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Newsletter

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ARBITRATION / CONSTRUCTION

The SIA Standard 150:2018 for Arbitrations in Construction Disputes

The Swiss Association of Engineers and Architects (“**SIA**”) has revised its old arbitration rules for the first time in over 40 years. The new rules entered into force on 1 January 2018. Interesting innovations in particular are the urgent determination procedure, the instruction hearing, and the possibility to appoint a technical expert as a consultant to accompany the arbitration.

1 INTRODUCTION

The SIA has recently revised its Standard 150: Provisions for Arbitration Proceedings (the “**SIA Rules**”). The new SIA Rules, which replace the predecessor rules from 1977, entered into force on 1 January 2018 and apply in principle to all arbitration proceedings pursuant to the SIA Rules **initiated after 1 January 2018**, irrespective of when the arbitration agreement was entered into.

Arbitration proceedings, i.e. dispute resolution proceedings before private arbitral tribunals, have **considerable advantages** over state court proceedings: The parties may appoint persons with specific expertise as arbitrators. In addition, the procedure is generally confidential and may take less time because state courts can only review arbitral awards to a very limited extent. Especially in construction disputes, these are important reasons for agreeing on arbitration proceedings.

Institutional rules such as the SIA Rules contain the rules of the arbitral procedure. There are **numerous, especially international, sets of institutional arbitration rules** which in some cases vary considerably with respect to content and level of detail. However, the parties are not required to agree upon a certain set of institutional arbitration rules. In case the parties have not chosen institutional rules, the arbitral tribunal itself will determine the rules of the arbitral procedure *ad hoc*.

Generally, an **arbitration institution** monitors compliance with the arbitration rules and performs certain tasks during the proceedings. In case of the SIA Rules, the SIA Head Office performs these functions.

Parties typically agree upon arbitration and the applicable institutional rules **when entering into a contract**. The SIA model contracts also contain the option to choose

arbitration under the SIA Rules as the means of dispute resolution.

While the revised SIA Rules primarily aim at domestic construction arbitrations, they can in principle apply to any kind of dispute, including domestic and international contractual relationships.

The new SIA Rules were adapted to match the current legal framework, which has undergone considerable changes since 1977. Moreover, the drafting committee has taken into account the provisions of well-established, modern arbitration rules and introduced **innovative elements** so far unknown in other institutional rules. Specifically, these include the **urgent determination procedure** and the **mandatory instruction hearing**.

2 INSTITUTIONALIZATION

The revision of the SIA Rules brought about a notable **institutionalization**. In particular, the new SIA Rules assign more tasks and competences to the SIA Head Office at the beginning of the proceedings. For instance, the request for arbitration must be submitted to the SIA Head Office. The SIA Head Office is also involved in the constitution of the arbitral tribunal and transmits the file to the tribunal upon its constitution. Finally, the SIA Head Office retains an original of the award upon completion of the proceedings.

Overall, this institutionalization results in a notable **simplification** of the procedure for the parties. Here, however, compared to other institutional rules, the institutionalization is less far-reaching and thus continues to allow for a high degree of procedural flexibility.

3 PROVISIONS ON TIME LIMITS

In order to promote an efficient conduct of the proceedings, the SIA Rules contain **strict time limits**. For example, the respondent must submit the answer to the request for arbitration within 30 days after receipt of the request for arbitration. The arbitral tribunal shall hold a case management conference within 30 days of its constitution to establish a procedural timetable. Unless the statement of claim or the statement of defense, respectively, are already contained in the request for arbitration or the answer to the request for arbitration, the parties shall generally submit these within consecutive time limits of 30 days each. It is somewhat surprising that the SIA Rules do not set a deadline for rendering the final award in the regular proceedings.

4 PROMOTION OF AMICABLE DISPUTE SETTLEMENT

The SIA Rules contain several provisions which are intended to **encourage the parties to settle their dispute amicably**. The SIA Rules clarify that the arbitral tribunal may at any time attempt to facilitate a settlement agreement between the parties. Furthermore, the SIA Rules incorporate the institution of an **instruction hearing**.

The SIA Rules provide that the arbitral tribunal shall invite the parties to an instruction hearing within 30 days after receipt of the statement of defense or of the reply to counterclaim, as the case may be. During this instruction hearing, the arbitral tribunal provides the parties with a preliminary oral assessment of the prospects and risks of

the case (including evidentiary risks) based on the tribunal's study of the file. Again, the objective of this instruction hearing is to encourage a settlement agreement between the parties.

"In order to promote efficient dispute resolution, the SIA Rules introduce a mandatory instruction hearing."

5 TECHNICAL EXPERT

The SIA Rules expressly allow the arbitral tribunal to appoint a **technical expert** to accompany the entire proceedings. This technical expert functions as a **consultant** and is hence neither an arbitrator nor a tribunal-appointed expert within the meaning of the SIA Rules. The provisions on arbitrator impartiality and independence as well as the challenge procedure for arbitrators also apply to the technical expert.

This institution is particularly innovative and efficient because it can eliminate the need for costly and time-consuming formal expert reports. The Federal Supreme Court has expressly stated that the use of such consultants is possible in Switzerland (decision 4A_709/2014). It goes without saying that the arbitral tribunal cannot delegate its decision-making powers to the technical expert.

