

IBA International Construction Projects Committee

ADR in Construction

Switzerland

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1 Background

1.1 Which type of dispute resolution is most often used in construction matters in your jurisdiction? Can you give reasons why one type of dispute resolution is preferred above another? If there have been changes in preference in the past ten years, what has caused this?

A number of dispute resolution mechanisms are used in construction matters in Switzerland, including court litigation and arbitration, and many other major forms of alternative dispute resolution (“**ADR**”), namely mediation, conciliation, expert determination, and different forms of dispute boards. These latter forms of ADR are often used as first steps before proceeding to arbitration or litigation. In addition, disputes submitted to the Swiss courts are, in certain circumstances, subject to mandatory pre-litigation conciliation proceedings.

The most widely used conditions of contract for Swiss domestic construction contracts, the SIA Norm 118 of the Swiss Society of Engineers and Architects (the “**SIA**”), provide for disputes to be submitted to the competent state court unless the parties agree otherwise (Art. 37(3) SIA Norm 118). Arbitration is, however, also viewed as being well-suited to construction disputes given the procedural flexibility it affords and the ability of the parties to select arbitrators who have some experience with construction matters.

For many of the same reasons, arbitration is also a commonly used form of dispute resolution in respect of international construction contracts, for which Swiss law is a popular choice of law, and in which parties often designate Switzerland as the seat of arbitration. Parties to international construction contracts are often unwilling to submit their disputes to the local courts in the country of the other contracting party, or in the jurisdiction in which the works are to be carried out. It is also easier to enforce arbitral awards than court judgments in many foreign jurisdictions as a result of the New York Convention.

Dispute review boards and dispute adjudication boards are not widely used for domestic construction projects. However, a form of dispute review boards issuing non-binding recommendations has been used with success to resolve several disputes concerning the on-going CHF 10 billion construction of the Gotthard Base Tunnel, the world’s longest railway tunnel and one of the largest infrastructure projects in the Switzerland’s history. Dispute review boards and dispute adjudication boards are also commonly used in contracts related to large international construction projects, which, as mentioned above, are often governed by Swiss law and/or provide for Switzerland as the seat of any arbitral proceedings.

1.2 Are there special laws on resolving construction disputes in your jurisdiction (for example statutory adjudication)?

Unlike some other jurisdictions, there are no special laws which govern the resolution of construction disputes in Switzerland. In particular, there is no regime of statutory adjudication, no special procedures apply to construction disputes submitted to the Swiss courts, and none of the Swiss cantonal courts have special chambers dedicated to construction disputes.

1.3 Are there provisions in the legislation concerning civil procedure or in the civil code (if your jurisdiction has one) or other legislation that would apply to binding decisions of non-statutory dispute adjudicators? What type of binding decisions are known in your jurisdiction that are used for construction disputes (please state the names used in the language of your jurisdiction and describe the main characteristics).

A number of types of procedures leading to binding decisions are used to resolve construction disputes in Switzerland, including adjudication and expert determination (“*expertise-arbitrage*” or “*Schiedsgutachten*”), although the latter is used only in respect of distinct issues of fact or law, and not to resolve a dispute as a whole.

No specific provisions governing adjudication mechanisms, such as dispute adjudication boards, exist in Swiss legislation. This was also the case for expert determination (“*expertise-arbitrage*” or “*Schiedsgutachten*”) until the entry into force of the new federal Code of Civil Procedure (the “**CCP**”) in 2011. Article 189 CCP now expressly provides that parties may agree that certain disputed facts be determined by an “expert-arbitrator”, although pursuant to the jurisprudence of the Swiss courts, legal issues can also be submitted to expert determination.

Unlike an arbitral award, expert determinations and the binding decisions of adjudicators do not have *res judicata* effect, and are not directly enforceable. Article 189(3) CCP does, however, expressly provide that Swiss courts are bound by an expert determination under certain conditions, *inter alia* that (1) there was no ground for recusal of the expert arbitrator, (2) the expert determination was rendered in an impartial manner, and (3) the expert determination is not manifestly incorrect. Although the CCP does not apply to arbitral tribunals, an arbitral tribunal with seat in Switzerland would likely seek guidance from the conditions in Article 189(3) CCP in determining whether it is bound by an expert determination. Decisions of adjudicators, such as decisions rendered by a dispute adjudication board, are in principle contractually binding, and Swiss courts and arbitral tribunals would treat them as such.

1.4 What are the legal differences in your jurisdiction between arbitration and binding decisions (adjudication)? Are there specific procedural rules for arbitration that do not apply to binding decisions/adjudication/expert determination decisions?

As explained under 1.3 above, the main difference between arbitration and other binding ADR mechanisms, such as adjudication or expert determination, is that arbitral decisions are directly enforceable and have *res judicata* effect. The outcome of an adjudication can, however, be contractually binding on the parties. An expert determination is binding pursuant to the CCP, subject to certain conditions, although, unlike arbitration or adjudication, it is aimed at resolving distinct issues of fact or law, and not a dispute as a whole.

Swiss law provides a comprehensive legal regime governing domestic and international arbitrations, which does not apply to adjudication or expert determination. Domestic arbitration is governed by Part 3 of the CCP, while Chapter 12 of the Swiss Private International Law Act (“**PILA**”) applies to international arbitral proceedings with seat in Switzerland. These regimes do not, however, set out detailed procedural rules. Instead, they leave a great deal of discretion to the parties or to the arbitral tribunal to determine the applicable procedure, subject to certain minimum standards of due process (see Question 5.1 below).

A distinguishing feature of Swiss arbitration law is that all challenges of arbitral awards are heard directly by the highest Swiss court, the Swiss Federal Supreme Court, without any possibility of appeal. The grounds for seeking the annulment of an international arbitral award are very limited. Expert determinations are not subject to the same regime, and would therefore have to be challenged in proceedings before the competent court of first instance, or before a court or tribunal before which they are invoked.

1.5 Does your country have special institutions (arbitral or otherwise) dealing with construction disputes? What is the role of these institutions, for example are they supervising the proper conduct of the proceedings or involved in appointments?

The Swiss Society of Engineers and Architects, which publishes the most widely used conditions of contract in Swiss domestic construction projects (the SIA Norm 118), recently published, along with other professional organisations in the construction and real estate fields, a set of arbitration and conciliation rules for construction and real estate disputes (known as the “Construction + Real Estate Rules”). Proceedings under the Rules are administered by a registry, which fulfills largely the same role as other arbitral institutions, such as verifying the existence *prima facie* of an arbitration or conciliation agreement, administering deposits, and appointing arbitrators where required. The registry also maintains a list of specialised conciliators and arbitrators, although parties are free to choose an arbitrator or conciliator who is not included on the list. Only a small number of cases have, however, been conducted under the Rules since they were first published in 2007.

1.6 How prevalent is mediation for construction disputes in your country? What other forms of non-binding dispute resolution for construction disputes are used in your country (for example dispute recommendation boards)? Are hybrid forms of

dispute resolution used for construction disputes (for example recommendations that become binding after some time if not contested).

It is difficult to obtain figures on the use of mediation in construction disputes in Switzerland, however it appears that mediation is becoming more prevalent, especially in respect of larger projects. Other forms of non-binding dispute resolution, such as conciliation or dispute review boards, are also used. Under the new CCP, conciliation is, in principle, a mandatory preliminary step for disputes submitted to the Swiss courts (see Articles 197-212 CCP). There are, however some exceptions to this rule, including that it does not apply if there is a counterclaim, that a claimant may waive the procedure if the defendant resides outside Switzerland, and that the parties may together agree to waive the procedure if the amount in dispute is CHF 100,000 or higher (Article 199 CCP).

