
# International Arbitration

# 2020

## Sixth Edition

Contributing Editor:
**Joe Tirado**

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# Global Legal Insights
## International Arbitration

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# GLOBAL LEGAL INSIGHTS – INTERNATIONAL ARBITRATION

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# PREFACE

Following the success of the fifth edition, we are pleased to present the sixth edition of *Global Legal Insights – International Arbitration.* The book contains 32 country chapters, and is designed to provide general counsel, government agencies, and private practice lawyers with a comprehensive insight into the realities of international arbitration by jurisdiction, highlighting market trends and legal developments as well as practical, policy and strategic issues.

In producing *Global Legal Insights – International Arbitration*, the publishers have collected the views and opinions of a group of leading practitioners from around the world in a unique volume. The authors were asked to offer personal views on the most important recent developments in their own jurisdictions, with a free rein to decide the focus of their own chapter. A key benefit of comparative analyses is the possibility that developments in one jurisdiction may inform understanding in another. I hope that this book will prove insightful and stimulating reading.

Joe Tirado
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# Finland

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## Introduction

Arbitration in Finland is governed by the Arbitration Act of 1992 (967/1992 as amended). The Act was 'inspired' by the UNCITRAL Model Law in place at the time, but did not correspond to it word for word. Nevertheless, it did not conflict with the Model Law, nor has its interpretation been considered to conflict with how arbitration practice has evolved since then, either domestically or internationally.

The Arbitration Act contains a few sections applicable to foreign arbitral proceedings and awards. Only minor amendments have been made since its enactment. The legal community in Finland has been calling for a revision of the Act in order for it to correspond to international standards. As a result, in January 2019, the Finnish Ministry of Justice launched a project to revise the Finnish arbitration legislation.

The judiciary's attitude towards arbitration is quite positive, and attorneys also tend to recommend arbitration in business-to-business disputes due to the advantages afforded by arbitration. The fact that state courts often have limited knowledge of industry realities, despite otherwise being competent, also plays a role in attorneys' positive attitudes towards arbitration. Finland is party to, and has ratified, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The main centre for domestic or international arbitration is the Arbitration Institute of the Finland Chamber of Commerce. The present Arbitration Rules of the Finland Chamber of Commerce (the "Arbitration Rules") entered into force as of 1 June 2013 and were amended on 1 January 2020. The key objective of the Arbitration Rules was to address issues such as expediency and cost-efficiency, multi-party administration, arbitrator-ordered interim relief and increased confidentiality. As the Arbitration Rules of 2013 were found to be functional, the objective of the amendments of 2020 was only to further the efficiency of the arbitration process by small individual technical improvements.

The Arbitration Rules now stipulate a sole arbitrator to be the default number of arbitrators, unless the parties agree otherwise. If the board of the Institute considers it appropriate, the number of arbitrators may nevertheless be three. The challenge and replacement regimes concerning the arbitrators have also been conformed to the UNCITRAL Rules.

The reduction of the time and cost of proceedings has been addressed by stipulating that a preparatory conference shall be held (Art. 30), a procedural timetable shall be set up (Art. 31), a cut-off date prior to the hearing shall be set (Art. 35), the proceedings shall be officially closed, barring additional statements or claims (Art. 41), and the main rule is that the award shall be given within nine months from the time at which the tribunal received the case file from the Institute (Art. 44).

The Arbitration Rules also contain provisions on arbitrator-ordered interim relief. The Arbitral Tribunal may grant "any interim measures" it deems appropriate. What standards should be applied to the evaluation of whether an interim relief measure is appropriate have deliberately been left out in order to allow for flexibility in this respect. According to the Arbitration Rules, a party may seek a court-ordered interim measure only in appropriate circumstances.

In addition to the above, the Arbitration Institute has also revised the rules for expedited arbitration, although the expedition procedure is quite seldom used.

