Finland – 100 Years of Institutional Arbitration

Jussi Lehtinen and Heidi Yildiz
Dittmar & Indrenius

In recent years, an increasing number of international commercial parties have chosen Finland as a seat of international commercial arbitration. Given its progressive and pro-arbitration legislative framework and its modern, yet already 100-year-old world class arbitration centre, Finland is one of the most attractive jurisdictions for international arbitration in Europe. This article aims to provide an introduction to the current arbitration landscape in Finland, and therefore includes an overview of the Arbitration Institute of the Finland Chamber of Commerce (FCC) and the Finnish arbitration law.

The 100 year old Arbitration Institute of the Finland Chamber of Commerce

The 100 year old FCC, established in 1911, is today an attractive alternative for resolving complex international commercial disputes: the FCC represents a neutral arbitration centre, its Secretariat has a substantial experience in administering international arbitration cases and the FCC’s Arbitration Rules are clear and flexible in their scope, gather for the resolution of all types of commercial disputes, are in line with the generally accepted international arbitration practice and, most importantly, enable expeditious and economical arbitration process. In fact, the FCC has a track record for promoting resolution of disputes in an efficient and speedy manner: the average duration of a case resolved under its auspices in 2010 was nine months, and in any event, the FCC’s current Arbitration Rules require the arbitral tribunal to render its award within a year from the receipt of the case file. This time limit for the award has proven to work very well in practice. The enactment of rules for expedited arbitration in 2004 was further designed to reduce costs and speed up the arbitration process in relatively straightforward cases.

The FCC was originally established following a proposal from the Finnish Tradesmen’s Association. The Finnish merchants had encountered problems in the course of foreign trade and were, in particular, disappointed with the quality of foreign goods. Consequently, they felt that there was a need for a centralised forum for resolving disputes between the Finnish merchants and their foreign trade partners. The first Arbitral Rules of the FCC were adopted in November 1910 and already centred on the contemporary principles of arbitration that the dispute must be resolved expeditiously, the arbitrators must be impartial and the proceedings must be confidential. The drafters of the first Rules had also already given thought to the enforcement of the arbitral awards: the Rules provided that a party that had failed to comply with the award was to be publicly named on the notice board of the Helsinki Stock Exchange or on another such public notice board as the FCC saw fit. In the worst case of non-compliance, the public notice was to remain in place for a period of five years.

Renewal of the Rules of the Arbitration Institute of the Finland Chamber of Commerce in 2012

The FCC’s function is to promote the settlement by arbitration of domestic and international commercial disputes, provide information concerning arbitration and administer arbitrations when the parties have agreed to resolve their disputes in accordance with the FCC Rules. The FCC also acts as an appointing authority in a considerable number of ad hoc arbitrations: the FCC’s statistics show that the proportion of those ad hoc arbitrations in which the FCC appointed the arbitrators represented 18 per cent of all the arbitrations conducted under the auspices of the FCC in 2010.

In arbitrations conducted in accordance with the FCC Rules, the FCC reviews the award as regards the arbitrators’ fees, and ensures that the arbitrators can dedicate the necessary time to conduct the arbitration properly and efficiently and that the awards are rendered within the prescribed time limit.

Following a major reform and modernisation of the Finnish arbitration law in December 1992, the FCC revised its Arbitration Rules to make them compatible with the statutory framework in which they operate. The FCC’s current Arbitration Rules came into force on 1 January 1993 and are discussed in more detail in the context of the overview of the Finnish arbitration law below.

However, in the course of 2012, the FCC will release new revised Arbitration Rules. The FCC’s Rules will be amended to take into account the recent amendments to the UNCITRAL Arbitration Rules, as well as to make the Rules structurally more practical and user friendly. To strengthen its status as a world class arbitration centre, the FCC is also planning to make strategic changes to the composition of its board – including the appointment of non-Finnish nationals – as well as organise training events aimed at increasing the awareness of the FCC, launch an internship programme, and generally improve and increase the dialogue regarding the FCC in the international arbitration events.

