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# Experiences with the 2013 FAI Arbitration Rules

FAI / SCC Morning Seminar on Arbitration  
in Finland and Sweden

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The Arbitration  
Institute of the Finland  
Chamber of Commerce

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# Revision of FAI Rules – background

- Revised FAI Rules entered into force on 1 June 2013
- Key objectives: to promote
  - speed and cost-efficiency (while simultaneously respecting party autonomy)
  - effective administration of multiparty and multicontract arbitrations
  - parties' access to pre-arbitral and arbitrator-ordered interim relief
  - confidentiality of the arbitration proceedings
- This presentation focusses on two key amendments:
  - confirmation of arbitrators
  - multiparty provisions and consolidation of arbitrations



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# Confirmation of arbitrators under FAI Rules

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# Background

- Starting point in the constitution of an arbitral tribunal: party autonomy and freedom of contract
- Limitations -> Art. 15.4:
  - “In all cases, the provisions of Articles 20 to 23 regarding impartiality, independence, confirmation, challenge, release and replacement of arbitrators shall apply”
- Confirmation of arbitrators is one of the key innovations of 2013 FAI Rules
  - Inspired by the ICC, Swiss, DIS and Vienna Rules

# Confirmation of arbitrators – key features

- Requirement of confirmation applies to all nominations and direct appointments of an arbitrator under FAI Rules (Art. 21.1)
- In practice, FAI will not interfere with the parties' selection of arbitrators without weighty reasons
- Art. 21.3: “The Board may decline the confirmation [...] only if the prospective arbitrator fails to fulfil the requirements of impartiality and independence set forth in Article 20.1, or if he or she is otherwise unsuitable to serve as arbitrator”

# Confirmation of arbitrators – key features (cont'd)

- Art. 20.1: Each arbitrator shall be, and remain, impartial and independent of the parties
- Art. 20.2: Each prospective arbitrator must submit to FAI a standard-format “*Statement of Acceptance, Availability, Impartiality and Independence*” as a precondition for his/her confirmation
  - Any circumstances likely to give rise to justifiable doubts as to prospective arbitrator’s impartiality or independence must be disclosed in the Statement
- Art. 20.3: Parties may comment on the Statement, and object to confirmation, within a time limit fixed by the FAI Secretariat (typically 7 days)

# Arbitrator's duty of disclosure – FAI Arbitrator's Guidelines (1/3)

- “Article 22.1 sets out an objective test for disqualification of an arbitrator: an arbitrator may be challenged if circumstances exist that, from the point of view of a reasonable and informed third party, give rise to justifiable doubts as to the arbitrator's impartiality or independence.
- The prospective arbitrator has a duty to disclose such circumstances subject to sanction.”

# Arbitrator's duty of disclosure – FAI

## Arbitrator's Guidelines (2/3)

- “However, regardless of the objective test for disqualification of an arbitrator, [...] the parties have an interest in being fully informed about any circumstances that may be relevant in their view in assessing the impartiality and independence of a prospective arbitrator.
- Consequently, apart from circumstances that could actually result in the disqualification of an arbitrator, a prospective arbitrator should disclose also any circumstances that may, in the eyes of the parties, give rise to subjective doubts as to the arbitrator's impartiality or independence.
- The parties will then have an opportunity to comment on the prospective arbitrator's Statement and the prospective arbitrator will have an opportunity to decide, based on the parties' comments, whether to finally accept to act as arbitrator or not.”

# Arbitrator's duty of disclosure – FAI

## Arbitrator's Guidelines (3/3)

- “Any doubt as to whether a prospective arbitrator should disclose certain circumstances should be resolved in favour of disclosure (...)”
- In determining whether to disclose a given circumstance a prospective arbitrator may draw guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) (...)”