### Arbitration agreement

As a general rule, if a civil law case may be settled outside of court, the case is arbitrable. The exception is that consumers are not bound by arbitration agreements concluded before the dispute has arisen. Arbitration is not applicable to non-discretionary (indispositive) matters.

For an arbitration agreement to be valid, it must be in writing. Arbitration agreements concluded by way of correspondence are also acceptable. Arbitration clauses in wills, deeds of gift, bills of lading or similar documents, in the bylaws of an association, of a foundation, of a limited liability company or of another type of company or corporate entity, and by which the parties or the person against whom a claim is made are bound, shall have the same effect as separately concluded arbitration agreements.

The wording of the arbitration agreement is obviously subject to the normal rules of contract law, and can be interpreted or dismissed entirely if it is found lacking in clarity or enforceability. It is therefore recommended that due care be taken when drafting an arbitration clause. Consumers are not bound by arbitration agreements made before the dispute has arisen, but are equally bound to arbitration agreements concluded once the dispute has actualised.

The separability doctrine is applied in Finland. As a result, arbitrators may rule on the validity of a contract which includes an arbitration clause. The invalidity of the contract will therefore not automatically lead to the invalidity of the arbitration agreement. Arbitrators may also rule on their own competency (*kompetenz-kompetenz*).

Although it has not been stated *expressis verbis* in the Arbitration Act, arbitrators are generally considered to have the power to estimate damages when a party is unable to bear its burden of proof to the full extent (even if these powers have not been granted to the arbitrator in the arbitration agreement). Guidance on the powers of the arbitrators may to this extent be found in the Code of Judicial Procedure.

The Arbitration Rules include detailed provisions on the constitution of an arbitral tribunal in multi-party cases, joinder of additional parties to pending arbitration proceedings, claims between multiple parties, claims under multiple contracts (including multiple arbitration agreements) and on the consolidation of two or more arbitrations into a single arbitration proceeding.

### Arbitration procedure

The Arbitration Act does not contain very many provisions on the procedure of the proceedings. According to the Act, the parties may agree on the procedure to be applied and, in the absence of such an agreement, the arbitrators are empowered to decide on the procedure, taking into account the requirements of impartiality and expediency. The arbitrators may not impose fines or undertake other coercive measures to enforce their procedural orders. The proceedings may physically take place outside the seat of arbitration.

The proceedings are not confidential as such. The arbitrators have a duty of confidentiality, but a corresponding duty concerning the parties must be based on an agreement or applicable arbitration rules.

A party to an arbitration may, if the arbitral tribunal considers it appropriate, petition a court to order the production of documents for the purpose of the arbitration, in which case the court will apply the Code of Judicial Procedure on the matter.

Finland does not have extensive discovery or disclosure proceedings concerning evidence in civil law disputes. The court may nevertheless order a party to present a document or another piece of evidence which may be relevant as evidence in the dispute when petitioned by a party. Refusal may be sanctioned with a fine, and the court may order an executive officer (bailiff) to execute the order.

As the main rule is that a party must be able to present its own evidence in support of its claims, the Code of Judicial Procedure is based on the notion that the requested evidence must be specified and relevant as evidence in the case. Usually the requirement of specificity is quite strictly interpreted. A petition concerning a narrow category of documents may nevertheless be successful, as courts have been somewhat more flexible during the last decade. However, as a rule of thumb it may be stated that the petition, and the subsequent order to produce, should be specific enough for an executive officer to be able to enforce the order by executing it himself. The court may order a third party to produce the evidence as well.

The rules on privilege in the production of documents are for the most part similar to the exemptions of giving testimony in the main hearing. Some information and documentation (such as business and trade secrets) is protected by law and can therefore not be subject to a production order.

