



HPP ATTORNEYS

SPECIALISED IN  
THE ESSENTIAL

Norwegian Maritime

Law Day 17.11.2021

Halliburton v. Chubb –

Finnish perspective

Nora Gahmberg-Hisinger

# Finnish Arbitration Act 1992/967 –Examples of bias

## Section 9

(1) An arbitrator shall be **impartial and independent** in his or her duties.

### Preparatory works

- The arbitrator works at the same company or institution as one of the parties
- The arbitrator has consistently acted as an arbitrator for one of the parties for no apparent reason

## Section 10

On the challenge of a party, an arbitrator shall be disqualified if **he or she would have been disqualified from hearing the case as a judge**, or if **other circumstances exist** that give rise to justifiable doubts as to his or her impartiality or independence as an arbitrator.

- Finnish Procedural Code concerning disqualification of judges apply to arbitrators
- Other factors that cause suspicion of impartiality

# Finnish Arbitration Act – duty of disclosure

## Section 9

- (1) When a person is asked to consent to appointment as an arbitrator, he or she shall, unless he or she refuses to accept the appointment, **immediately disclose any circumstances likely to endanger or give rise to justifiable doubts as to his or her impartiality and independence as an arbitrator.**
- (2) **Until the conclusion of the arbitration proceedings, an arbitrator is obliged to disclose** without delay any circumstances referred to above of which the parties have not previously been informed.

## Section 10

**On the challenge of a party, an arbitrator shall be disqualified** if he or she would have been disqualified from hearing the case as a judge, or if other circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence as an arbitrator.

Dispositive provision

# Finnish Arbitration Act – procedure for challenge of an arbitrator

## Section 11

- (1) The parties **may agree on a procedure** for considering a challenge for disqualification of an arbitrator. Notwithstanding this, a party has the right to request the annulment of the award on the basis of section 41.
- (2) **Failing an agreement** as referred to in subsection 1, a party who intends to challenge an arbitrator shall present the **challenge within 15 days** from becoming aware of the appointment of the arbitrators and of any circumstance referred to in section 10 above. **The challenge shall be made in writing to the arbitrators.** The challenge shall include a statement of the reasons for the challenge.
- (3) Unless the challenged arbitrator withdraws from his or her office or the other party agrees to the challenge, the **arbitrators shall decide on the challenge.** The question may be **submitted to the consideration of a court** only if the annulment of the award is requested on the basis of section 41.

# Arbitration Rules of the Finland Chamber of Commerce – impartiality and duty of disclosure

Article 21 of the FAI (Finland Arbitration Institute) Rules

- Each arbitrator shall **be and remain impartial and independent** of the parties.
- Before confirmation, a prospective arbitrator shall **sign and submit to the Institute a statement**, in which the prospective arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.
- An arbitrator shall also disclose any circumstances (of aforementioned nature) which may arise during the arbitration
- The statement is sent by the Institute to the parties.

# FAI Arbitration Rules - content of duty of disclosure

## Arbitrator's Guidelines

- ❑ 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.**
- ❑ 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.**
- ❑ In determining whether to disclose a given circumstance a prospective arbitrator may draw guidance from the **IBA Guidelines on Conflicts of Interest**

# FAI Arbitration Rules – challenge of arbitrators and waiver

## Article 23

- ❑ Arbitrators may be challenged, **if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence** or if the arbitrator does not possess any requisite qualification on which the parties have agreed.
- ❑ A party may challenge an arbitrator whom it has nominated only for reasons of which it became aware after the nomination was made.
- ❑ Notice of Challenge shall be submitted to the Institute either **within 15 days** from the date of receipt by the challenging party of the notification of the confirmation of the arbitrator, or within 15 days from the date when the circumstances giving rise to the challenge became known to that party. **Failure by a party to comply with this time limit shall constitute a waiver of the right to make the challenge.**
- ❑ FAI Board decides on challenge of arbitrators – decision binding
- ❑ Award can be sought to be set aside based on challenge of an arbitrator in accordance with the Arbitration Act

# Confidentiality when disclosing

## Ad hoc proceedings

- No guidelines in the act or preparatory works

## FAI arbitration

Article 51 deals with confidentiality of the arbitration etc; Unless otherwise agreed by the parties, the Institute and the arbitral tribunal shall maintain the confidentiality of the arbitration and the award.

# Waiver of duty of disclosure

## Ad hoc proceedings

- Arbitrators's duty of disclosure mandatory – Waiver not possible

## FAI Arbitration

- Waiver unlikely possible

# Finnish case law concerning disclosure and bias

KKO/HD 2005:14 (Supreme Court of Finland/Korkein oikeus/Högsta Domstolen)

- ❑ The case concerned a tort claim against the arbitrator and whether the arbitrator should have disclosed that he had **given legal opinions to one of the parties** (the opinions did not concern the dispute).
- ❑ The Supreme Court applied Section 9 of the Arbitration Act. It adopted a **subjective impartiality** test and found that the arbitrator should have known, considering his education and experience, that providing respondent with legal opinions during arbitration proceedings would cause the claimants to reasonably question the arbitrator's impartiality and independence.
- ❑ The Supreme Court held that the **requirement of impartiality of an arbitrator is similar to that of an independent judge**
- ❑ The threshold for the obligation to disclose is set low in the decision.

# Finnish case law concerning disclosure

KKO 2001:11

- ❑ The lawyers who acted as arbitrators were members of the board in the local branch of the Finnish Bar Association of which the defendant attorney was also a member. The membership had not been disclosed to the claimants.
- ❑ The Supreme Court referred to, e. g. Article 6 ECHR. It held that submitting a dispute to a voluntary arbitration means the relinquishment of ordinary court proceedings and the rights related to it.
- ❑ The Supreme Court held that the claimants had waived their right to challenge the arbitrators based on the arbitrators' membership of the bar.
- ❑ The Court held that objectively, even though the claimants did not know about the membership, there was not any other special reason at hand for why the impartiality of the arbitrators should have been doubted.

# Finnish case law concerning disclosure

## HelHO 2017:15 (Helsinki Court of Appeal/Helsingfors HovR)

- ❑ The case was about whether the sole arbitrator (C), appointed by the FAI Board, was impartial because the arbitrator's daughter was employed by the law firm that represented the respondent.
- ❑ Based on Section 9 of the Finnish Arbitration Act, the arbitrator is obliged to report any factors that may affect his or her impartiality. **A had fulfilled that duty** by reporting that the arbitrator's daughter became employed by a law firm that represented the respondent in the arbitration. The Court ruled that C was impartial.
- ❑ The arbitrator's daughter worked for a team that was not involved in handling the arbitration in question. The actions of the arbitrator hereby had no effect on the outcome of the arbitration. Thus, since the settlement of the case was of no particular benefit to the arbitrator or his or her close person, the required impartiality was considered by the Court to be fulfilled.
- ❑ The claimant had appealed as a basis for impartiality to the IBA-guidelines, which were referred to by the Court, but whether the guidelines were given any weight when making the decision does not follow from the judgment



HPP ATTORNEYS

THANK YOU FOR  
YOUR TIME

Bulevardi 1 A  
00100 Helsinki  
Finland

Tel. +358 9 474 21

[info@hpp.fi](mailto:info@hpp.fi)