

Construction

Contributing editors

Robert S Peckar and Michael S Zicherman



2019

GETTING THE
DEAL THROUGH 

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Robert S Peckar and Michael S Zicherman
Peckar & Abramson PC

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Preface

Construction 2019

Twelfth edition

Getting the Deal Through is delighted to publish the twelfth edition of *Construction*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Chile and Switzerland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Robert S Peckar and Michael S Zicherman, of Peckar & Abramson PC, for their continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
July 2018

Switzerland

Thomas P Müller, Christian Eichenberger and André Kuhn

Walder Wyss

1 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 taking such a step?

In order to set up Swiss operations, foreign designers and contractors may establish a fully owned Swiss legal entity. Such an entity will typically be a corporation or a limited liability company (LLC). In order to set up a corporation, a minimum share capital of 100,000 Swiss francs is required, whereas an LLC can be established with a minimum quota capital of 20,000 Swiss francs. All shares or quotas can be held by one single shareholder or by multiple shareholders. If handled properly, both types of legal entities provide for a limitation of liability in a way that their shareholders and owners are not liable personally towards third parties for any debt incurred by the relevant legal entity.

Both the corporation's and the LLC's supreme management body can be composed of foreign nationals. However, at least one person with single signature authority or two persons with signature authority by two need to be resident in Switzerland. These individuals do not necessarily need to be members of the supreme management body.

As an alternative to establishing a Swiss legal entity, foreign designers and contractors may tie up with Swiss designers or contractors on a project-by-project basis. This type of cooperation is quite common in the Swiss market. The parties to such a consortium do not form a separate legal entity but a simple partnership that constitutes a mere contractual arrangement. Even though the Swiss Code of Obligations (Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) (CO)) contains provisions that govern the rights and obligations of a partner in a simple partnership (see articles 530 et seq), it is usually recommended that the members of the consortium enter into a partnership agreement that sets out the relationship among them in detail. In this context, it has to be noted that the relevant provisions of the CO are mainly of a non-mandatory nature. Thus, the designers and contractors involved have a lot of flexibility when determining the rights and obligations of each consortium member.

Contractors and designers domiciled in a country belonging to the EU are entitled to provide cross-border services under the bilateral treaty between the EU and Switzerland on the free movement of persons, provided that such cross-border services do not exceed 90 days of actual work in a calendar year. However, Switzerland has established regulations on dispatching employees that foreign designers and contractors must observe (minimal requirements regarding wages and labour conditions, work permits for long-term projects, etc).

Swiss public procurement law is very fragmented due to various regulations on international, federal and cantonal levels. It is currently being revised with the aim of harmonising the federal and the cantonal regulations. However, all regulations are in compliance with the WTO Government Procurement Agreement of 15 April 1994 (GPA; SR 0.632.231.422), so that the rights of foreign designers and contractors under the GPA are guaranteed.

On a more general basis, it needs to be noted that Switzerland has a federal legal system, which means that laws may be introduced on federal, cantonal and municipal levels. As a consequence, taxes are typically also levied on all three levels (whereas certain types of taxes may not be levied on all levels; eg, VAT is only levied on federal level). Therefore, legal requirements and taxation may depend on the

place a foreign contractor or designer establishes its Swiss business or provides work.

Lastly, Switzerland is a multilingual country, with the main languages spoken being German, French and Italian. Thus, official languages may vary among geographical areas.

2 Licensing procedures

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

There is no general licensing requirement for contractors in Switzerland. However, foreign designers and contractors must observe Swiss regulation on dispatching employees (eg, work permits, minimal wages etc). Moreover, there are certain licensing requirements for architects. These requirements are set out in cantonal law only, ie, there are no provisions on a federal level. This results in different licensing regimes being applicable. As of December 2017, only six out of 26 cantons had specific licensing requirements for architects in place: Geneva, Vaud, Neuchâtel, Fribourg, Ticino and Lucerne. In these cantons, certain licensing requirements apply when providing services in the relevant cantonal territory. For architects domiciled in an EU member country, there is a standardised (simplified) registration process in place, which needs to be undergone before providing the relevant services in one of the regulated cantons.