A public official, a healthcare professional, an attorney or counsel, a court-appointed mediator or auxiliary mediator may not present a document if it can be assumed that the document contains something on which he or she may not be heard as a witness. In addition, a witness may refuse to give a statement which would reveal a business or professional secret, unless very important reasons require that the witness be heard on the subject matter. Similarly, a party may refuse to provide a document containing this kind of information. The court will examine the grounds for refusal prior to deciding on the issue. Partial production of a document may also be ordered.

There is an exception to the confidentiality obligation and right of an attorney. An attorney might be ordered to testify and produce documents if he has not acted for the client in court proceedings (i.e. only acted in an advisory role) and the testimony relates to investigating an aggravated offence. In-house counsels are considered normal employees of a company and as such, do not enjoy any special confidentiality rights or obligations.

The IBA Rules on the Taking of Evidence in International Arbitration are frequently invoked, especially in disputes involving foreign parties (international arbitration). Even though Finland traditionally has had a rather dismissive stance concerning, for instance, disclosure, the stance on document production has nevertheless loosened up in domestic arbitration as well, and the apprehensive attitude found in the Code of Judicial Procedure no longer corresponds to the attitudes of seasoned arbitrators. An arbitral tribunal is not bound by the Code of Judicial Procedure and is consequently not obligated to apply the principles found in it, even when both parties are domestic.

Adverse inferences may be drawn by the arbitral tribunal if a party refuses to produce the requested evidence (drawing adverse inferences is naturally beset by its own set of

problems concerning the conclusions one might be able to draw based on a refusal). Parties are nevertheless quite prone to adhering to orders issued by tribunals, and refusal rarely becomes an issue in the proceedings.

The Arbitration Act does not contain provisions on expert witnesses. The Arbitration Rules, on the other hand, allow the arbitral tribunal to appoint one or more experts to report on specific issues after consulting the parties.

Electronic production of documents has not surfaced as a real problem, due to a restrictive view on document production in general. At the moment, no steps are being taken to prepare for possible problems concerning electronic production that might surface in the future.

A party may petition a state court to appoint one or more arbitrators to the tribunal. Correspondingly, a court may relieve an arbitrator when requested to do so by the parties. A court may also enforce the production of evidence (including witness testimony) if it is considered necessary by the arbitral tribunal.

Notwithstanding the *lis pendens* rule applicable to the relationship between the arbitration proceedings and court proceedings, a state court may grant interim relief when petitioned to do so by a party. The Code of Judicial Procedure is applicable to the application for interim relief.

### Arbitrators

Unless the parties have agreed otherwise (or applicable institutional arbitration rules provide for rules on the arbitrators), three arbitrators shall be appointed. However, the starting point in the Arbitration Rules, in the absence of agreement between the parties, is that only one arbitrator is appointed unless the board of the institute considers three arbitrators appropriate considering the circumstances. Foreign nationals are *expressis verbis* allowed. An arbitrator shall be impartial and independent of the parties. Arbitrators have not been afforded immunity and are, as a starting point, liable for their actions.

The arbitration tribunal may rule on an arbitrator challenge. A challenge shall be presented within 15 days from the time at which a party became aware of the grounds for the challenge. Based on the Arbitration Rules, the Board of the Arbitration Institute may release an arbitrator, if it accepts a challenge made by a party due to partiality, for example. Where an arbitrator has been replaced, the reconstituted arbitral tribunal shall, after consulting with the parties, decide if and to what extent prior proceedings will be repeated before the reconstituted arbitral tribunal.

National courts will examine the matter only after an award has been rendered.

The IBA Guidelines on conflict of interest are not binding on tribunals or courts. The guidelines are nevertheless invoked quite frequently in challenge cases, and it can be said that the guidelines are taken into account when deciding on a challenge.

Based on the Arbitration Rules, the arbitral tribunal may, after consulting with the parties, appoint a secretary when deemed appropriate. A secretary shall meet the same requirements of impartiality and independence as any arbitrator. Secretaries for arbitral tribunals are utilised to a certain degree and are more common in complex, high-value disputes involving an abundance of factual issues.