Hybrid forms of dispute resolution, such as dispute adjudication boards, are also used, usually in the context of multi-tiered dispute resolution clauses. Such forms are especially used in respect of large international construction projects, which are often governed by Swiss law.

1.7 Would FIDIC Red Book type DAB decisions be considered valid evidence in subsequent arbitration or court proceedings in your jurisdiction? What would the role of these DAB decisions be for further proceedings?

It is unclear whether a FIDIC Red Book type DAB decision could be considered as valid evidence in subsequent proceedings before the Swiss courts. The CCP sets out a list of the types of evidence that are admissible before Swiss courts (Art. 168 CCP), including documents that “are able to constitute proof of legally relevant facts” (Art. 177 CCP), as well as expert opinions (Art. 183 CCP) and expert determinations (Art. 189 CCP). A DAB decision would not qualify as an expert opinion or expert determination within the meaning of the CCP. It might, however, be considered a document within the meaning of Art. 177 CCP, although a DAB decision will not usually in itself be evidence of a fact in dispute between the parties, and the matter does not appear to have been addressed by the Swiss courts. If a DAB decision is considered to be valid evidence, a Swiss court would be free to weigh it as it sees fit (Art. 157 CCP).

A DAB decision would likely be considered to be valid evidence in arbitral proceedings in Switzerland, which are not subject to the rules governing the admissibility of evidence set out in the CCP for Swiss court proceedings. As mentioned above in 1.4 and below in 5.3, Swiss arbitration law leaves a great deal of discretion to the parties and to the arbitral tribunal to determine the applicable procedural rules, including as to the admissibility of evidence. Parties may, for example, expressly agree that a DAB decision will be admissible as evidence in a subsequent arbitration, as is contemplated in Clause 20.6 of the FIDIC Red Book. Even in the absence of such an agreement, however, arbitral tribunals are free to admit DAB decisions as evidence, and to assess their weight.

In assessing the weight to be given to a DAB decision, however, an arbitral tribunal will have to be mindful of the requirement that it must itself take the evidence (Art. 184(1) PILA). An arbitral tribunal would therefore likely not be able to simply rely on findings of fact in a DAB decision without itself taking the relevant evidence.

1.8 What form of ADR is considered to be cost effective for construction disputes in your jurisdiction? Please explain what type of costs is usually allocated to which party and how this compares to court litigation.

It is difficult to assess what forms of ADR are considered to be cost-effective for construction disputes in Switzerland, as we are not aware of any studies or surveys that have been conducted on the issue, and since the cost-effectiveness of various forms of ADR may in particular depend on the nature of a particular dispute or construction project.

As mentioned in 1.1 above, the most widely used conditions of contract for domestic construction projects, the SIA Norm 118, provide for disputes to be submitted to the competent Swiss courts, unless otherwise agreed by the parties. The recent CCP introduced mandatory pre-litigation conciliation in order to foster as much as possible a quick and inexpensive resolution of disputes submitted to the courts. In addition, mechanisms akin to a dispute review board have been used with success in avoiding litigation in certain large infrastructure projects, and are therefore generally viewed as being cost-effective.

Arbitration, which is also used in construction disputes in Switzerland, may be viewed as being more cost-effective than litigation in certain circumstances. An arbitral tribunal is generally free to allocate the costs of arbitration, and the parties' costs for legal representation and other assistance, between the parties as it considers appropriate. In many cases, arbitral tribunals will order the losing party to bear a greater share or all of the costs of arbitration, and to pay part or all of the (reasonable) costs incurred by the winning party. The Swiss Rules even specifically provide that the losing party will in principle bear the costs of the arbitration, although this rule does not apply to the costs incurred by the winning party, and the tribunal may, if it considers it reasonable to do so, apportion the arbitration costs differently (Art. 40(1) and (2) Swiss Rules). Tribunals will typically take into account a number of factors, including the parties' conduct, in deciding on the allocation of costs.

In court proceedings, the judicial or court fees will be borne by the losing party (Art. 106 CCP), although the courts can in certain circumstances depart from that general rule (Art. 107 CCP). The allocation of the parties' legal costs follows the same rule. However, a winning party may only be able to recover a fraction of its real legal costs, as the courts will fix the costs on the basis of the schedule for legal costs established by the relevant canton (Arts. 96 and 105 CCP).

2 Dispute resolution agreements

2.1 What are the requirements for a valid arbitration agreement and a valid multi-party arbitration agreement? Would clause 20.6 of the FIDIC Red Book be considered a valid arbitration clause? Would this clause prevent a party from seeking interim measures from a competent court?

There are very few requirements of content or of form for arbitration agreements under Swiss law, whether bilateral or multi-party. In terms of content, it must be clear that the parties intend to exclude the jurisdiction of the State courts and submit their dispute to an arbitral tribunal. In case of doubt, Swiss law requires a restrictive interpretation of the parties' intentions, as the existence of an arbitration agreement cannot be assumed lightly. The arbitration agreement must also identify the dispute or legal relationship which it covers in a sufficiently clear way. As long as these two essential elements of content are present, an agreement which is otherwise incomplete, unclear, or contradictory will not necessarily be invalid.

With respect to form, Swiss law only requires that the arbitration agreement must be made in writing, in a manner which allows it to be evidenced by a text (Article 178(1) PILA). This requirement is arguably less onerous than that of Article II(2) of the New York Convention, which refers to a signature of the parties or an "exchange" of letters or telegrams.

In light of the above, and provided it accurately reflects the intentions of the parties, Clause 20.6 of the FIDIC Red Book would likely be considered a valid arbitration clause under Swiss law.

An arbitration agreement does not, under Swiss law, prevent a party from seeking interim relief from a competent Swiss or foreign court, however the jurisdiction of a court to grant such relief will be governed by its own law. The parties may waive the right to seek interim measures from a State court, although it is unclear whether they could waive their right to seek such measures before the arbitral tribunal is constituted, when they would have no other option than to apply to a State court. Clause 20.6 of the FIDIC Red Book does not in any event provide for such a waiver, and therefore would not normally prevent a party from seeking interim measures from a competent court.

2.2 Are there any restrictions on enforceability or validity of arbitration clauses regarding standard forms of contracts, including consumer protection laws or similar laws? Is this the same for other forms of ADR?

There are no specific restrictions in Swiss law on the enforceability or validity of arbitration clauses contained in standard forms of contracts. However, Swiss law does provide that consumers cannot waive in advance the right to submit a dispute arising from a consumer contract to the courts at her or his place of residence, or at the place of residence of the supplier (Articles 32 and 35 CCP; Article 114 PILA). Whether or not a construction contract would qualify as a consumer contract, in other words whether it could be considered to relate to “goods and services for ordinary [or usual] consumption intended for a consumer’s personal or family use...” (Article 32 CCP; Article 120(1) PILA) will have to be determined on a case by case basis. In addition, arbitration clauses, or clauses providing for another form of ADR, may in certain circumstances be rendered invalid or unenforceable by Swiss law on general terms and conditions, which applies to terms and conditions that have not been seriously negotiated between the parties.

