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FAI Board's Recent Practice on the Consolidation of Arbitrations under the FAI Rules

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Introduction

Consolidation means combining two or more arbitrations that are pending under a specific set of rules into a single arbitration proceeding. In appropriate circumstances, consolidation has various advantages. Most importantly, it eliminates the risk of having contradictory awards rendered in different proceedings on closely related sets of facts. Additionally, it makes for procedural and cost efficiency as all issues in dispute will be decided by a single arbitral tribunal in one proceeding, rather than by different tribunals in two (or more) separate arbitrations.

The FAI Rules permit consolidation of different FAI arbitrations on conditions set forth in Article 13. In principle, consolidation is possible irrespective of whether the proceedings to be combined are pending between the same or different parties, provided that at least one of the following requirements (1)-(3) is met: (1) all parties to all arbitrations have agreed to consolidation; or (2) if all claims in the arbitrations are brought under the same arbitration agreement; or (3) where the claims in the arbitrations are brought under different arbitration agreements, if (i) 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 or corporate transaction involving formally different but related contracts); and (ii) the arbitration agreements do not contain contradictory provisions that would render consolidation impossible (e.g. different seats, different number of arbitrators or different method of appointing the tribunal).

The FAI Board decides in its discretion whether to accept or deny a request for consolidation by taking into account the factors listed in Article 13.2. These include 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), and any other relevant circumstances (such as the progress already made in the arbitration that was commenced first and into which the second arbitration would be consolidated).

Turning to the FAI practice, since the adoption of the revised FAI Rules on 1 June 2013, there have been a total of eight requests for consolidation. Six of them were accepted, whereas two were denied. In 2017, the FAI witnessed four new applications for consolidation. This suggests that the number of consolidation requests may be on the increase.

It is not unheard of that all parties to all different arbitrations specifically agree to, and jointly request, consolidation. In such event, the FAI Board will normally accept the parties' joint request almost as a matter of routine, provided only that all the proceedings to be combined are indeed FAI arbitrations (and not, for instance, ad hoc cases). But problems may arise if one or more parties to one or more of the proceedings raises an objection against the other party's request for consolidation.

The FAI faced this situation first time in 2015, in a case where the Board ultimately decided to dismiss the consolidation request (see an anonymous case comment posted on the FAI website). However, more recently, the FAI experienced the first case where the Board did order consolidation of two separate FAI arbitrations regardless of the objections of the respondent parties to those arbitrations. The formal justification for such "non-consensual" consolidation lies in the fact that, when incorporating the FAI Rules to their arbitration agreement, the parties are deemed to have consented in advance to the consolidation of arbitrations on conditions laid down in Article 13.

Below is a brief description of the factual circumstances of the case and the FAI Board's reasons for consolidation.

First FAI case where consolidation was ordered over the objection of respondents

Two Finnish companies, A and B, had entered into an Asset Purchase Agreement ("APA") whereby A acquired certain business from B. Clause 16 of the APA provided that the APA was governed by Finnish substantive law and that any disputes arising out of or relating to it shall be finally settled in FAI arbitration seated in Helsinki.

Some time after the transaction, a dispute arose between A and B in relation to certain intellectual property rights that B had allegedly granted to A under the terms of the APA. The APA contained also the following undertaking by B's non-Finnish parent company C: *"[C] hereby (…) acknowledges [A's] right to use [certain intellectual property rights], as set out in Clause 8.5. Clause 16 (Governing Law and Dispute Resolution) shall apply to this undertaking."*

As the parties could not settle their dispute amicably, A commenced FAI arbitration against B and requested e.g. that the arbitral tribunal declare that A had the right to use certain intellectual property rights granted by B under the APA. Soon after that, A commenced separate arbitration proceeding against C, seeking effectively the same relief as in the first case and requesting that the two proceedings be consolidated. Respondents B and C objected to the consolidation mainly because of the alleged lack of a valid and binding arbitration agreement.

The FAI Board allowed both arbitrations to proceed, being prima facie satisfied that there may exist a valid and binding FAI arbitration agreement. After that – and once the Board had consulted with all parties and the arbitrator nominated by A – the Board ordered consolidation pursuant to Article 13 FAI Rules mainly on the following grounds: (1) Although the parties in the two proceedings were formally different (A vs. B / A vs. C), they were closely related (as C was B's parent company); (2) disputes in both proceedings arose from the same legal relationship and economic transaction (i.e. the APA, including C's undertaking that was part of it); (3) both proceedings were based on the same FAI arbitration agreement (set out in Clause 16 of the APA); and (4) the relief sought by A was essentially the same in both proceedings.

The Board concluded that, for the above reasons, the arguments and evidence that A, B and C were likely to put forward in both proceedings could be expected to be virtually identical. Non-consolidation would mean that the parties would have to present the same arguments and evidence twice in two separate proceedings, which would cause unnecessary extra expenses. Also, in the event of non-consolidation, the parties would face a risk of conflicting decisions in separate proceedings. Therefore, in the interest of procedural efficiency and fairness, and in order to avoid conflicting decisions on effectively the same dispute under the same arbitration agreement, the Board decided to consolidate the cases.

Conclusions

The outcome of the FAI Board's decision was hardly surprising. In light of the factual circumstances, consolidation was undoubtedly well-founded. On a more general level, this case – together with other existing FAI practice on "non-consensual" consolidation – lends support to the conclusion that the undersigned presented already when commenting on the FAI Board's first decision on consolidation in 2015 (see the case reference and hyperlink above). Accordingly, even though the consolidation regime under the FAI Rules is flexible and allows, in principle, far-reaching applications, the FAI Board may be expected to apply Article 13 somewhat restrictively. To illustrate, the Board is likely to accept a request for consolidation mainly in cases where the arbitrations are pending between the same (or closely related) parties and they are based on the same arbitration agreement. Conversely, it is probably safe to say that the threshold for consolidation is high if the parties are different and the proceedings are based on different arbitration agreements (unless all parties expressly agree to consolidation). Further, consolidation is also unlikely if different arbitrators have already been confirmed in the different arbitrations, absent special reasons to the contrary.

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