3 Competition

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

No. Particularly with respect to public procurements, the relevant federal law and international treaties establish that all bidders must be treated equally.

4 Competition protections

What legal protections exist to ensure fair and open competition to secure contracts with public entities, and to prevent bid rigging or other anticompetitive behaviour?

Legal protection in relation to fair and open competition behaviour of public entities is mainly granted by public procurement rules. Basically, any violation may be subject to an appeal, eg, unfair tender conditions, bid rigging, unequal treatment of competitors, etc. Contractors must be aware that they have to object to some violations immediately (eg, in case of unfair tender conditions).

5 Bribery

If a contractor has illegally obtained the award of a contract, for example by bribery, will the contract be enforceable? Are bribe-givers and bribe-takers prosecuted and, if so, what are the penalties they face? Are facilitation payments allowable under local law?

Contracts with an unlawful or immoral content are null and void under Swiss law. As a consequence, contracts covering the payment of bribes do not have any legal effects at all. Contracts with lawful content

obtained through an act of corruption, on the other hand, are not automatically void (Supreme Court Decision 129 III 320). Nevertheless, such contracts may be voided by one of the contracting parties by claiming a fundamental error when entering into the contract or fraudulent behaviour by the other party. Whether a contract party will be able to successfully challenge the contract will depend on the facts underlying the specific case.

Bribe-givers and bribe-takers are prosecuted and face up to five years of imprisonment or a fine. Facilitation payments are also criminal offences for which both the public official and the person(s) acting on behalf of the contractor may be sentenced with up to three years of imprisonment or a fine. In addition to the individuals giving bribes or making facilitation payments, the company employing or commissioning such individuals may be prosecuted if it has failed to take all reasonable organisational measures that are required in order to prevent the relevant criminal offences.

6 Reporting bribery

Under local law, must employees of the project team members report suspicion or knowledge of bribery of government employees and, if so, what are the penalties for failure to report?

No, there is no such obligation under Swiss law. Government employees, on the other hand, are required to report suspicion or knowledge of bribery of public officials.

7 Political contributions

Is the making of political contributions part of doing business? If so, are there laws that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties?

The making of political contributions is not part of doing business in Switzerland. Even if political contributions are made, there are no laws in Switzerland that restrict the ability of contractors or design professionals to work for public agencies because of their financial support for political candidates or parties.

8 Compliance

Is a construction manager or other construction professional acting as a public entity's representative or agent on a project (and its employees) subject to the same anti-corruption and compliance as government employees?

A construction manager or other construction professional acting as a public entity's representative or agent will usually not be subject to the same anti-corruption and compliance provisions as a public official. However, it needs to be noted that not only bribery of public officials but also bribery of private individuals (ie, individuals not qualifying as public officials) is a criminal offence in Switzerland, which is prosecuted upon lodging of a criminal complaint by a person affected by the bribe.

9 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?

There are restrictions in Switzerland when it comes to acquiring non-commercial real estate by foreign individuals, foreign legal entities or Swiss legal entities under foreign control. As such, foreign contractors will typically not be able to acquire the properties they are developing unless such properties are used only commercially. Of course, this restriction does not prevent a foreign contractor from developing a non-commercial property owned by a Swiss investor.

As Switzerland is a civil law country, contractors from common law countries should be aware that the rules governing contract interpretation may differ from common law. As such, Swiss courts will establish the real and common intention of the contract parties in case of a dispute by interpreting not only the wording of the contract but also considering evidence outside of the contract.

10 Construction contracts

What standard contract forms are used for construction and design? Must the language of the contract be the local language? Are there restrictions on choice of law and the venue for dispute resolution?

In Swiss construction and design contracts, the standard terms issued by the Swiss Society of Engineers and Architects (SIA) are widely used. There are different rules for different types of work. For instance, the SIA rules 118 are relevant for construction contracts. For contracts with architects or construction engineers, on the other hand, the SIA regulations 102 and 103 respectively are used.