Such circumstances might include situations in which a party cannot reasonably determine the content of the general terms and conditions, although this is unlikely to be an issue for construction contracts, as any standard forms will typically be included within the contractual documents. A clause may also be invalid if it is unusual and was not specifically brought to the attention of a weaker or less sophisticated party. In order to be considered “unusual”, a clause must be inconsistent with what the accepting party could reasonably expect, and must be objectively alien to the type of contract or transaction, which is the case for example if it leads to a fundamental changes in the nature of the contract. Depending on the circumstances, an arbitration clause in a construction contract might be considered to be “unusual”, especially in respect of small projects involving an unsophisticated party. Swiss courts or tribunals applying Swiss law may also interpret arbitration or ADR clauses contained in general terms and conditions restrictively, at least insofar as they may be considered less favourable to the party accepting them than the default rules of law, under which a party may have recourse to the State courts.

Finally, Article 8 of the Swiss Federal Act on Unfair Competition (*Bundesgesetz gegen den unlauteren Wettbewerb*) (“UCA”) protects consumers from general terms and conditions which “create a considerable and unjustifiable imbalance between [their] contractual rights and obligations.” Although the CCP and PILA already preclude a waiver by consumer of his or her right to resort to State courts, the definition of a consumer contract under the CCP and PILA is quite restrictive. The definition of a consumer under the UCA, which might for example include an individual hiring a contractor to build a house, is arguably broader. Therefore, Article 8 UCA may, in certain circumstances, also constitute a barrier to an arbitration or ADR clause, provided it can be shown to “create a considerable and unjustifiable imbalance between [the consumer's] rights and obligations.”

2.3 In the standard conditions that are mostly used for construction projects in your country, is there a clause on arbitration? If so, is reference made to an

arbitral institution and the rules of this institution? Are other forms of dispute resolution more common in these standard conditions?

The most widely used standard conditions for domestic construction projects in Switzerland are the SIA Norm 118, which, as explained in 1.1, provides for disputes to be submitted to the competent court unless the parties agree otherwise. Many international construction contracts governed by Swiss law incorporate or are based on the FIDIC conditions, which provide for the submission of disputes to a dispute adjudication board, followed by arbitration under the ICC Rules.

2.4 May arbitration agreements bind non-signatories (for example subcontractors)? If so, under what circumstances? Is this different for other forms of ADR?

Arbitration agreements can be extended to bind non-signatories, such as guarantors or subcontractors, however Swiss law imposes restrictive conditions on such extensions. The key factor in determining whether an arbitration agreement can be extended to a non-signatory is the parties' intentions, as expressed by the terms of the contract or their conduct. In particular, an arbitration agreement could be extended to a third party if its conduct could be understood, in good faith, as demonstrating an intention to be bound by the agreement. This could for example be the case where a third party interferes in the performance of the contract in which the arbitration agreement is contained. The threshold is, however, a high one; there must be clear evidence of the non-signatory's intention to be bound. In addition, the mere affiliation to the same group of companies is not sufficient to justify the extension of an arbitration agreement, as the Swiss Federal Supreme Court has clearly rejected the group of companies doctrine.

The extension to a third party of an agreement to a form of ADR other than arbitration, such as expert determination or mediation, would also depend on the intention of the parties. Swiss law might, however, more easily admit an extension of an ADR agreement than of an arbitration agreement if it would not deprive the non-signatory of its right to ultimately submit disputes to the State courts.

2.5 If expert determination is not supported by legislation and the binding nature of expert determination derives solely from the agreement of the parties to submit their dispute to the expert, is this process mandatory and is any resulting determination binding on the parties? What needs to be in the contract to ensure this?

As explained in 1.3 above, expert determination is governed in Switzerland by Art. 189 CCP, which provides, *inter alia*, that the Swiss courts are, subject to certain conditions, bound by an expert determination. Expert determination is, however, based on the agreement of the parties to submit disputed facts or legal issues to an "expert-arbitrator". According to Article 189(2) CCP, which refers to Articles 17(2) CCP, an agreement on

expert determination must be concluded in writing or in a form which allows it to be evidenced by a text.

While the CCP does not set out any requirements as to the content of an expert determination agreement, the parties would be well advised to ensure that their agreement clearly reflects their intention to resort to expert determination and not to arbitration, and to be bound by the outcome. Distinguishing between expert determination and arbitration agreements can sometimes be difficult. In doing so, the Swiss courts will notably look to their wording, and in particular to references, if any, to an arbitral tribunal, arbitrator, or seat of arbitration. They will also consider the scope of the mandate referred to the arbitrator/expert, as only distinct factual or legal issues, and not a dispute as a whole, can be submitted to an expert-arbitrator. In addition, Swiss courts will look at whether the parties intended the resulting determination to be enforceable; unlike an arbitral award, an expert determination is not enforceable.

2.6 Construction contracts may contain dispute resolution clauses requiring several tiers of dispute resolution processes typically culminating in arbitration or court litigation. In your jurisdiction, would a party be allowed to skip one or more tiers before starting litigation or arbitration? How would a contractual multi-tiered dispute resolution process be characterized in your jurisdiction? Is the multi-tiered dispute resolution clause common in construction contracts and if so, are there problems with the use of this type of clause?

Given the numerous and often complex disputes that can arise in a large construction project, multi-tiered dispute resolution clauses are quite common in construction contracts for large projects, especially in international contracts which are either governed by Swiss law or provide for arbitration in Switzerland.

Whether or not a party might, under Swiss law, be allowed to skip one or more tiers set out by such a clause before starting litigation or arbitration is a question which often arises, and the answer depends on the intention of the parties. The more the wording of the clause suggests an obligation to comply with pre-arbitration or pre-litigation procedures, the more likely that it will be enforced by an arbitral tribunal or court. In a recent decision, the Swiss Federal Supreme Court for example found that DAB proceedings were a precondition for arbitration under Clause 20 of the FIDIC Conditions of Contract (decision 4A_124/2014) (for a more detailed summary of the decision, see Question 9). If it is established that parties intended a pre-arbitration or pre-litigation procedure to be compulsory, a failure to comply is generally considered to deprive an arbitral tribunal or court of jurisdiction *ratione temporis* (see the decision of the Swiss Federal Supreme Court 4A_488/2011, ASA Bull. 1/2013, p. 112). A party might not be obliged, however, to resort to a pre-arbitration or pre-litigation procedure such as conciliation or mediation if it is manifest that the opposing party will refuse to participate.

3 ADR and jurisdiction

3.1 Are there disputes that can only be decided by a court or by an administrative law tribunal/court? What type of disputes regarding construction projects cannot be subjected to ADR? (For example, are disputes relating to decennial liability arbitrable?)

Swiss law defines very broadly the types of disputes which can be submitted to arbitration. Article 177(1) PILA provides that any dispute over a “financial interest” (“*jeder vermögensrechtliche Anspruch*”), in other words an interest which is measurable in monetary terms, can be the subject of an international arbitration. Art. 354 CCP, which applies to domestic arbitration, provides that any claim which the parties are “free to dispose of” can be submitted to arbitration. Under Swiss law, the types of issues that cannot be freely disposed of by the parties are very limited, and would not apply to most claims that typically arise in construction disputes; they include certain family law issues and the invalidation of securities, but also changes to a public registry, and decisions as to zoning of lands. In sum, the vast majority of issues arising in construction projects would likely be arbitrable under Swiss law, including disputes relating to decennial liability.

Swiss legislation does not impose any limitations on the types of disputes that can be submitted to other forms of ADR, with the exception of the limitations on the scope of expert determination, which are addressed in 3.2 below.

3.2 Is there a restriction on the matters that may be the subject of a binding expert determination or other binding third party decision?

