



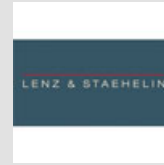
The Legal 500 Country Comparative Guides

Switzerland: Construction

This country-specific Q&A provides an overview to construction laws and regulations that may occur in Switzerland.

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1. **Is your jurisdiction a common law or civil law jurisdiction?**

Switzerland is a civil law jurisdiction.

2. **What are the key statutory/legislative obligations relevant to construction and engineering projects?**

The relevant obligations to construction and engineering projects result from both private and public law, and may be federal, cantonal and/or communal.

From a private law perspective, the main obligations are laid down in articles 363 to 379 of the Swiss Code of Obligations ("CO") concerning the contractor agreement and in articles 394 to 406 CO concerning the mandate agreement. Having said that, the vast majority of these legal provisions are not mandatory and may be amended by contract between the parties. The SIA Norms, which are private regulations issued by the Swiss Society of Engineers and Architects ("SIA") concerning technical and legal standards for planning and construction, are often included in the agreement by the parties as integral part, corresponding to standard market practice.

From a public law perspective, the main obligations are laid down in the following law areas, which provisions may be federal, cantonal and/or communal, depending on the area and on each Canton: environmental laws, zoning/planning laws, construction laws, housing laws, energy laws, and employment laws, health and safety laws.

3. **Are there any specific requirements that parties should be aware of in relation to: (a) Health and safety; (b) Environmental; (c) Planning; (d) Employment; and (e) Anti-corruption and bribery.**

Health and safety

In respect of health and safety, for older buildings (in particular those built before the '90s), building permits are subject to an asbestos-analysis, and in some Cantons, to a PCB/leaded-paint analysis. In case the building contains asbestos (or PCB/leaded-paints), special requirements for workers must be complied with by the contractor (duty to report, paper trail, special equipment to be used by the workers, etc.) and the hazardous materials must be eliminated in authorized waste disposal areas.

With regard to health and safety, the revision of the statute of limitations in the CO should be taken into consideration which entered into force on January 1, 2020. The limitation period was extended from one year to three years from the day on which the injured party became aware of the damage and of the person liable for compensation. In the event of personal injury, claims for damages or satisfaction are time-barred after a period of twenty (instead of ten years) from the day on which the harmful conduct occurred or ceased.

Environmental issues

In respect of environmental regulations, in case of existence of hazardous material and/or soils pollution, the parties have to comply with specific federal/cantonal provisions regarding the removal, waste management and treatment of such hazardous material/pollution. The sale (broadly defined), except for by way of a share deal, of polluted sites in particular requires a special authorization.

Planning

In respect of planning regulations, the most important point is that the construction project complies with the planning and zoning regulations applicable to the zone area where the construction project is located, noting that such regulations are usually cantonal and/or communal depending on the Canton. In particular, the construction project must be in line with the permitted allocation and the construction regulations of the area, which are set out in legal acts and/or in zoning or neighborhood plans. On top, projects in touristic areas having more than 20% of holiday homes must comply with the requirements of the so-called "Lex Weber".

Employment

In respect of employment regulations, the contractor has to comply with general principles such as equality of treatment, non-discrimination, rules applicable to foreign workers, pension funds and social security regulations, etc. The contractor must also comply with provisions on health and safety at work with respect to its employees.

Anti-corruption and bribery

In respect of anti-corruption provisions, no specific rules apply to the construction sector solely, and standard anti-corruption and bribery regulations apply.

4. What permits/licences and other documents do parties need before starting work, during work and after completion? Are there any penalties for non-compliance?

Works can usually not be initiated before issuance and entry into force of the relevant construction permit. During work, a complementary construction permit may be required if amendments are made to the initial construction project and, in the absence of any changes, compliance with the permit as well as with regulations for construction works apply (schedules, work during week days, no night work except if authorized, etc.) After completion of the work, depending on the Canton/municipality, a formal completion acceptance confirmation by the competent authority, the delivery of an occupancy permit and/or the certification by an architect is required. If the construction project does not comply with the

construction permit, the main risk is that the non-authorized part of the project has to be removed and/or altered and that a fine is being imposed.

5. Is tort law or a law of extra contractual obligations recognised in your jurisdiction?

Yes, tort law is a law of extra-contractual obligations recognized under Swiss law.

6. Who are the typical parties to a construction and engineering project?

-The principal: who generally owns the land on which the construction will be erected;

- One or several contractors

- Architect and other planners

- Engineers (civil engineer / HVAC engineer / etc.)

- Construction managers/representative of the principal

7. What are the most popular methods of procurement?

The most popular methods of procurement are the architect agreement and the general or total contractor agreement.