Public entities typically use the standard forms established by the *Koordinationskonferenz der Bau- und Liegenschaftsorgane der öffentlichen Bauherren* (KBOB) (Coordination Conference of the Construction and Real Estate Agencies of the Public Principals; see www.kbob.admin.ch/kbob/de/home/publikationen/beschaffungs--und-vertragswesen.html).

Contracts are typically drafted in the local language spoken at the place of performance (ie, German, French or Italian) or in English. However, the contract parties may opt for any other language as there are no relevant restrictions under Swiss law. If a non-local language is used, the parties need to be aware that the contract and its schedules may have to be translated in case a dispute is brought before a Swiss state court.

There are no restrictions on the choice of law or the venue for dispute resolution.

11 Payment methods

How are contractors, subcontractors, vendors and workers typically paid and is there a standard frequency for payments?

Contractors, subcontractors, vendors and workers are typically paid by electronic payment. Cheques are rarely used in Switzerland and cash payments would also be rather unusual.

Payments to contractors and subcontractors are either made in accordance with a pre-agreed payment schedule (typically linked to the completion of certain milestones) or – mainly in cases of smaller contract values – upon completion of the works. Vendors are usually paid within 30 days from delivery of the products ordered. Workers (employees) are paid a monthly salary which usually becomes due around the 25th day of the month.

12 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?

In a major Swiss project, the owner typically enters into a total contractor agreement or a general contractor agreement. The relevant total contractor or general contractor then retains its subcontractors as it deems necessary. These subcontractors, however, do not have a contractual relationship with the owner.

Moreover, the owner will regularly appoint an independent consultant who represents it on the construction site vis-à-vis the total contractor or general contractor.

13 PPP and PFI

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

In Switzerland, cooperation between the public and private sectors has a long tradition. However, formalised forms of cooperation have not yet been established in Switzerland. Accordingly, there is no formal statutory and regulatory framework for PPP or PFI.

14 Joint ventures

Are all members of consortia jointly liable for the entire project or may they allocate liability and responsibility among them?

A consortium under Swiss law usually has the form of a simple partnership (article 530 et seq CO). As such, it constitutes a contractual

relationship and is not itself a legal entity. Absent any agreement to the contrary, members of the consortium are jointly and severally liable and responsible for obligations of the consortium vis-à-vis third parties contracted jointly or through representatives (article 544, para 3 CO). The members of the consortium may allocate liability differently. However, third parties are not bound to such allocation unless agreed otherwise.

If a legal entity (corporation or limited liability company) is set up to form a joint venture, the relevant entity alone will be liable towards third parties.

15 Tort claims and indemnity

Do local laws permit a contracting party to be indemnified against all acts, errors and omissions arising from the work of the other party, even when the first party is negligent?

Generally, a contracting party is liable for any damages caused to the other contracting party due to its non-performance or improper performance, unless it can demonstrate that it has neither acted wilfully nor negligently (article 97 CO). If the injured party has acted with negligence, the damaging party's liability will not be forfeit but the competent court has the right to reduce the compensation owed to the injured party as it deems appropriate.

16 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?

If a building is sold after its construction, the purchaser will typically ask for the seller's warranty claims against the contractor to be assigned. As a consequence, the contractor may become directly responsible towards the purchaser of the building. In addition, if construction defects cause injuries, the contractor may be held liable under criminal law or tort law. Under certain conditions, such claims may be made even if the injured person has no contractual relationship with the contractor.

17 Insurance

To what extent do available insurance products afford a contractor coverage for: damage to the property of third parties; injury to workers or third parties; delay damages; and damages due to environmental hazards? Does the local law limit contractors' liability for damages?

Any of these insurance products are available in Switzerland. Swiss law does not provide for a statutory limit of the contractor's liability for damages. However, contractually, such limitations may be agreed. It needs to be noted, though, that such contractual limitations do not apply to third parties or in cases of wilful misconduct or gross negligence.

18 Labour requirements

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

No. However, foreign companies must observe the requirements on dispatching employees (see question 2).

19 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?

Hiring of local labour is governed by Swiss employment law (articles 319 et seq CO). If the employment is not limited in time, contractors must observe the mandatory requirements in relation to notice periods. Specific provisions apply for temporary work and for freelancers.