As mentioned in 1.3 above, parties may submit to expert determination distinct factual or legal questions which are in dispute between them, but not a dispute as a whole. In addition, pursuant to Article 189(3)(c) CCP, in order to be binding on the courts, an expert determination must relate to a dispute which the parties are free to dispose of, as is also the case for domestic arbitration (Art. 354 CCP – see 1.3 above). Swiss legislation does not impose any limitations on the types of disputes that can be submitted to other binding third party decisions.

3.3 Are there any restrictions on the type of arbitral awards or binding decisions that may be issued(For example, may a FIDIC Red Book type DAB rule on questions of fact only or also on questions of law and are there any restrictions on the issues that this DAB may decide)?

There are no further restrictions under Swiss law on the type of arbitral awards or binding decision that may be issued. In particular, unless otherwise agreed by the parties, there is no restriction on a FIDIC Red Book type DAB ruling on questions of law.

3.4 Are public entities barred from settling disputes by ADR (arbitration, DAB/DRB and/or mediation)?

There are no rules barring Swiss public entities from settling disputes by ADR. In practice, public entities regularly conclude construction contracts with dispute resolution provisions which provide for one or more forms of ADR. For example, contracts for the Gotthard Base Tunnel project, one of the largest infrastructure projects in Switzerland's history, which were based on dispute settlement recommendations published by the Swiss Association of Road Professionals (VSS), provided for proceedings before dispute review boards issuing non-binding recommendations before parties could resort to the courts.

3.5 Do state parties enjoy immunities in your jurisdiction? Under what conditions?

Under Swiss law, states enjoy immunity in relation to their public acts (*acta jure imperii*), however there is no guarantee of immunity for their private acts (*acta jure gestionis*), such as personal injury, property damage (torts) or all types of commercial activities.

The issue of sovereign immunity is mainly governed by the jurisprudence of the Swiss courts, in particular that of the Swiss Federal Supreme Court. In addition, Switzerland is party to a number of international treaties on immunities that are directly applicable under Swiss law, namely the 1972 European Convention on State Immunity, the 1972 Additional Protocol to the European Convention on State Immunity, and the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (which is not yet in force).

3.6 Can procurement disputes be decided by ADR? If so, are there special requirements for this type of dispute or is only arbitration allowed?

Certain types of procurement disputes, namely those which relate to the patrimonial relations between the parties, such as disputes as to prices, are arbitrable, and could presumably also be submitted to other forms of ADR. However, disputes relating to administrative decisions involving the exercise of public powers cannot be decided by ADR. These include disputes as to decisions to allow a party to submit a bid, decisions awarding a tender, and decisions excluding a party from the tender process.

3.7 In the FIDIC Red Book, Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated "The Employer and the Contractor empower the DAB, among other things to (b) decide upon the DAB's own jurisdiction and as to the scope of the dispute referred to it,". In your jurisdiction,

in a situation where there are several interrelated contracts between the employer and the contractor (not all with a DAB clause), would the DAB be allowed to decide on issues outside the contract with the DAB clause? If the DAB purports to make a decision on a matter not referred to it, will that decision be deemed to have been made outside its jurisdiction?

The scope of a DAB's jurisdiction to decide on issues outside the contract which contains the DAB clause will depend on the agreement of the parties, which will be interpreted in accordance with the parties' intentions. If a DAB decides on a matter which is outside its remit, a party may of course issue a notice of dissatisfaction or object to or challenge the decision in any other way which may be provided for in the contract. In addition, any DAB decision which would otherwise be final and binding on the parties, but which is beyond the DAB's agreed remit, may not be considered to be binding on the parties by a court or tribunal.

4. Arbitrators, adjudicators, dispute board members, mediators

4.1 Are there special rules on arbitrator appointment or the appointment of tribunals or entities issuing binding decisions (like for example DAB's) regarding construction disputes in your jurisdiction? Do arbitrators, adjudicators etc. need to have special qualifications?

Swiss law does not set out special rules for the appointment of arbitrators, adjudicators, or other individuals called on to make binding determinations in construction disputes, or require them to have special qualifications. Under Swiss law, anybody can serve as an arbitrator, provided that she or he is independent and impartial. This is also true of "expert-arbitrators" under Article 189 CCP. While no provisions of Swiss law apply directly to dispute adjudication boards or other forms of ADR involving binding decisions, such decisions might not be considered to be binding if the individuals issuing them did not have a certain degree of independence and impartiality.

Nothing prevents parties, however, from agreeing that arbitrators, adjudicators, or experts must have certain qualifications beyond independence and impartiality. For example, parties might agree that arbitrators appointed to resolve a construction dispute involving complex technical issues must be engineers (although they should carefully consider the potential implications of such a choice, notably on the tribunal's ability to conduct the proceedings efficiently and in accordance with due process, and to assess legal issues). Expert determinations on specific factual issues will normally be rendered by experts in the relevant field, and parties will typically seek to appoint dispute adjudication board members who have experience handling large and complex construction disputes.

4.2 If there are special arbitral institutions for construction arbitrations, do these have a system of lists with names of arbitrators? Do these institutions appoint the arbitrators or do the parties appoint the arbitrators? Do the parties have to choose from these lists or are they free to have arbitrators that are not on the list? How are these lists composed? Is there a difference with other forms of ADR?

There are no special arbitral institutions for construction arbitrations which are widely used in Switzerland.

In 2007, various organisations in the construction and real estate sectors, including the SIA, did create a set of arbitration and conciliation rules for construction and real estate disputes (known as the “Construction + Real Estate Rules”). Very few cases have, however, been submitted to arbitration under the Construction + Real Estate Rules.

The Construction + Real Estate Rules are administered by a registry which maintains lists of arbitrators and conciliators, although the parties are free to appoint arbitrators or conciliators who are not included on the list. The registry is restricted to its list if it is called on to appoint a conciliator (where the parties are unable to reach an agreement), however it is not limited to the list for the appointment by the registry of an arbitrator. The lists are composed of judges and lawyers with experience in construction disputes who were selected and contacted directly by the registry.

4.3 In your jurisdiction, do arbitral tribunals and tribunals issuing binding decisions regarding construction disputes usually include a lawyer? If not, are there requirements that the secretary added to the tribunal must be a lawyer? Would the presence of a lawyer, either as member of the tribunal or as secretary added to the tribunal, be required if these tribunals are to rule on issues of law?

There are no figures available which would show the prevalence of non-lawyers acting as arbitrators, or as members of a body issuing binding decisions. As mentioned in 4.1 above, Swiss law does not require that arbitrators or members of other bodies issuing binding decisions have any particular qualifications, including legal qualifications. There is also no requirement that a tribunal composed of one or more non-lawyers be assisted by a secretary who is a lawyer.

However, it is probably safe to say that, more often than not, arbitral tribunals and other bodies issuing binding decisions include one or more lawyers. This is especially the case in the context of large international construction disputes. Legal expertise is usually desirable, notably to ensure that proceedings are conducted efficiently and in accordance with due process.

4.4 In construction industry arbitrations, how often do arbitrators belong to the engineering/construction profession? Are panels integrated both by lawyers and

construction professionals possible/common? Is there a difference with other forms of ADR?

There are no reliable figures available which would show the prevalence of arbitral tribunals composed in part or in whole of construction professionals, such as engineers or quantity surveyors. However, it is likely that arbitral tribunals are more often composed of lawyers (frequently with experience in construction disputes) than of construction professionals. Other forms of ADR, such as DAB proceedings, and especially expert determination, may be more likely to involve construction professionals.