6 RULES ON THE TAKING OF EVIDENCE

The SIA Rules contain detailed rules on the taking of evidence, some of which soften the classic adversarial principle (*Verhandlungsgrundsatz*). It is worth highlighting that the **factual submissions** may be supplemented by **specific references to the content of submitted documents**. This provision must be understood against the backdrop of the Swiss practice for court submissions, which in turn is a response to the strict standard of substantiation imposed, for example, by the Commercial Court of Zurich. The drafting committee considered these court submissions unnecessarily detailed and thus costly for the client. Most importantly, however, the arbitral tribunal may also **take into account facts** which do not form part of the parties' respective submissions but rather only **arise out of the submitted evidence**.

In the event of **unclear, contradictory, undefined or incomplete factual submissions**, the arbitral tribunal may **inform** the parties accordingly.

7 PRELIMINARY MEASURES

At the request of a party, the arbitral tribunal may order **provisional measures** if there is an imminent risk of harm. As is customary in arbitration, the claimant may choose between bringing its request before the arbitral tribunal or the competent state court (even in the presence of an arbitration agreement).

However, regarding the **provisional registration of the building contractor's lien**, which is of particular interest to the construction sector, a request before **state courts** should **generally** prove to be **preferable**. This is due to the registration deadline, the costs associated with the application for interim relief, and the authority of the state courts to order registration in the land register.

8 COSTS

The **costs of the proceedings** comprise the registration fee of CHF 1,000 as well as the fees and expenses of the arbitral tribunal and, if applicable, those of a legal secretary, a technical expert and a tribunal-appointed expert. These costs are generally **allocated in accordance with the** outcome of the proceedings. However, again in the interest of efficient dispute resolution, the SIA Rules contain an **important exception** where a **written settlement offer** has been **rejected**. If the award does not accord one party substantially more than what the other party offered during the arbitration and at the latest until the case management conference in case of an amicable settlement, the former party may be ordered to bear the entire costs of the proceedings.

Unlike other institutional rules, the SIA Rules contain **no scales for the calculation of the arbitrator's fees** but merely provide that the members of the arbitral tribunal must consider the amount in dispute, the complexity of the dispute, the amount of time spent on the case and any other relevant circumstances when determining their "adequate remuneration". In order to account for the uncertainties associated with this provision and to raise cost awareness, the parties should ask the arbitral tribunal to draw up a detailed budget at the beginning of the proceedings. Although arbitrator fees tend to exceed court fees, the aforementioned advantages of arbitration often make this means of dispute settlement preferable to litigation.

Regarding the parties' legal and other costs, the arbitral tribunal has discretion to decide which party shall bear which costs. In doing so, the tribunal shall take into account the outcome of the proceedings and the parties' behavior throughout the proceedings, as well as the extent to which the parties had reason to make their respective submissions in good faith.

9 SIMPLIFIED PROCEDURE

Where the **amount in dispute does not exceed CHF 250,000** or where the **parties so agree**, the SIA Rules provide for a simplified procedure comparable to the expedited procedures known from other institutional rules.

In order to minimize time and costs, a sole arbitrator decides the case, and generally there is only a single round of submissions and (unless the parties already agreed that the arbitrator should make her decision based solely on the file) a single evidentiary hearing. The sole arbitrator will generally render **a summary award within six months** after receipt of the file.

10 URGENT DETERMINATION PROCEDURE

The Annex contains the **truly remarkable feature** of the new SIA Rules, namely the urgent determination procedure. This procedure is not to be confused with the emergency arbitrator proceedings for interim relief that have found their way into most other institutional rules in recent years. Rather, the urgent determination procedure allows for a declaratory decision to be made on **certain exhaustively listed questions** which typically arise during construction (right to order a variation, violation of an obligation to cooperate, and non-performance) and which require a quick solution in the interest of **planning and legal certainty**.

This **declaratory decision** is rendered by the arbitrator **within 30 days** after the SIA Head Office transmits the file.

It has – albeit strictly limited to the findings on the questions listed in the Annex – the **effect of a final award**, unless one of the parties initiates a regular arbitration within 30 days of receipt of the written notification of the reasoning underlying the decision.

"The urgent determination procedure could make the SIA Rules particularly attractive."

The urgent determination procedure only applies in case of a separate opt-in. It is thus necessary that the parties have explicitly agreed on the applicability of the urgent determination procedure.

11 STATE COURT REVIEW OF THE AWARD

An arbitral award made under the SIA Rules is subject only to limited review by the state courts. Unlike awards rendered in international arbitration, those rendered in domestic arbitrations seated in Switzerland may also be **challenged** on the **ground of arbitrariness**.

Unless the parties expressly agree on the jurisdiction of the higher cantonal court at the respective place of arbitration, the **Federal Supreme Court** is competent to hear challenges to a domestic arbitral award.

12 CONCLUSION

The new SIA Rules contain innovative and remarkable new features to promote the **efficient resolution of disputes**, which makes them particularly attractive. For example, the arbitral tribunal is obliged to streamline the conduct of the proceedings immediately upon its constitution and must provide a preliminary assessment at the instruction hearing. Especially in view of ambitious time limits, the appointment of a technical expert can prove helpful. The evidentiary rules deviating from the adversarial principle as well as the simplified procedure for smaller amounts in dispute must also be welcomed. Finally, the urgent determination procedure presents a promising novelty. It remains to be seen whether it can establish itself in practice.

All in all, the new SIA Rules have turned out well. Parties are thus recommended to make use of this option in their contracts for work in the future and thereby avoid lengthy state court proceedings.

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The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:

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