Increased popularity of arbitration in Finland

The statistical figures published by the FCC indicate a considerable level of arbitration activity in Finland. This is regardless of the fact that these figures do not capture most of the ad hoc arbitrations, which are also very common. The FCC estimates that approximately half of all the arbitrations in Finland are ad hoc arbitrations.

The statistics of the FCC evidence that this clear trend for the increased popularity of arbitration in Finland has continued since the year 2003, albeit with slight variations in the number of arbitrations filed with the FCC each year. 2007 was a record-breaking year, with 68 arbitration cases filed. In 2009, 65 arbitrations were filed, whereas, in 2010, 57 arbitrations were filed. On the basis of the information available at the time of writing, it seems that, in comparison to the 2010 figures, there will be a slight increase in the number of arbitrations filed in 2011.
A considerable proportion of the arbitration cases conducted under the auspices of the FCC, namely one-third of all the arbitrations, has an international dimension (at least one party is domiciled abroad). The majority of cases — approximately 25 per cent of the cases on average — have typically concerned a dispute arising in the context of corporate transactions. Other common subjects in FCC arbitrations have been agent and distribution agreements, lease agreements, construction agreements, shareholders’ agreements and managing director agreements. Partnership agreements and debt collection have recently arisen as new subjects in the FCC arbitrations.

The legislative framework for arbitration in Finland

Finland not only has a long tradition of Institutional Arbitration, its legal framework for Arbitration also dates back to as early as 1928. Today, the arbitration procedures in Finland are governed by the 1992 Arbitration Act (as amended) (the FAA), which largely mirrors the provisions of the UNCITRAL Model Law on International Commercial Arbitration of 1985 (with amendments, as adopted in 2006) (the UNCITRAL Model Law). The UNCITRAL Model law as such has not, however, been implemented into the Finnish law. In spite of being based on the principles embodied in the UNCITRAL Model Law, the FAA applies without distinction to both domestic and international arbitrations.

Finland has further ratified and enacted the 1958 New York Convention and ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). Together, the Finnish legislative framework for arbitration and the FCC Rules, which supplement the legislation, confirm Finland’s standing as an arbitration-friendly jurisdiction.

Arbitration agreement

Pursuant to section 2 of the FAA, '[a]ny dispute in a civil or commercial matter which can be settled by agreement between the parties may be referred for final decision by one or more arbitrators.' Thus, in practice, only disputes relating to public or criminal law, as well as disputes in which the dominant issue concerns a public interest matter, such as family law matters, cannot be submitted to arbitration in Finland.

The requirements in the FAA as to the definition and form of the arbitration agreement are in substance identical to the requirements contained in article 7 of the UNCITRAL Model Law. In parallel to the UNCITRAL Model Law, the FAA does not distinguish between a submission and an arbitration clause; rather, it provides that an agreement to arbitrate may concern an existing dispute or future disputes or both arising ‘from a particular legal relationship specified in the agreement’. Section 3 of the FAA provides that the arbitration agreement is valid if it is in writing and that this formality is satisfied if:

- it is contained in a contract signed by the parties; or
- the parties have made a written record of it in exchange of letters, telegrams, telexes or other such documents; or
- in the course of arbitral proceedings, the parties exchange written submissions in which one party acknowledges the existence of an agreement and the other party does not deny it; or
- the arbitration agreement is incorporated by a reference in a written contract.

The separability doctrine is more or less unanimously accepted in Finnish legal literature and the decisions of the Supreme Court. Consequently, the arbitration agreement constitutes an independent agreement and thus the invalidity of the main contract in which the arbitration clause is contained does not prevent the arbitrators from deciding on the validity of the arbitration agreement.

A valid arbitration agreement constitutes a bar to court proceedings, provided that the respondent has invoked the arbitration agreement before raising any defence on the merits of the claim and, in any event, no later than when submitting his first statement on the substance of the claim. If the respondent fails to do this and answers a claim filed at a court, however briefly, in written or oral form, he will be considered to have waived his right to submit the matter to arbitration and the matter will be heard by a general court of law.

However, an arbitration agreement does not preclude a party from requesting a domestic court to grant interim, including protective measures such as a conservatory attachment or temporary injunctions. In fact, the domestic courts have an exclusive jurisdiction, both before the commencement of and during the arbitral proceedings, to grant injunctions that are enforceable by sanction.