There are no restrictions in Swiss law on tribunals being composed of both lawyers and construction professionals. This is also true of other forms of ADR.

4.5 Are arbitrators and tribunals issuing binding decisions allowed to use their own technical expertise without consulting the parties regarding the results of using this expertise?

Given the often highly technical nature of construction arbitrations, it is not uncommon for parties to appoint arbitrators who have relevant technical or other expertise. Such expertise may indeed be helpful to the arbitrator in understanding the parties' submissions, and the reports and testimony of any experts. The proceedings may also, in certain circumstances, be more efficient if the parties do not have to educate the tribunal on basic technical concepts which may be required to understand the issues in dispute. However, an arbitrator's use of his or her technical expertise must take into account, and be balanced with, the parties' fundamental right to be heard (see Art. 182(3) PILA). It may therefore sometimes be necessary for the arbitrator to consult the parties regarding the result of using his or her expertise. For example, an arbitrator may have to give the parties the opportunity to make submissions if he or she wishes to rely in the award on a technical concept which the parties have not previously addressed in their arguments.

4.6 Do the most used rules for construction arbitrations contain a rule for the tribunal to apply the rules of law to the merits of a case or do these rules contain a rule that the tribunal decide "ex æquo et bono", as "amiable compositeur", or in "equity"? Is there a difference with other forms of ADR?

The most widely used rules of arbitration provide that the arbitral tribunal may only decide *ex aequo et bono*, as *amiable compositeur*, or in equity if the parties have authorised it to do so (see for example Art. 21 ICC Rules; Art. 33 Swiss Rules; see also Art. 3.1 Construction + Real Estate Rules). Otherwise, the tribunal must apply the law agreed to by the parties, or, if no law has been chosen by the parties, the law which is most appropriate (Art. 21 ICC Rules), the law with which the dispute has the closest connection (Art. 33 Swiss Rules), or simply Swiss law (Art. 3.1 Construction + Real Estate Rules). The approach adopted in these rules of arbitration are essentially the same as that under Swiss arbitration law, which provides that, in the absence of a choice of law

or an agreement that the tribunal should decide *ex aequo et bono*, the tribunal must apply the law with which the dispute has the closest connections (Article 187(1) PILA).

5 ADR procedure

5.1 Are arbitrators and others making binding decisions required to follow any minimum due process rules? Does a party usually have a right to have legal representation?

Swiss law allows parties and tribunals a great deal of discretion in deciding on the procedure to follow in arbitral proceedings. It requires, however, that whatever the procedure chosen, arbitral tribunals must always guarantee the equal treatment of the parties and the parties' right to be heard in adversarial proceedings (Article 182(3) PILA; Article 373(4) CCP).

Similarly, in order for his or her determination to be binding under Article 189 CCP, an expert-arbitrator must guarantee the equal treatment of the parties and the parties' right to be heard, although the parties may be able to agree to limit their right to be heard. Although no provisions of Swiss law specifically govern proceedings before DABs, it is likely that DABs would have to comply with the same fundamental principles of due process in order for their decisions to be binding.

The Swiss courts have recognised that the right of parties to be represented and assisted in international arbitral proceedings forms part of the right to be heard. With respect to domestic arbitration, Article 373(5) CCP expressly provides that parties have a right to be represented. The issue of whether a right to representation exists in other forms of ADR, such as expert determination or proceedings before a dispute adjudication board, does not appear to have been addressed by the Swiss courts, however it is at least arguable that it does absent an agreement of the parties to the contrary.

5.2 Is the focus in the arbitral procedure and the procedure for tribunals issuing binding decisions on written submissions or on oral presentations?

Swiss law allows the parties and the arbitral tribunal, or any other entity issuing a binding decision, a great deal of discretion in organising the proceedings. Therefore, the procedure adopted can vary greatly from one case to another, and will notably depend on the nature of the case and the wishes of the parties. Nevertheless, it is common in arbitral proceedings that parties submit one or two rounds of written pleadings, as well as written witness statements and expert reports. The main purpose of hearings is often to allow parties to question the witnesses and experts adduced by the opposing party, although parties are usually afforded some time to present their cases, and tribunals

may schedule hearings the main purpose of which is to allow parties to make oral arguments.

5.3 Are there rules on evidence in the laws of your country and/or the arbitration rules and/or the rules for tribunals issuing binding decisions most commonly use or is this left to the discretion of the tribunal?

Swiss law does not impose rules on the presentation, admissibility, or assessment of evidence in arbitral proceedings, with the exception of the requirement that the arbitral tribunal must conduct the taking of evidence itself (Article 184(1) PILA, Art. 375(1) CCP). The parties' and the tribunal's broad discretion to determine the procedure of the arbitration (Art. 182(1) PILA, Art. 373(1) CCP), which for instance permits the parties to submit their dispute to a specific set of arbitration rules, therefore also extends to the rules of evidence.

The most widely used arbitration rules do not, however, address the taking of evidence in any detail, and merely leave the matter to the discretion of the tribunal. For example, the Swiss Rules provide that the "arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence" (Art. 24(2)), without setting out any criteria which the tribunal should apply in doing so. The Swiss Rules also provide little guidance on document production (Art. 24(2): "At any time during the arbitral proceedings, the arbitral tribunal may require parties to produce documents, exhibits, or other evidence...") or on the conduct of hearings (Art. 25(4): "At the hearing, witnesses and expert witnesses may be heard and examined in the manner set by the arbitral tribunal"). The rules of evidence contained in the ICC Rules are similarly sparse (see Arts 25 and 26 entitled "Establishing the facts of the case" and "Hearings").

Swiss law also does not set out any rules on evidence for other forms of ADR leading to binding decisions. For instance, Swiss law only requires that an expert determination be conducted in accordance with fundamental principles of due process in order to be binding (Art. 189(3) CCP).

5.4 Is a hearing mandatory for all forms of ADR?

In keeping with the wide discretion that Swiss law bestows on the parties and the tribunal to determine the procedure of the arbitration (Art. 182(1) PILA; Art. 373(1) CCP), a hearing is not mandatory in arbitration proceedings. The most widely used rules of arbitration also do not require the tribunal to hold a hearing (see for example Art. 15(2) of the Swiss Rules), although under the ICC Rules, a hearing must be held if one of the parties requests it (Art. 25(6) ICC Rules). A hearing may, however, be required in certain circumstances in order to safeguard the parties' right to be heard. This might be the case, for example, where a party wishes to question a witness adduced by the other party.

Swiss law also does not require a hearing in other forms of ADR, such as expert determination (Art. 189 CCP), with the exception of the conciliation procedure provided for in Articles 197 to 212 CCP. The conciliation procedure, which is mandatory for disputes submitted to the Swiss courts (although parties may avoid it in certain cases: see Art. 199 CCP), requires the parties themselves to be present at a conciliation hearing (Arts. 203-204 CCP).

5.5 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules.”. Under your jurisdiction, would the DAB still be bound to conduct a hearing according to rules of “natural justice”? If so, what would this mean for conducting the hearing?

Swiss law does not impose any specific rules on DABs. It is likely, however, that in the same way as expert determinations, a court or tribunal would not consider a DAB decision to be binding on the parties if the proceedings, including any hearing, were not conducted in accordance with due process. In particular, a DAB would likely have to guarantee equal treatment of the parties, as well as the parties’ right to be heard, provided the parties have not agreed otherwise.