8. What are the most popular standard forms of contract? Do parties commonly amend these standard forms?

The standard form regulations issued by the SIA (www.sia.ch) are the most popular standard forms of contract used in practice, in particular by architects, engineers and contractors. However, the Coordination Conference of the Building and Real Estate Authorities of Public Owners (www.kbob.admin.ch) also issued standard form contracts that are regularly used for projects involving public owners. The blanks of the standard forms and the multiple choice questions have first to be completed by the parties, so as the standard form be adjusted to the relevant construction project.

In view of the multiple possible types and characteristics of construction projects, the standard forms are usually amended by the parties in order to fit the actual construction project or to balance-out standard clauses that may be deemed too favorable to architects, engineers and contractors (the interest group of private professional builders (www.ipb-online.ch) for example issued general terms and conditions that are meant to be incorporated to amend certain contractor- and planner-friendly provisions of the general terms and conditions of the SIA Norms)

9. Are there any restrictions or legislative regimes affecting procurement?

Public bodies are subject to special rules, in particular, the strict regime of public procurement laws.

10. Do parties typically engage consultants? What forms are used?

Parties generally engage consultants. In particular for larger construction projects, it is common that the principal appoints a third party as project manager, to assist with respect to the construction works (as a decision support), to follow and supervise the progress of the construction milestones and to represent the principal during the works towards the contractor(s) and other parties involved (architect, engineers). The principal concludes a so-called "principal's assistant" agreement or "principal's representative" agreement with a so-called "assistant to the contracting authority", which is typically qualified as a mandate within the meaning of articles 394 to 406 CO.

11. Is subcontracting permitted?

Sub-contracting is generally permitted. However, pursuant to article 364 para. 2 CO, the contractor is obliged to carry out the work in person or to have it carried out under his personal supervision, unless the nature of the work is such that his personal involvement is not required. In other words, subcontracting is permitted if the nature of the work does not require the personal involvement of the contractor. As the nature of the work is rarely viewed as "personal" in the context of construction works, sub-contracting should generally be permitted. The parties may, however, contractually restrict or exclude the right of subcontracting, and may, in particular, grant the principal the right to oppose to the choice of the subcontractors (veto right) or to propose/impose certain subcontractors (proposal right).

12. How are projects typically financed?

Construction projects are generally financed by construction loans (or mortgage loans) granted by banks or insurance companies and secured by mortgages encumbering the property on which the project is erected.

13. What kind of security is available for employers, e.g. performance bonds, advance payment bonds, parent company guarantees? How long are these typically held for?

There are two kinds of securities that are typically requested by the principal: during completion of the contract (so-called "performance guarantee") and after completion, to secure claims arising out of defects in the work (so-called "guarantee for defects"). The performance guarantee is generally provided at signing of the contract and is given back upon delivery of the work and against delivery of the guarantee for defects. Different types of guarantees can be used, such as first demand bank guarantee, joint surety bond, first demand insurance guarantee, etc.

14. Is there any specific legislation relating to payment in the industry?

There is no specific legislation relating to payment in the industry. However, due to AML rules, payments are customarily executed through wire transactions through the banks of the parties involved with corresponding compliance implications.

15. Are pay-when-paid clauses (i.e clauses permitting payment to be made by a contractor only when it has been paid by the employer) permitted? Are they commonly used?

“Pay-when-paid”-clauses are permitted, but not commonly used in practice.

16. Do your contracts contain retention provisions and, if so, how do they operate?

Retention provisions are common when SIA norms are applicable, as they provide for 10% holdback amount on each invoice. The remaining 10% must be paid at the end of the construction (or following a certain period to ensure the right of contractors to request the registration of a construction lien (which is four months) is expired).

17. Do contracts commonly contain delay liquidated damages provisions and are these upheld by the courts?

Contracts may contain liquidated damages provisions in particular in respect of delays incurred by the contractor. These are upheld by the courts to the extent they are reasonable.

18. Are the parties able to exclude or limit liability?

Parties may exclude or limit liability, but provisions limiting liability for unlawful intent or gross negligence in advance are void.

19. Are there any restrictions on termination? Can parties terminate for convenience? Force majeure?

The principal/customer may withdraw from a contractor agreement at any time (before the work is completed) provided he pays for work already done and indemnifies the contractor in full (loss of gain indemnity). The principal/customer may also withdraw from the contract before or after completion if an estimate agreed with the contractor is significantly and disproportionately exceeded without fault of the customer. However, this right of withdrawal is granted only with reservation by Swiss courts. Extraordinary circumstances (such as force majeure) entitle the parties first to adapt the price or the timeline; termination is possible in such cases only if the court rules so, i.e. when, even with a price adaptation, the execution of the contract cannot be reasonably requested.

20. What rights are commonly granted to third parties (e.g. funders, purchasers, renters) and, if so, how is this achieved?

Contracts usually limit duties and rights of the parties to the agreement. Buyers get control and monitoring rights when buying turn-key projects.

