.

Large-scale projects often provide construction area insurance (*Bauplatzversicherung*) that covers all planners and contractors of the project and an additional insurance policy covering interruption in construction resulting from fire.

7.4 Insolvency

In the event of the formal bankruptcy of a contractor, the employer has the right to terminate the contract early by law. However, under the contract, the employer is granted the right to terminate the contract early in the event of certain financial difficulties on the part of the contractor (eg, a petition for a debt restructuring moratorium, liquidation of parts of the company) even before the opening of bankruptcy proceedings.

In addition, contracts often include a right for the employer to make direct payments to subcontractors that will be deducted from the contract price if the contractor does not pay its subcontractors on time.

Regarding financial difficulties of the employer, contractors have the right to suspend their works if they are not paid on time. Moreover, contractors have the mandatory right to register a contractor's lien in order to secure the payment of works already performed.

7.5 Risk Sharing

Given the freedom of contract principle in Switzerland, it is admissible for the parties to agree to share any type of risk between them.

However, risks are not usually shared by the parties: certain kinds of risks are typically borne by the employer (eg, risk of unforeseen ground conditions) while others are usually covered by the contractor (eg, cost risk).

8. Contract Administration and Claims

8.1 Personnel

There are various mandatory provisions for a contractor's personnel (work security, laws on dispatching employees, etc). While the employer may not be held responsible if the contractor does not observe such requirements, doing so might have a negative impact, from both an economic (eg, the stopping of construction by the authorities) and a reputational perspective, so that this issue is often specifically addressed in the contract and secured by penalties and the right to terminate the contract early.

In addition, contracts often include provisions regarding key persons and their replacement, as well as the right of the employer to request that the contractor no longer engages a specific person for rendering the works.

8.2 Subcontracting

In Switzerland, the contractor is usually free to enter into subcontractor agreements. However, contractors are responsible for ensuring that their subcontractors observe the statutory laws on works security and on dispatching employees.

Employers may reserve the contractual right to approve subcontractors and to require the engagement of certain subcontractors.

8.3 Intellectual Property

Pursuant to SIA Rule 102:2020 and 103:2020, respectively, the architect and the engineer shall retain the copyright on their work and the employer, upon payment of the fees, shall be entitled to utilise the architect's and engineer's work results for the agreed purpose (Articles 1.3.1 and 1.5.3 of the SIA Rule 102:2020 and Articles 1.3.1 and 1.5.3 of the SIA Rule 103:2020).

However, typically, contracts relating to large-scale projects include the full assignment and transfer of all work results and other intellectual property rights to the employer.

9. Remedies and Damages

9.1 Remedies

In the event of a breach of the construction contract, Swiss law provides several remedies for the different parties.

From the view of the employer, the most important remedies are rescission, reduction or rectification (Article 368 of the Code of Obligations). In principle, the employer is free to choose which claim it wishes to pursue (the so-called right of choice), whereby the claims for defects for buildings are limited to reduction or rectification. The choice of the right of rectification presupposes that the defect in the work is of minor importance, that the rectification of the construction defects is possible and that no excessive rectification costs are incurred by the contractor.

In addition to the rights in terms of defects, the employer may also claim compensation for any consequential damage caused by a defect, to the extent the contractor is at fault.

From the view of the contractor, the most important remedy is the so-called building contractor's lien. If the employer has failed to meet his payment obligation, the contractor has the option to register a lien on the employer's property in the amount of his claim. This must be done within four months of the completion of the construction work. If the employer still fails to pay, the contractor is entitled to seize the property and thus obtain his remuneration for the work. However, only "building contractors" are entitled to this right; architects cannot pursue this claim but have the option of asserting copyrights to their work in court. The employer may then only continue to use the work or plan if the claim is paid.

The subcontractor has no contractual relationship with the employer. A unique feature of Swiss law is that, in the event of non-payment, the subcontractor still has the option to have a construction lien registered on the employer's property to secure its claim, even though the employer may not be at fault for the non-payment of the claim.