5.6 What type of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc.)? Is there a difference on this topic between arbitration and court litigation in your jurisdiction? Are experts used in the same manner in procedures for tribunals issuing binding decisions?

Three main types of experts are commonly used in construction arbitrations, namely (1) delay experts, (2) quantum experts, and (3) experts in specific technical fields relevant to the case (for example, if the quality of welds is an issue in a case, welding experts may be used). The types of experts often used in court litigation of construction disputes is often the same.

5.7 Are these experts mostly party appointed or appointed by the tribunal? Is there a difference as to the evidential value? How are the costs of experts allocated?

Both party-appointed and tribunal-appointed experts are used in construction arbitrations seated in Switzerland. Tribunal-appointed experts are traditionally more commonly used than party-appointed experts in civil law jurisdictions such as Switzerland, and the Swiss Supreme Court has ruled that the parties’ right to be heard requires an arbitral tribunal to appoint an expert in certain circumstances if a party requests it. Such a request must, *inter alia*, be made in time, the requested expert evidence must be necessary, and the requesting party must have accepted to advance the costs of the expert (although the other party might ultimately be ordered to bear part or all of those costs). In practice, however, party-appointed experts are regularly used in

arbitration proceedings with seat in Switzerland, especially in large international construction arbitrations.

There is no formal difference in the probative value of the reports and testimony of party-appointed or tribunal-appointed experts. As already explained above, arbitral tribunals have a great deal of discretion in assessing the evidence before them. Depending on their legal background and the practice in their own jurisdictions, however, arbitrators may give more or less weight to the evidence given by party-appointed experts. Some arbitrators, especially those from certain civilian jurisdictions, may perceive party-appointed experts as being less reliable as they are not required to be independent and impartial.

There are no rules under Swiss law as to how the costs of experts should be allocated in arbitral proceedings. Tribunals have broad discretion to decide on the allocation of the costs of arbitration, which include the costs of experts. Tribunals often order the unsuccessful party to bear the costs of either tribunal or party-appointed experts, however tribunals' approaches to the allocation of costs vary greatly and will depend, *inter alia*, on the facts of each case, the conduct of the parties, and the application arbitration rules. Under Art. 40(1) of the Swiss Rules, for example, the costs of arbitration, which include the costs of a tribunal-appointed expert, should as a general rule be borne by the unsuccessful party. However, this rule does not apply to the costs of party-appointed experts (Art. 40(2) Swiss Rules).

5.8 Is the expert supposed to be independent to the parties/counsel?

According to the jurisprudence of the Swiss Federal Supreme Court, tribunal-appointed experts must be independent and impartial (see also Art. 27(5) of the Swiss Rules). This is also the case for court-appointed experts before the Swiss courts (Art. 183(2) CCP). However, there is no requirement of independence and impartiality for party-appointed experts. A lack of independence of the expert from the party which appointed him or her may nevertheless have an impact on the court or tribunal's assessment of the weight to be given to his or her opinion.

5.9 Does the expert normally give written evidence or oral evidence?

It is common in arbitral proceedings for both tribunal and party-appointed experts to present one or more written reports, and to appear at a hearing in order to be questioned by the parties and the tribunal. For example, Art. 27(3-4) of the Swiss Rules, which deals with tribunal-appointed experts, contemplates the submission of an expert report, which the parties must be given the chance to comment on in writing, and a hearing at which the parties may examine the expert and present their own expert witnesses.

5.10 Can the tribunal ignore the expert statements in its decision, even if the tribunal has appointed the expert? Does the tribunal need to give reasons for

following or not following the statement of an expert? Can part of the decision by the tribunal be “delegated” to the expert?

A Swiss-seated arbitral tribunal is free to assess the weight to be given to the evidence of a tribunal-appointed expert, and may decide not to follow part or all of it. There is no specific duty for the tribunal to provide reasons for following or not following the opinion or conclusions of an expert it appointed, although a tribunal is under a general duty to issue a reasoned award (Art. 189(2) PILA; Art. 384(1)(e) CCP), and a failure to address evidence requested by a party might be considered to be in breach of the parties’ right to be heard.

While a tribunal-appointed expert may be called on to draw certain factual conclusions on the basis of her or his special knowledge, the tribunal cannot delegate its responsibilities in respect of the taking of evidence, and by extension its decision-making functions, to an expert either in part or in full, without the consent of the parties. The arbitral tribunal must itself conduct the taking of evidence (Art. 184(1) PILA, Art. 375(1) CCP).

It is, however, conceivable that the parties could agree to submit distinct factual or legal issues (but not the dispute as a whole) to a tribunal-appointed expert for a binding expert determination within the meaning of Art. 189 CCP (see the decision of the Swiss Federal Supreme Court 4A.438/2008, para. 3.2.1, which provides that expert determination and arbitral proceedings are not mutually exclusive).

5.11 Is “hot tubbing” (this involves experts from the same discipline, or sometimes more than one discipline, giving evidence at the same time and in each other's presence) a feature in construction arbitrations or procedures of tribunals issuing binding decisions in your jurisdiction?

Hot-tubbing is sometimes used by Swiss arbitral tribunals. It is unclear, however, to what extent hot-tubbing is used in procedures other than arbitration leading to binding decisions. Whether or not it is appropriate in a given proceeding is to be determined by the parties and the tribunal in the exercise of their broad discretion to determine the procedure to be followed.

5.12 Are site visits by the arbitral tribunal and tribunals issuing binding decisions regulated by the laws of your country and/or by the arbitration and other rules most used in your country? If not, are they allowed/mandatory?

Swiss law does not set out any specific provisions on site visits by arbitral tribunals or other bodies issuing binding decisions. Instead, such site visits fall within the broad discretion of the tribunal and the parties to determine the procedure, and are therefore neither prohibited nor mandatory.

5.13 Do all parties need to be present during the site visit and be given an opportunity to comment on the findings of the tribunal?

In principle, the parties to an arbitration must be given the opportunity to be present during a site visit, although a site visit can be conducted even if one or more of the parties refuse to attend. It has been suggested by commentators that the parties need not be given an opportunity to attend a site visit if the site is freely accessible, it being sufficient for the tribunal to notify them subsequently and give them the opportunity to comment on its observations.

Where parties are given the opportunity to be present during a site visit, neither Swiss law nor the main arbitration rules appear to impose a general requirement for the parties to also be given an opportunity to comment on the tribunal's findings. However, it may be prudent for the tribunal to prepare a record of the site visit, including of its observations, and to invite the parties to comment on it.

5.14 How common and how important are generally witness testimonies in construction arbitrations and other forms of ADR in your jurisdiction? Under the rules most often used in your jurisdiction for construction disputes, are there any restrictions on either not admitting testimony, or not giving value to the declaration of witnesses that are employees or consultants of the party presenting their testimony?

Witness testimony is often an important form of evidence in construction disputes, and it is commonly used in construction arbitrations and, possibly to a lesser extent, other forms of ADR. The arbitration rules most often used in Switzerland for construction disputes do not impose any restrictions on admitting, or on the weight to be given to, the testimony of witnesses who are employees or consultants of a party.

5.15 Under the rules most often used in your jurisdiction for construction disputes, what degree of discretion do the arbitrator(s) or tribunals issuing binding decisions have in weighing evidence, including balancing potentially contradictory pieces of evidence or disregarding any piece of evidence? Are there any rules on valuation of evidence in the law or in such rules?

Neither Swiss law, nor the most commonly used rules of arbitration, set out detailed rules on the assessment of evidence by arbitral tribunals or other bodies issuing binding decisions. Arbitral tribunals and other bodies therefore have broad discretion to assess the evidence before them.