The FAA is, on the other hand, silent on the possibility of an arbitral tribunal granting interim measures. In practice, however, the arbitral tribunals also order injunctive relief under their general authority to decide on procedure, unless the parties have specifically limited their power to do so. Although the injunctions ordered by arbitral tribunals are not enforceable by law, the tribunals may nevertheless draw negative inferences from the non-compliance. In situations where it is particularly important to obtain an enforceable interim award, the party seeking the relief is nevertheless well advised to apply to the local district court. The commentators have, in fact, proposed a revision of the Finnish Act, inter alia, to provide for the right of the arbitral tribunals to grant interim relief. Moreover, it will be interesting to see whether the new FCC Rules will include provisions for the appointment of emergency arbitrators in line with the recent changes to the ICC Rules.

Section 6 of the FAA further retains a party’s right to file his claim with a court in spite of the arbitration agreement, in circumstances where the opposing party ‘refuses to refer the subject-matter to arbitration,’ or has failed to perform his contractual obligations such as the appointment of the arbitrator or the payment of the advance fees or the security for costs. Thus, these circumstances are regarded as sufficient breaches of the arbitration agreement granting the non-infringing party an option to either continue the arbitration proceedings or request a court of law to hear the matter.

The doctrine of Kompetenz-Kompetenz is, in principle, recognised and applied in Finland and thus, if a party disputes the jurisdiction of the arbitral tribunal when the other party requests arbitration or during the arbitral proceedings, it for the arbitral tribunal to decide on its own jurisdiction. This does not, however, prevent a party from requesting a court to rule on the jurisdiction of the arbitral tribunal, provided that the opposing party has refused to refer the subject matter to the arbitration.

It has been thought that the drafters of the FAA included this provision for the purposes of avoiding the parties incurring unnecessary costs of obtaining an arbitral award, which is subsequently set aside on the basis that the tribunal lacked jurisdiction to hear the matter.

However, by the same token, the arbitral tribunal has the right to continue the existing proceedings and even render a final award, albeit pending the determination by the court on the jurisdiction.
of the arbitral tribunal. There is, therefore, a risk that if the tribunal decides to continue the arbitration, the award is subsequently set aside. To avoid situations where a party finds itself involved in these types of parallel proceedings – especially as a result of the other party using the section 6 mechanism as a dilatory tactic to obstruct and delay the proceedings – the parties can expressly agree in a separate arbitration agreement to waive their right to challenge the award on the basis of the tribunal’s lack of jurisdiction.52

Appointment of arbitrators
Sections 7 to 20 of the FAA govern the appointment of arbitrators. The parties are free to agree on the number of arbitrators43 and in the absence of such an agreement there are to be three arbitrators.44 The FCC Rules further supplement the statutory provision and stipulate in section 6(1) that if the parties have not agreed on the number of arbitrators then the FCC will appoint three arbitrators, unless it considers that the circumstances of the case are such as to entail the appointment of a sole arbitrator.45 Moreover, section 8 of the FAA stipulates that any natural person who is not bankrupt, under age or whose competence is not otherwise restricted may act as an arbitrator. The FCC Rules further specify that only a qualified lawyer can be appointed as the chairman of the arbitral tribunal or as a sole arbitrator.46 In appointing arbitrators, the FCC further follows the accepted international practice of not appointing a chairman from the same domicile as one of the parties.

Arbitrator conflicts and challenges
Section 9 of the FAA requires the arbitrator(s) to be ‘impartial and independent’47 and imposes a fundamental duty on the prospective arbitrator to immediately disclose any circumstance likely to ‘give justifiable doubts as to his impartiality or independence.’48 Moreover, an arbitrator is under a duty from the time of his appointment and throughout the arbitral proceedings to disclose without delay ‘any such circumstances of which the parties have not previously been informed.’49 The FCC Rules also contain similar disclosure obligations on part of the arbitrators.50 In practice, the FCC requires the prospective arbitrators to fill in a declaration of impartiality and independence and an undertaking to disclose ‘any facts or circumstances not previously brought to parties’ attention that are likely to affect [the arbitrator’s] independence and impartiality as arbitrator or give rise to reasonable doubts in these respects.’ The declaration is to remain binding until the completion of the proceedings. The form further requires the prospective arbitrator to declare that within the past five years he has not been appointed as an arbitrator by either of the parties, by counsel to either of the parties or by the law firm to which the counsel to either of the parties belongs.