9.2 Restricting Remedies

It is common practice in Switzerland to contractually limit remedies. According to Article 169 of the SIA 118:2013, for example, the employer is initially only entitled to claim rectification of the defect within a reasonable time. Only if the contractor fails to repair the defect within the

time limit set is the employer entitled, at its own discretion, either to maintain its insistence upon remediation (on condition that the remediation works do not engender excessive costs in proportion to the employer's interest in rectification of the defect) or to pursue either reduction or rescission (on the condition that removal of the project does not entail the imposition of a disproportionate burden on the contractor and that acceptance cannot reasonably be expected of the employer).

9.3 Sole Remedy Clauses

As stated in **9.2 Restricting Remedies**, it is possible to limit remedies in a way so that one is limited first (Article 169 of the SIA 118:2013). It is also possible to use sole remedy clauses in the sense that only reduction or rectification can be claimed.

9.4 Excluded Damages

There are no damages that are regularly excluded from liability in construction contracts. However, some contractors try to exclude indirect or consequential damages.

9.5 Retention and Suspension Rights

It is often agreed that the employer has a retention right (eg, under Article 149 of the SIA 118:2013). The employer is entitled to keep 10% of the performance value as security for the performance of the contractor's obligations until acceptance of the project or a part of the project.

9.6 Termination

For as long as the project has not been completed, the employer may terminate the agreement at any time in exchange for full indemnification of the contractor. The indemnification shall be equivalent to the consideration to which the contractor would have been entitled for execution of the agreed works, deduction being made for expenses saved by the contractor as a result of the employer's termination (see Article 377 Code of Obligations and Article 184 of the SIA 118:2013).

10. Dispute Resolution

10.1 Regular Dispute Resolution

General Judiciary System

In Switzerland, all cantons have their own judiciary system. All cantons have set up a double judiciary instance system, with the exception of the cantons of Argovie, Berne, St. Gall and Zurich, which have established a Court of Commerce for certain proceedings. All final cantonal decisions may be appealed to the Swiss Federal Supreme Court, provided that certain requirements are met (eg, minimal disputed sum).

Duration of the Proceedings

Ordinary proceedings that are appealed before the Swiss Federal Supreme Court usually take up to five years. Typically, construction-related proceedings at the first instance are rather time-consuming as they usually include hearings, expert opinions, proof examinations, etc. Depending on the complexity of the case, they last two years or more.

Proceedings are often drawn out by interim measures such as expert opinions. Courts of appeal are faster and usually take their decision within a year, while the Swiss Federal Supreme Court generally issues its rulings within six to nine months.

10.2 Alternative Dispute Resolution

Typical Alternative Dispute Resolution

Parties are free to determine the method of dispute resolution, with state court litigation being most commonly used in Switzerland. Domestic

arbitration is used less frequently, while international institutional (SCAI, ICC) arbitration is often provided in international treaties.

Domestic and International Arbitration

Even though arbitration is possible in both domestic and international matters in Switzerland, arbitration clauses are typically found in contracts regarding large or complex projects involving international parties.

For domestic matters, Article 353 et seq of the Swiss Civil Procedure Code applies, while international arbitration is regulated in Article 176 et seq of the Federal Act on Private International Law.

SIA Rule 150:2018

The Swiss Society of Engineers and Architects (SIA) has published special arbitration rules (SIA Rule 150:2018) for construction-related contracts that have recently been revised and modernised. In practice, however, they are not (yet) very popular.

Mediation

Switzerland is a country with a rich tradition of mediation. Since 2011, the Swiss Civil Procedure Code has recognised mediation as a form of judicial proceedings at a national level in most civil and commercial cases. There are several leading associations that provide mediation services at a domestic level. These associations also provide lists of certified mediators for civil and commercial mediations. In the field of construction disputes, it is again the SIA that plays a key role; it promotes mediation in its contract templates. Notwithstanding the foregoing, professionally organised mediation has not yet gained a lot of acceptance, maybe because of the good reputation of state courts and arbitration tribunals when it comes to resolving construction disputes by way of settlement.

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