6 Interim measures and interim awards

6.1 Are measures devoted to preserving a situation of fact or of law, to preserving evidence or ensuring that the ultimate award in a case will be capable of enforcement allowed in your jurisdiction? Are these measures usually decided by the arbitral tribunal or by a judge?

Both arbitral tribunals and state courts have the authority to issue a wide array of interim measures, and in the context of arbitral proceedings, they have concurrent jurisdiction to do so (Art. 183 PILA; Art. 374 CCP). Parties to disputes which are covered by an arbitration agreement can therefore opt to seek interim measures from a Swiss or foreign State court or an arbitral tribunal.

Considerations a party may take into account in deciding whether to resort to the arbitral tribunal or to the State courts include the nature of the measure it is seeking, the urgency of the measure, the likelihood that the other party will comply with a measure ordered by an arbitral tribunal, and whether there is a risk that the other party could frustrate a measure if it is informed of it before it is granted. Parties may also agree to exclude the jurisdiction of the courts to grant interim measures, although according to some commentators, such an agreement could not validly be enforced before the constitution of an arbitral tribunal, as it could effectively constitute a waiver of the right of access to justice.

6.2 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (g) decide upon any provisional relief such as interim or conservatory measures (...) The FIDIC Red Book has no explicit provisions for DAB decisions that have a provisional nature. It is not clear if, how and when these should be followed by decisions that are meant to be final and binding. Would this lead to problems in your jurisdiction?

Although parties may agree to empower a dispute adjudication board to issue interim measures, there are no rules under Swiss law specifically governing how dispute adjudication boards or similar entities should exercise such powers. Interim measures are, however, meant to protect or guarantee the parties' rights during the course of proceedings on the merits. This is reflected in the Swiss CCP, which provides that that interim measures ordered by the Swiss courts will expire if the party that sought them does not initiate proceedings on the merits within a period of time to be fixed by the courts (Art. 263 CCP). Interim measures ordered by a DAB may similarly be considered to lose any binding effect they may have on the parties if the party which sought them does not submit the relevant dispute on the merits to the DAB. A court may, in particular, find that it would be inconsistent with the intention of the parties for such interim measures to continue to be binding indefinitely in the absence of proceedings on the merits.

7 Awards, decisions, recommendations, negotiated agreement

7.1 Is a binding decision (for example the decision of a DAB) enforceable in your country? If not directly enforceable, what steps must be taken to get a binding decision enforced? Would FIDIC Red Book clause 20.7 allow enforcing a DAB decision directly through court in your jurisdiction (skipping the arbitration)?

Unlike an arbitral award, a decision of a DAB or other ADR body which is not an arbitral tribunal would not be enforceable in Switzerland, even though it may be binding on the parties. A party may, however, bring a claim arising from the failure of the other party to comply with a decision which is contractually binding between the parties.

If such a claim is covered by an arbitration agreement, as is for example contemplated in Clause 20.7 of the FIDIC Red Book, a party would in principle be precluded from bringing it before the courts, as doing so would likely constitute a breach of the arbitration agreement.

7.2 Does the award or binding decision have to be reasoned?

Swiss law requires that an arbitral award be reasoned (Art. 189(2) PILA, Art. 384(1)(e) CCP). As a practical matter, however, the failure to state reasons will not be fatal to an award. The jurisprudence of the Swiss Federal Supreme Court suggests that the mere absence of reasons is not in itself a ground for annulment of an award (see Swiss Federal Supreme Court Decision 130 III 125, para. 2.2).

No provision of Swiss law requires that entities other than arbitral tribunals issuing binding decisions, such as DABs, must state reasons.

7.3 Are dissenting opinions in arbitral awards allowed in your jurisdiction and if so, can they be added as a separate opinion to the award? Are they allowed in other forms of ADR?

Swiss law does not contain any provisions on the admissibility of dissenting opinions in arbitration or other ADR proceedings. In the context of arbitration, the Swiss Supreme Court has ruled that, unless the parties have agreed to the contrary, the majority of the arbitral tribunal may decide on whether and how to communicate a dissenting opinion to the parties (Swiss Federal Supreme Court Decision 4P.23/1991, para. 2b, confirmed by 4P.196/2003, para. 1.2). A dissenting opinion does not form part of the award itself, but it may be annexed to the award or delivered to the parties separately.

7.4 Can an award or (binding) decision be corrected, clarified or reconsidered? If so, can the tribunal do this on its own accord or only if parties request it to do so?

Swiss law allows an arbitral tribunal to interpret or explain certain parts of its award, correct errors in the award, and render an additional award on claims asserted during the arbitration but which were not addressed in its initial award. These powers are expressly provided for in Art. 388 CCP, which applies to domestic arbitration, but not in the PILA, which applies to international arbitrations. The doctrine and the jurisprudence of the Swiss Federal Supreme Court has nevertheless confirmed that international arbitral tribunals have the same powers in this respect as domestic arbitral tribunals. It is unclear whether an arbitral tribunal may, under Swiss law, correct or interpret its award, or render an additional award, on its own motion. Art. 388 CCP only contemplates the tribunal exercising such powers upon the request of a party, however commentators have suggested that tribunals can act on its own motion, and, as discussed below, some arbitration rules expressly allow a tribunal to do so.

In accordance with their broad discretion to determine the procedure (Art. 182(1) PILA, Art. 373(1) CCP), the parties may, and often do, agree on the powers of the arbitral tribunal to interpret or correct its award, or to issue an additional award, by agreeing on a set of arbitration rules. The most widely used international arbitration rules expressly provide for the tribunal's powers in this respect (see Arts. 35-37 Swiss Rules; Art. 35 ICC Rules, which does not, however, contemplate additional awards). Under the Swiss Rules and the ICC Rules, a tribunal may correct its award on its own motion, but cannot interpret its award or, in the case of the Swiss Rules, render an additional award, on its own motion.

Swiss law also allows for the revision of an arbitral award in certain circumstances, such as if a party subsequently discovers significant facts or decisive evidence which it could not have submitted during the arbitration, or if the award was influenced by a criminal offence. As is the case for interpretation and correction, revision is expressly contemplated for domestic arbitral awards in Art. 396 CCP, but not for international arbitral awards in the PILA. Nevertheless, the Swiss Federal Supreme Court has ruled that it can decide on requests for the revision of international arbitral awards in the same way as the competent cantonal courts can decide on requests for the revision of domestic arbitral awards (Art. 396(1) CCP). In the event that the competent Swiss court admits a request for revision, it does not decide on the case anew; instead, the case is remitted to the arbitral tribunal (see Art. 399(1) CCP).

Swiss law does not set out any rules on the correction, interpretation, or revision of binding decisions other than arbitral awards, or as to issuing additional decisions. It is arguable, however, that bodies issuing such binding decisions, the powers of which are based in contract, do have such powers, subject to any agreement of the parties.

8 Enforcement of and challenges to awards and decisions

8.1 What steps would a party have to take to get to the enforcement binding third party decisions in your jurisdiction?

Both domestic arbitral awards rendered under Part 3 of the CCP, and international arbitral awards rendered by tribunals with seat in Switzerland under Chapter 12 of the PILA, are automatically enforceable in the same way as a judicial decision by a Swiss state court (see Art. 387 CCP). Therefore, a party seeking to enforce an award is not required to first obtain a declaration of enforceability (exequatur).