Section 10 of the FAA allows a party to challenge the appointment of the arbitrator if the arbitrator ‘[h]ad been disqualified to handle matter as a judge, or if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.’51 The parties are further free to agree on the procedure for challenging an arbitrator.52 Failing to reach such an agreement, the parties are allowed to make a challenge in writing directly to the arbitral tribunal.53 The arbitral tribunal shall then decide on the application unless the arbitrator in question withdraws from his office or the opposing party agrees to the challenge.54 The arbitral tribunal’s decision on the challenge is regarded as final and the only resort left for the party whose objection to arbitrator’s appointment has been rejected is to pursue an action for setting aside the award under section 41 of the FAA.55

However, if the parties have agreed to arbitrate under the FCC Rules, the challenge must be made to the FCC’s board of arbitration in writing, stating the grounds for the challenge and within 30 days from the date when the grounds for the challenge became known.56 The challenges to arbitrators’ appointment in FCC arbitrations have been very rare and the cases in which the challenge has been accepted have been even rarer.

The arbitral proceedings
In parallel to the UNCITRAL Model Law, the provisions in the Finnish Act concerning the arbitral proceedings are centred on the principle of party autonomy. Section 23 of the FAA stipulates: ‘[a]s long as otherwise provided in this Act, the proceedings shall be conducted in accordance with what the parties have agreed on the procedure to be followed by the arbitral tribunal. Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, subject to the provisions of the Act and taking into account the requirements of impartiality and speed.’57

The words ‘as long as otherwise provided in this Act’ refer to the few rules and principles contained in the FAA that are of a mandatory nature and thus restrict party autonomy. One of these is, for example, contained in section 22,58 which provides that the arbitral tribunal is obliged to give both parties a sufficient opportunity to present their case with the facts and evidence.59

Section 21 of the FAA stipulates that the arbitral proceedings commence when the respondent has received from the claimant a notice of arbitration that complies with the form requirements contained in section 12(1) of the FAA.60 In practice, the notice of arbitration is relatively short and is not supposed to fulfill the requirements concerning a statement of claim.61 The FCC Rules contain identical, albeit more detailed, content requirements for the request of arbitration.62 Sections 25 to 30 of the FAA provide further procedural guidance. However, in accordance with the principle of party autonomy, the FAA grants the parties considerable freedom in deciding on the conduct of the arbitral proceedings. The common practice is that the proceedings are divided into two main phases: the exchange of written pleadings and the oral hearing, which are followed by the arbitral award. Post-hearing briefs are also often submitted after the hearing and the parties typically hold a preliminary procedural meeting prior to or after the exchange of written pleadings where the parties outline the disputed issues and present their opinions on the organisation of the subsequent proceedings.63

Substantive Law
In parallel to the UNCITRAL Model, the Finnish law provides that the arbitral tribunal must decide the dispute in accordance with the rules of law that the parties have chosen to be applicable to their disputes.64 If the parties fail to choose the applicable law, then the tribunal must decide the dispute in accordance with the rules of law applicable to the substance of the dispute.65 According to the travaux préparatoires of the FAA, this means that the tribunal will determine the applicable law in accordance with the conflict of laws rules, which the tribunal considers applicable.66 Furthermore, the arbitral tribunal may decide the dispute ex aequo et bono, only if the parties have expressly authorised it to do so.67 Thus, the arbitral tribunals are not entitled to consider the principles of lex mercatoria or ‘general principles of international trade law’ in making the award, unless expressly authorised by the parties. In fact, a violation
of this rule might lead to the award being set aside pursuant to section 41(1) on the basis that the arbitral tribunal has exceeded its authority.\textsuperscript{66}