### Interim relief

Under the Arbitration Rules of the Arbitration Board of the Finnish Chambers of Commerce (Art. 38.5), a party in need of urgent interim measures that cannot await the constitution of an arbitral tribunal may apply for the appointment of an emergency arbitrator in accordance with

Appendix III of the Arbitration Rules ("Appendix III"), unless the parties have exercised their right to opt out of the application of the provisions contained in Appendix III, i.e. specifically excluded the possibility of emergency arbitration in the relevant underlying agreement.

If the emergency arbitrator proceedings have not been ruled out, parties normally have the freedom to choose between applying for interim measures from the court from the emergency arbitrator, or even from the arbitral tribunal or arbitrator.

The purpose of emergency arbitrator proceedings is to get access to interim measures where the client's need for interim relief is so urgent that it cannot wait for the constitution of the arbitral tribunal. Where the urgency requirement is not fulfilled, the emergency arbitrator shall dismiss the Applicant's request for interim measures of protection.

The emergency arbitrator shall have the same power to grant any interim measures of protection as the arbitral tribunal. The scope of interim measures available under the Arbitration Rules is wide, since the arbitral tribunal may, at the request of a party, grant any interim measures it deems appropriate.

The practicability of arbitrator-ordered interim measures is limited by the fact that under the Arbitration Rules, the arbitral tribunal, and also the emergency arbitrator, shall give the party against which the request is directed an opportunity to submit comments before deciding whether to grant any interim measure. The right to comment on interim measures before they have been ordered may defeat the element of surprise sometimes needed to make full use of such protective measures.

Even if the provisions of the Appendix concerning emergency arbitrator proceedings are applied, the parties are not prevented from seeking urgent interim measures of protection from a competent judicial authority such as the local courts, at any time prior to making an application for the appointment of an emergency arbitrator, and in appropriate circumstances even thereafter.

Interim measures are regulated under Finnish law in the Code of Judicial Procedure, when measures are applied from general courts. Under the Code of Judicial Procedure, the court may order "precautionary measures" in situations set out in Chapter 7 of the Procedural Code. Usually, the party petitioning for interim relief must post security for the potential damage an injunction may cause the other party.

The court may order the seizure of property if the petitioner establishes its receivable to be likely, and there is a danger that the other party hides or otherwise acts in a manner that endangers the receivable.

If the petitioner establishes the likelihood of him having some other enforceable right, and there is a danger that the other party, by doing or neglecting to do something, endangers or otherwise diminishes the right from being realised, the court may: (i) under the threat of a fine, order the other party to refrain from doing something; (ii) under the threat of a fine, order the other party to do something; (iii) entitle the petitioner to do something or have something done; (iv) order the property of the other party to be set into the custody of an agent (trustee); or (v) order any other measure which is necessary to safeguard the right which needs to be protected.

The order must be proportional to the right which is to be safeguarded, and may not cause unreasonable harm to the other party. The system for interim relief is quite flexible in that it recognises different kinds of rights and the need to protect them, and has, for instance, successfully been used to prevent a strike by a labour union and to prevent a party from terminating an agreement.

### Arbitration award

The arbitration award must be made in writing and must be signed by the arbitrators. If an arbitrator refuses to sign the award, an explanation as to the refusal shall be provided. Unless the parties explicitly agree that the arbitrators shall base their award on equity (*ex aequo et bono*), the arbitrators must base their award on the law.

The arbitral tribunal's final decision on the merits of the case constitutes the final award rendered by the tribunal. In addition to final awards, the tribunal may issue separate awards during the course of the proceedings. The tribunal may also render consent awards and additional awards if requested by the parties. The tribunal may furthermore order the parties to bear the costs of the arbitration and also allocate the costs *inter partes*. An award on both the main issues in dispute as well as costs may include interest if the applicable substantial law allows for it.