20 Labour and human rights

What laws apply to the treatment of foreign construction workers and what rights do they have? What are the local law consequences for failure to follow those laws?

Swiss public law provides the general rights and duties of construction workers, including maximum working times and the remuneration of night work. Such provisions also apply for foreign workers irrespective of which law governs their employment contracts.

Swiss public employment law (eg, Federal Act on Labour Law, SR 821.11) primarily aims to protect the health and safety of employees and to ensure decent working conditions.

Construction sites are regularly inspected by the authorities, in particular to prevent undeclared work. In the event of breaches of the regulations, the authority can stop construction and impose administrative fines. Constructors must be aware that they may also be liable for violations by their sub-contractors.

21 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?

If a foreign contractor decides to dissolve its Swiss legal entity by means of voluntary liquidation, statutory rules must be observed. Also, notice periods must be respected if employment agreements are terminated (typically three months). If the Swiss entity has more than 20 employees, special provisions governing mass redundancies must be complied with. Also, pension funds legislation may be of relevance.

22 Payment rights

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?

According to articles 839 et seq of the Swiss Civil Code (SR 210; CC), building contractors that have supplied labour and materials, or labour alone, for construction or other works may register legal liens on the property. This right is granted to all contractors, even if they are not in a direct contractual relationship with the principal or property owner, eg, subcontractors of a general contractor.

Furthermore, if the owner does not comply with its payment obligations, the contractor could claim default interest of 5 per cent per annum in addition to damages for non-performance (articles 102 et seq CO). Other options would be to simply stop the works and insist on payment before continuing in accordance with article 82 CO or withdraw from the contract altogether (article 107 CO).

23 'Pay if paid' and 'pay when paid'

Does local law prohibit construction contracts from containing terms that make a subcontractor's right to payment contingent on the general contractor's receipt of payment from the owner, thereby causing the subcontractor to bear the risk of the owner's non-payment or late payment?

Under Swiss law, the parties are free to agree on 'pay if paid' or 'pay when paid' provisions. However, the right of subcontractors to register contractor's lien (see question 22) is mandatory and may not be validly waived under subcontractor agreements.

24 Contracting with government entities

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

No, government agencies may not assert sovereign immunity in court proceedings or, as the case may be, in an arbitration. However, as regards enforcement of a court judgment or an arbitral award, specific rules may apply if the assets against which enforcement is made serve public interests (*Verwaltungsvermögen*).

25 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?

As mentioned in question 22, if contractors as well as subcontractors are not paid they are protected by their right to register contractor's liens on the property on which they have performed work.

26 Force majeure and acts of God

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

Article 376 CO provides that if the work is destroyed prior to delivery by a force majeure event the contractor can in principle not demand compensation for its labour nor restitution of its expenditures. Such a non-mandatory rule is, however, in practice often contracted away.

27 Courts and tribunals

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

On the private side, the SIA has recently published its revised rules of arbitration that are dedicated to resolving construction disputes (see www.sia.ch). On the official side, some cantons have established specialised commercial courts in which not only lawyers, but also experienced businesspeople from the construction industry, sit as judges. Therefore, these commercial courts are noted for their professional expertise, as well as for the commercial common sense they apply when they strive for – and often find by way of settlement – quick and efficient solutions to construction disputes.

28 Dispute review boards

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

No, DRBs are not commonly used in Switzerland. We have seen them only in a few domestic infrastructure projects over the past few years while, for example, Swiss engineers engaged in international projects encounter them more often.

29 Mediation

Has the practice of voluntary participation in professionally organised mediation gained acceptance and, if so, how prevalent is the practice and where do the mediators come from? If not, why not?

Switzerland is a country with a rich tradition of mediation and neutrality. Since 2011, the Swiss Civil Procedure Code (SR 272, CPC) 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 furnish 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 (see www.sia.ch). Notwithstanding the foregoing, professionally organised mediation has not yet gained a lot of acceptance, maybe because of the good reputation of state courts or arbitration tribunals when it comes to resolving construction disputes by way of settlement (see question 27).