21. Do contracts typically contain strict provisions governing notices of claims for additional time and money which act as conditions precedent to bringing claims? Does your jurisdiction recognise such notices as conditions precedent?

Yes, contracts typically contain provisions about notifications of defects which may be negotiated by the parties. Swiss law recognizes these requirements as conditions precedent.

22. What insurances are the parties required to hold? And how long for?

Parties are required to hold different insurances: the principal must hold a principal's civil liability insurance as well as construction works insurance. The contractor must hold a contractor's civil liability insurance, a building insurance, a fire and elementary damages insurance, and insurance for materials and tools brought to the worksite by the contractor. These insurances need to be in place during performance of the works. A ground-up insurance is sometimes put in place for construction sites of a long duration and with several actors involved.

23. How are construction and engineering disputes typically resolved in your jurisdiction (e.g. arbitration, litigation, adjudication)? What alternatives are available?

Construction and engineering disputes in a domestic context are mostly resolved via litigation before ordinary courts. Arbitration is available (different ad hoc bodies have been developed) but the number of cases resolved by this way remains limited, due to high costs associated thereto.

24. How supportive are the local courts of arbitration (domestic and international)? How long does it typically take to enforce an award?

Domestic courts are rather supportive of arbitration. They can be asked to nominate the members of the arbitral tribunal if such members are not appointed within a reasonable deadline. Ordinary courts may also be asked to order interim measures as well as to support the arbitral tribunal if the evidence gathering or any other procedural act requires the assistance of the official authorities. In certain situations, an award may be appealed to the ordinary courts or to the Federal Supreme Court. Timing for the enforcement highly depends on the merits of the case.

25. Are there any limitation periods for commencing disputes in your jurisdiction?

There are no specific rules or limits to the commencement of disputes, but such are generally dictated and/or limited by the rules on time-barring periods, which the defendant can raise. The right of the principal to assert claims due to defects in the work is generally limited to two years from acceptance of the work if SIA norms are integrated and to five years in a standard contractor's agreement (i.e. if SIA norms are not integrated). Under the standard CO rules, a claim for defect is only valid if the notice for defect was made immediately, i.e. within 24 to 48 hours from noticing the defect.

26. What are the biggest challenges and opportunities facing the construction sector in your jurisdiction?

The biggest legal and regulatory challenges facing the construction sector in Switzerland for the moment is the implementation of the (first part of the) revised Federal Act on Spatial Planning ("SPA") with stricter conditions applicable to zoning plans and building in non-buildable areas, as well as an increasing pressure on prices in transboundary areas.

The second part of the revisions of the SPA is yet to be enacted but it is still unclear when it will be in force. Such revision primarily concerns the constructions outside the construction areas. The Swiss Federal Council intends to hold on to the fundamental principle of the separation of constructible and non-constructible areas but aims at decreasing or at least stabilizing the stock of constructions outside the construction areas. However, to enable the Cantons to take into account Cantonal or regional peculiarities, the Federal Council is prepared to give the Cantons more leeway with regard to constructions beyond the construction zone.

From a non-legal perspective, the biggest challenge facing the construction sector in Switzerland is certainly the negative interest policy of ECB and the Swiss central bank SNB and its long-term effects on the booming Swiss construction sector. Ambitions carbon emission targets on the one hand and their foreseeable effect on existing and

new constructions will, together with the expected continuing growth of the Swiss population on the other hand, offer significant opportunities and additional challenges for the construction sector in Switzerland.

27. What types of project are currently attracting the most investment in your jurisdiction (e.g. infrastructure, power, commercial property, offshore)?

While commercial and residential property investments continue to remain on record high levels, infrastructure related projects and investments have become more and more a focus point in Switzerland (tramway, railroad, transboundary railway Cornavin-Eaux-Vives-Annemasse, so-called "CEVA", new underground hyperloop cargo transportation projects such as Cargo Sous Terrain, etc.).

28. How do you envisage technology affecting the construction and engineering industry in your jurisdiction over the next five years?

Technology driven innovations affecting the construction and engineering industry are for example the increasing use of Building Information Modeling (“BIM”). This is a method of “data and information based” cooperation between the parties which requires systematic contractual arrangements. BIM will probably allow for a better survey of the different steps in construction procedures and standardize the information available to the different parties. As of today, there is no statutory regulations on the BIM method. However, there are neutral frameworks for a contractual basis provided by private institutions such as the SIA or the Coordination Conference of the Building and Real Estate Authorities of Public Owners. Questions of intellectual property on the data collected via BIM will arise. Similarly, it is to be expected that more and more buildings will be optimized for power and energy neutrality and self-sufficiency through improved solar and earth energy absorption technologies and other sustainable forms of local power generation and through improved forms of seasonal building isolation.