In Switzerland, different rules apply to the enforcement of monetary and non-monetary awards. The enforcement of monetary claims is governed by the Swiss Debt Enforcement and Bankruptcy Act of 1889 (DEBA; see Art. 335(2) CCP). Under the DEBA, a party can directly initiate debt enforcement proceedings on the basis of an award by applying for a payment order from the Debt Enforcement Office at the domicile or seat of the debtor. The Debt Enforcement Office then sends the debtor a Payment Order, giving it 20 days to pay the debt, after which the creditor can apply for a seizure of the debtor's assets, and 10 days to raise an objection. In the event the debtor raises an objection, the enforcement procedure is suspended, but the creditor can apply to the competent court for an order rejecting the objection. It is only at this stage that the creditor must produce the award. The grounds on which a debtor can rely to resist enforcement before the courts are limited. The debtor can for example contest the existence or finality of the award, but cannot raise any grounds which it could have raised in annulment proceedings (unless the parties have waived the possibility of seeking annulment).

The enforcement of non-monetary claims is governed by Arts. 335-346 CCP. Under the CCP, the beneficiary of an award can simply submit a request for enforcement to the competent court. Like for monetary claims, the grounds on which the other party can resist enforcement are limited.

The recognition and enforcement of foreign arbitral awards is governed by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (Art. 194 PILA). The procedure to be followed by a party seeking enforcement of a foreign award is, however, largely the same as that for awards rendered by tribunals with seat in Switzerland, and there is no requirement to obtain a declaration of enforceability in a separate procedure beforehand. In respect of monetary claims, the creditor must only comply with the formal requirements for enforcement under the New York Convention, namely the production of the authenticated original or certified copy of the award and arbitration agreement, if the creditor has to seek a court order rejecting an objection by the debtor. At that stage, the court will consider the requirements for enforcement, and any ground raised by the debtor to resist enforcement, under the New York Convention. In respect of non-monetary claims, the party seeking enforcement can initiate

enforcement proceedings directly, as it would for an award from a Swiss tribunal. The court will then consider the requirements for enforcement, and any grounds for resisting enforcement raised by the other party, under the New York Convention.

DAB decisions and other such forms of binding ADR decisions are not directly enforceable in Switzerland. In order to enforce such a decision, a party must apply to the competent court to have it confirmed. Parties will not usually seek to enforce an expert determination, given that expert determinations relate to specific factual or legal issues, and not a dispute as a whole. Instead, parties can argue that an expert determination is binding on a court or tribunal deciding on the dispute.

8.2 In your opinion, would the New York Convention allow recognition and enforcement of FIDIC Red Book DAB-type awards deemed to be the equivalent to arbitral awards through contractual arrangement?

The only binding ADR decisions which are directly enforceable in Switzerland are arbitral awards. In deciding whether a decision constitutes an arbitral award such that it would be enforceable, a Swiss court would look at the agreement between the parties to assess whether it was in fact their intention, whether expressly stated or not, to submit their dispute to arbitration, to the exclusion of the State courts.

8.3 Would your country allow the enforceability of a foreign arbitration award which in turn enforces a FIDIC Red Book type DAB decision?

Foreign arbitral awards will only be denied enforcement in Switzerland if there is a ground to do so under the New York Convention.

8.4 Are there any remedies (which possibly cannot be waived) to challenge a FIDIC Red Book type DAB decision in case of fraud, failure to follow minimum due process or other serious irregularity? Will these remedies make a DAB decision unenforceable in court without first having to go through arbitration (clause 20.6 FIDIC Red Book)?

No Swiss law provisions specifically address DABs. However, if a DAB decision is tainted by fraud, a failure to comply with fundamental principles of due process, or other serious irregularities, it may be possible to seek a finding from a Swiss court that it is not binding. In particular, a court may find that the parties could not have intended, when they agreed to submit disputes to a DAB, that they would be bound by decisions tainted by such irregularities.

As explained in 8.5 below, Art. 189 CCP expressly provides that an expert determination will not be binding in certain circumstances, in particular if the expert-arbitrator did not comply with fundamental principles of due process. Unlike expert determination, however, parties usually have the right to indicate their disagreement to a DAB's decision

within a certain period of time, and then to re-submit any issues decided by the DAB to arbitration or to the courts (see for example Clauses 20.5 and 20.6 of the FIDIC Red Book). If a party does not avail itself of any contractual right it has to contest or indicate its disagreement to a DAB decision, a court or tribunal might consider that it has waived any right to subsequently raise irregularities in the DAB proceedings.

If the parties have concluded an arbitration agreement which covers the issue of whether or not a DAB decision is binding on the parties, any dispute as to impact of serious irregularities such as fraud or a breach of due process in the DAB proceedings would likely have to be submitted to arbitration.

8.5 Would a binding expert determination be subject to review on the merits by the law courts in your jurisdiction?

Art. 189 CCP does allow courts to review the merits of an expert determination to a certain extent, as it provides that a determination is not binding if it is manifestly wrong (see Art. 189 CCP). According to the Swiss Federal Supreme Court, an expert determination as to the value of something may for example be found to be manifestly wrong if it is more than 25% higher or lower than the value as estimated on the basis of an objective assessment of the circumstances.

9. Recent developments

In an important judgment dated 7 July 2014, which was made public on 20 August 2014 (case no. 4A_124/2014), the Swiss Federal Supreme Court analysed whether DAB proceedings are a precondition for resorting to arbitration under Clause 20 of the FIDIC Conditions of Contract. The Supreme Court analysed the issue in the context of a challenge of a partial award in which the arbitral tribunal found that it had jurisdiction to hear a case under Clause 20 despite the fact that no DAB proceedings had taken place.

The Supreme Court disagreed with the arbitral tribunal's finding that DAB proceedings were not a prerequisite for the initiation of arbitration under Clause 20, finding instead that the use of the term "shall" in Sub-Clause 20.2 ("[d]isputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 ...") indicated that such proceedings were a requirement rather than an option. The Court also noted that the use of the term "may" in Sub-Clause 20.4 ("either Party may refer the dispute in writing to the DAB ...") did not qualify the mandatory nature of the precondition, and only meant that it is open to either party to initiate DAB proceedings.

The Supreme Court however recognised that there were exceptions to the precondition, arising notably under Sub-Clause 20.8 and the general principle of good faith. In

determining whether these exceptions were applicable, it notably recalled that the *raison d'être* for the introduction of the DAB in the FIDIC Conditions was to allow for an efficient resolution of disputes arising during the construction works, in a manner that would not put the works into jeopardy. In the case before the Supreme Court, the constitution of the *ad hoc* DAB had begun after the completion of the works, at a time when the parties' positions were undoubtedly already irreconcilable, and therefore it was unlikely that DAB proceedings would prevent the dispute subsequently being submitted to arbitration. Moreover, the Court noted that the DAB was not operational even though 15 months had passed since the Contractor's referral – a period five times longer than the 84-day period contemplated in the FIDIC Conditions for the DAB to render its decision – and that the Owner had dragged its feet in the process of constituting the DAB. In the circumstances, the Supreme Court concluded that the fact that no DAB proceedings were initiated was not fatal to the arbitral tribunal's jurisdiction.

The decision is a rare example of a State court reviewing the interpretation of the FIDIC Conditions by an arbitral tribunal. Given the wide use of the FIDIC Conditions, especially in Eastern Europe, Russia, Africa and the Middle East, this is an important decision for construction practitioners, and given the prevalence of the choice of Swiss law as applicable law in international construction contracts, it will have an impact well beyond Switzerland's borders.