30 Confidentiality in mediation

Are statements made in mediation confidential?

If all the parties request so, the conciliation proceedings provided for in the CPC shall be replaced by mediation. In such a case, mediation is confidential according to article 205 CPC. Other than that, there is no statutory federal law on confidentiality in mediation.

Update and trends

Building Information Modelling (BIM) is a new digital technology to model any existing or future building using extremely detailed and comprehensive information. In Switzerland, more and more players in the construction industry use BIM. At the same time, planning and zoning laws, for example, still require the submission of blueprints (or computer models) in 2D to request a building permit. Hence, we expect legislators to become active in this field soon; the SIA has already published its first Swiss BIM standard.

31 Arbitration of private disputes

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

In many cases, arbitration of construction disputes is considered as more expensive than litigation in the local courts. Therefore, parties to a domestic dispute tend to prefer litigation over arbitration. What we see quite often, however, is that the parties agree to obtain an expert's opinion on a limited specific question of a construction dispute. Also, in international construction disputes, arbitration is popular and widely used.

32 Governing law and arbitration providers

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?

The ICC rules of arbitration are well known in Switzerland and widely used in connection with Swiss substantive law in international disputes.

33 Dispute resolution with government entities

May government agencies participate in private arbitration and be bound by the arbitrators' award?

Yes.

34 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?

The Swiss Federal Act on International Private Law and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Switzerland is a member state, considerably limit the grounds on which enforcement can be refused. Such grounds could, for example, be non-compliance with the principle of equal treatment of the parties or non-observance of their right to be heard in an adversary procedure. An arbitral award can also be set aside if the award is considered as incompatible with Swiss public policy.

35 Limitation periods

Are there any statutory limitation periods within which lawsuits must be commenced for construction work or design services, and are there any statutory preconditions for commencing or maintaining such proceedings?

Yes. On the one hand, the CO provides limitation periods (of five and 10 years, respectively; see article 127 et seq and article 371 CO). On the other hand, contractual or statutory notice requirements that may impose a much shorter time limit on a party that wishes to assert a claim have to be observed. In particular, according to article 370 CO, the principal has to notify hidden defects immediately upon their discovery. The parties may, however, provide for other notice requirements in their contracts.

36 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?

Switzerland has enacted a multitude of laws and regulations in relation to the protection of the environment. The basic provisions are set forth in the Federal Act on Environmental Protection (EPA, sr 814.01), which is followed by various detailed regulations (*Verordnungen*), eg, on air pollution, noise protection, hazardous waste, etc.

The EPA provides for mandatory studies to be prepared to assess major projects' impact on the environment.

37 Local environmental responsibility

What duties and liability do local laws impose on developers and contractors for the creation of environmental hazards or violation of local environmental laws and regulations?

Swiss federal environmental law is very detailed and aims to protect humans, animals and the environment against all types of pollution. Contractors are responsible for compliance with all these regulations. In the event of non-compliance, the entrepreneur must not only bear all costs for the restoration of the legal status, but may also be subject to administrative fines and criminal prosecution.

38 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 is a signatory to the International Centre for Settlement of Investment Disputes (ICSID) Convention and has one of the largest bilateral investment protection treaty (BIT) networks, with over 100 BITs worldwide.

There is no publicly available BIT model. Arbitration (typically under UNCITRAL or ICSID rules) will be available to the investor in most instances. 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.

39 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 entered into various tax treaties to prevent double taxation. These tax treaties usually also provide for a mechanism to claim back all or part of the withholding tax levied on dividends, interests and royalties (see also question 41). A list of Switzerland's double taxation treaties can be downloaded from the website of the Federal State Secretariat for International Finance SIF (www.sif.admin.ch).

40 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.

41 Removal of revenues, profits and investment

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

Any dividends distributed by a Swiss legal entity are subject to 35 per cent withholding tax. Such tax may be refunded in full or in part under the protection of a double taxation treaty. However, the application of a double taxation treaty requires that the foreign shareholder of the Swiss entity qualifies as the beneficial owner of the dividend received and has not only artificially been interposed in order to benefit from a favourable tax treaty.

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