# Confirmation process

- Twofold procedure (Art. 21.2):
  - Secretariat may confirm a nomination or direct appointment of an arbitrator
    - (a) if the prospective arbitrator’s Statement is unqualified, and
    - (b) provided that no party has objected to the confirmation in accordance with Art. 20.3
  - In all other cases, the decision on confirmation must be taken by the Board
    - In practice, uncontroversial cases may be decided by the Board Committee (but the Committee may only confirm an arbitrator – not decline confirmation)

# FAI practice on confirmation

- Only six cases where a party has objected to confirmation
- Only three cases where the FAI Board was called upon to decide the objection
  - In two cases, the objection was directed at a sole arbitrator selected by the Board
  - In one case, a party opposed the confirmation of a co-arbitrator nominated by the other party

# FAI practice – first two cases

- Sole arbitrator candidate disclosed that 3 / 5 years earlier his / her partner colleague had provided limited advice to respondent in an unrelated case
  - Previous assignment comprised only a few hours of work
  - Arbitrator candidate had not participated in its performance
- Claimant objected to confirmation based on alleged lack of independence
- Board dismissed the objection and confirmed the appointment
  - No reason to suspect the candidate's independence -> no basis to decline confirmation pursuant to Art. 21.3

# FAI practice – third case

- Claimant objected to confirmation of a co-arbitrator nominated by respondent on the grounds that:
  - many years before, another partner at the prospective arbitrator's law firm had acted against one of the parties to the pending arbitration in an unrelated case
  - also, many years before, the prospective arbitrator had given two second opinions in unrelated matters to companies represented by the same law firm that acted as respondent's counsel in the pending arbitration
- Board dismissed the objection and confirmed the nomination

# Conclusions from FAI practice

- FAI Board will not decline confirmation based on alleged lack of independence without objectively justifiable concerns
- Questions not settled yet in the FAI practice:
  - Is the threshold for non-confirmation the same – or different – for
    - party-nominated arbitrators, and
    - sole or presiding arbitrators directly appointed by FAI?
  - When may FAI Board be expected to decline confirmation based on the candidate’s “unsuitability” to serve as arbitrator?

# Objections vs. challenge of arbitrators

- “Objection” = a party informs FAI that it opposes the confirmation of a certain candidate as a party-nominated, sole or presiding arbitrator
  - Art. 20.3
- “Challenge” = a party requests that FAI remove an arbitrator from office for his/her alleged lack of impartiality or independence
  - Art. 22.1
- Parties can invoke the challenge procedure only after an arbitrator has been confirmed; prior to that, they can only object to the confirmation
- To date, there have been no challenges against arbitrators under Art. 22.1



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# Multiparty provisions and consolidation under FAI Rules

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# Background

- Number of multiparty and multicontract arbitrations is on the increase
- Previous 1993 Rules failed to provide adequate mechanisms for the administration of such proceedings
- 2013 Rules introduced detailed provisions on:
  - constitution of an arbitral tribunal in multiparty cases (Art. 19)
  - joinder of third parties as parties to a pending arbitration (Art. 10)
  - claims between multiple parties (Art. 11)
  - claims under multiple contracts (including different arbitration agreements) (Art. 12)
  - consolidation of two or more arbitrations into a single arbitration proceeding (Art. 13)

# Joinder of additional parties (Art. 10)

- Joinder of third (so-called “additional”) parties to the pending arbitration is permitted on conditions set forth in Art. 10
- System largely inspired by Art. 7 of the ICC Rules
  - Request for Joinder (“RFJ”) must contain actual claims against the additional party
  - RFJ brings the additional party automatically as party to the existing arbitration
  - RFJ must be submitted to FAI prior to the transmission of the case file to the arbitral tribunal
  - Additional party may bring claims against any other existing party and/or submit a RFJ of its own
  - FAI Board decides whether to accept or deny RFJ based on Art. 14

# Joinder – application of Art. 14

- Board may allow the arbitration to proceed against the additional party sought to be joined on the following conditions:
  - Claims made under one arbitration agreement -> Board must be *prima facie* satisfied that an arbitration agreement that binds the parties may exist
  - Claims made under different arbitration agreements -> Board must be *prima facie* satisfied that
    - the arbitration agreements do not contain contradictory provisions; and
    - all parties may have agreed that those claims can be determined together in a single arbitration
  - Board's decision to allow the arbitration to proceed is not binding on the arbitral tribunal