The arbitral tribunal may, by way of a separate award, decide an independent claim presented to the tribunal. A separate award may also be given concerning a part of a claim which has been admitted by the respondent. In addition, a separate award may be rendered, with the consent of the parties, concerning an issue which determines how the rest of the dispute shall be resolved. The tribunal may, for instance, rule on a time-bar issue or divide a damages case by first ruling on the grounds of liability, and only after that will it rule on the amount of damages.

Additional awards are also possible if the arbitral tribunal neglects to rule on a claim in its actual award. In addition, the arbitral tribunal may correct clerical errors in the award at the behest of a party. The tribunal may also, on its own initiative, correct the clerical error after having heard the parties on the issue.

Based on the Arbitration Rules, the award shall be rendered within nine months of the tribunal having received the case file from the Arbitration Institute.

### Challenge of the arbitration award

An arbitral award can be set aside by the court on the basis of either invalidity or nullity. The award is considered invalid if: (i) the case was inarbitrable; (ii) the award contradicts the foundations of the judicial system (*ordre public*); (iii) the award is so unclear and incoherent it cannot serve as a basis for enforcement; or (iv) the award has not been signed by the arbitrators (majority suffices, but an explanation must be provided for why the minority has not signed the award). The award is considered null if: (i) the arbitrators have exceeded their powers; (ii) the arbitrators have been appointed in the wrong manner; (iii) an arbitrator has been incompetent due to bias; or (iv) the arbitral tribunal has not afforded a party sufficient opportunity to present its case.

There have recently been a few attempts at challenging arbitration awards in high-value cases. Challenges have nevertheless often been appeals on the merits concealed in claims on the issues described above. The courts have not been convinced and the *in favorem pro validitate* principle has been upheld.

### Enforcement of the arbitration award

The enforcement of arbitral awards is decided on by the state courts. As a rule, the state court will apply the *in favorem pro validitate* rule on its deliberation, and the threshold for setting the award aside is quite high. Very many arbitral proceedings take place in Helsinki, and other district courts may not be as familiar with arbitral law. Thus, it is recommended to seat the arbitration in Helsinki.

Finland has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and foreign arbitral awards are therefore enforceable in Finland. Arbitral awards are challenged every now and then, but challenges are quite seldom accepted by the courts. In principle, an award can be enforced even though it has been successfully challenged in the place of arbitration.

Enforcement of a foreign arbitral award can be denied by the court if: (i) the arbitration agreement has been invalid (due to certain grounds); (ii) a party has not been informed of the proceedings or has otherwise been inhibited or unable to present its case; (iii) the arbitral tribunal has exceeded its powers; (iv) the composition of the arbitral tribunal or the arbitration itself has significantly deviated from the arbitration agreement; or (v) the arbitral award has not yet become binding in the country in which it was given, or if it has been set aside in that country. The arbitral award may not be enforced to the extent that the arbitral award contradicts the foundations of the Finnish legal system (*ordre public*).

The party enforcing the award or the judgment always bears the risk for the other party's insolvency. If the execution is unsuccessful due to lack of assets, the party enforcing the award will have to pay its own legal costs, in addition to not being able to retrieve the claimed amount.

### Investment arbitration

Finland signed the Convention on the Settlement of Investment Disputes between States and National of other States (also known as the ICSID Convention or the Washington Convention) on 14 July 1967 and deposited its instrument of ratification on 9 January 1969. Finland attained status as a Contracting State to the ICSID Convention on 8 February 1969. There is only one case on ICSID record involving parties of Finnish nationality (claimants). The case was largely successful for the claimants.

Finland has signed Bilateral Investment Treaties (BITs) with over 80 countries. Most of these BITs have entered into force and allow recourse to arbitration as a means of dispute resolution.

Finland has also signed the Energy Charter Treaty and ratified it on 16 December 1997.

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Markus regularly advises major domestic and international clients on dispute resolution and corporate crime cases.

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