# Joinder – scope of application

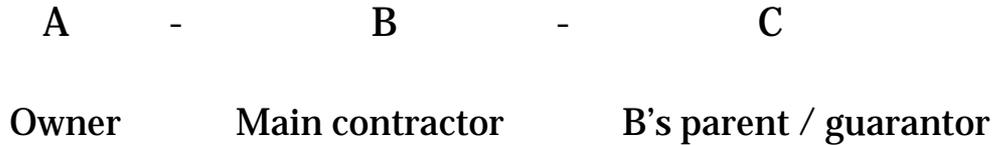
- Example I:



- Separate contracts between (i) A and B, and (ii) B and C
- Assumption: the main contract and the subcontract contain two distinct yet compatible FAI arbitration clauses
- A sues B -> B seeks to join C -> A and/or C objects to joinder
- Outcome: absent special reasons to the contrary, Board will dismiss B's RFJ

# Joinder – scope of application (cont'd)

- Example II:



- A and B have concluded a construction contract; C has issued a parent company guarantee for B's obligations in favour of A
- Assumptions: two distinct yet compatible FAI arbitration clauses; C's guarantee is directly related to the contract between A and B, and forms an essential part of the transaction
- A sues B -> B denies liability -> A subsequently seeks to join C -> B and/or C objects to joinder
- Outcome: absent special reasons to the contrary, Board is likely to accept A's RFJ

# Consolidation of arbitrations (Art. 13)

- In principle, FAI Rules permit consolidation of two (or more) FAI arbitrations irrespective of whether they are between the same or different parties, if:
  - all parties have agreed to consolidation; or
  - all claims in the arbitrations are made under the same arbitration agreement; or
  - where the claims in the arbitrations are made under different arbitration agreements:
    - the disputes in the arbitrations arise in connection with the same legal relationship (in practice, the same economic transaction, e.g. a common construction project); and
    - the arbitration agreements do not contain contradictory provisions (e.g. different seats or different number of arbitrators)

# Consolidation of arbitrations (cont'd)

- FAI Board decides whether to accept or deny a request for consolidation by taking into account the following factors (Art. 13.2):
  - the identity of the parties in the different arbitrations
  - the connections between the claims made in the different arbitrations
  - whether any arbitrator has been confirmed or appointed yet in any of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed
  - any other relevant circumstances

# Consolidation – FAI case law

- One application to date (Cases X-Y/2014) -> factual circumstances:
  - A commenced simultaneously two separate FAI arbitrations: one against B and C (Case X/2014), and the other against B only (Case Y/2014)
  - Case X/2014 was based on an arbitration clause contained in a shareholders' agreement (“SHA”) between A and B/C (-> C being the sole owner and manager of company B) concerning the ownership and governance of company D
  - Case Y/2014 was based on an arbitration clause contained in a share purchase agreement (“SPA”) concerning the sale and transfer by A, and acquisition by B, of A’s shares in company D
  - Arbitration clauses in the SHA and SPA both provided for a sole arbitrator, but the clauses differed with respect to the language of the arbitration

# Consolidation – FAI case law (cont'd)

- A contended that B and C had breached the SHA, and B also the SPA, by failing to inform A of certain circumstances that would have affected the share purchase price
- A claimed damages from B and C
- A – being claimant in both arbitrations – requested consolidation of the two cases
- Respondents B and C opposed the request

# Consolidation – FAI case law (cont'd)

- Board dismissed the application mainly on the following grounds:
  - Special reasons should be required for consolidation if one of the parties opposes it on seemingly valid grounds
  - Different (though closely related) parties to the different arbitrations
  - Proceedings based on different (and not fully compatible) arbitration clauses
  - All parties had subsequently informed FAI that, in the event that the cases were not consolidated, the parties agreed to have the same arbitral tribunal in both arbitrations, which could then be conducted in the same language (Finnish)