Recognition and enforcement of an arbitral award
The FAA provides that the award rendered by the arbitral tribunal is a final award\textsuperscript{67} and will be recognised as binding and enforceable, whether or not rendered in Finland or in a foreign state.\textsuperscript{68} Pursuant to section 44 of the FAA,\textsuperscript{71} a court may, however, refuse an application for the enforcement of an arbitral award on the basis that it is null and void within the meaning of section 40 of the Act\textsuperscript{72} or ‘if the arbitral award has been set aside by a court, or if a court, because of an action for declaring null and void or for setting it aside, has determined that any enforcement of the award shall be interrupted or suspended.’ Section 41 further specifies the limited grounds for setting aside an arbitral award.\textsuperscript{73} These grounds include, for example, the excess of the tribunal’s authority or an improperly appointed tribunal.\textsuperscript{74}

In respect of the recognition and enforcement of foreign arbitral awards, Finnish law is largely identical to the New York Convention, which Finland ratified in 1962. The Finnish courts will refuse to recognise and enforce a foreign award on its own motion (ex officio) only if the award is contrary to the public policy of Finland.\textsuperscript{75} Section 53 of the FAA, which stipulates the other grounds for refusing to recognise and enforce arbitral awards made in a foreign state,\textsuperscript{76} is almost identical in scope to article V of the New York Convention.

Notes
6. In fact, the proposal originally came from the Tradesmen’s Association of the city of Vaasa as early as in 1909.
11. First Arbitral Rules of the FCC dated 1910, at section 18. The non-complying party was able to have the notice removed if it subsequently complied with the award and paid a fine to the FCC (First Arbitral Rules of the FCC dated 1910, at section 18).
12. The Guidelines for Using a Secretary in FCC Arbitration can be obtained on the FCC’s website at www.arbitration.fi/Guideline_Secretary_FCCC_Arbitration.pdf.
19. The FCC’s records show that in the last 10 years the parties appearing in the FCC arbitrations have been: Finnish, Swedish, Norwegian, Lithuanian, Latvian, Estonian, British, Irish, German, Dutch, French, Monacan, Luxembourgh, Belgian, Swiss, Austrian, Liechtenstein, Italian, Greek, Portuguese, Polish, Russian, Israeli, Kuwaiti, Australian, Singaporean, Chinese, Brazilian, Mexican, Canadian and American. (The FCC’s responses to the MIDS-ASA Research Study 2011 on the Role of Arbitral Institutions, released in the ASA Conference on 9 September 2011.)
20. However, in 2010 the proportion of cases arising in the context of corporate transactions was exceptionally low at 16 per cent, www.arbitration.fi/en/statistics.html.
26. Issues concerning, for example, status or legal capacity of natural persons, divorce, adoption, custody of children, guardianship and so on cannot be submitted to arbitration in Finland (eg, KKO1937 II 212; KKO 1950 II 257).
29. Section 3(2) of the Finnish Arbitration Act provides: ‘An arbitration agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters between the parties. An arbitration agreement is also in writing when the parties, by exchanging telegrams or telexes or other such documents, have agreed that a dispute shall be decided by one or more arbitrators’ (Arbitration Act (967/1992), at section 3(2)).
30. Section 3(3) of the Finnish Arbitration Act provides: ‘An Arbitration agreement is also in writing if an agreement which has been made in the manner mentioned in paragraph (2) refers to a document containing an arbitration clause,’ (Arbitration Act (967/1992), at section 3(3)).
34. Interim relief provided by the courts is regulated in Chapter 7 of the Code of Judicial Procedure (4/1734). It can be of a compelling or prohibitory nature. The applicant must be able to establish a probability that he has a right and there is danger that the opposing party, by deed or negligence or in some other manner, hinders or undermines that right or decreases essentially its value or significance. The court will balance the injury caused to the opposing party with the benefit to be secured.
Dittmar & Indrenius, established in 1899, is an independent law firm focused on the quality of its services within four practice areas: mergers and acquisitions, dispute resolution, finance and capital markets, and corporate and commercial. Dittmar & Indrenius represents both domestic and foreign companies as well as multinationals from a wide range of industry sectors.

Dittmar & Indrenius aims to provide the best legal services in complicated transactions and complex dispute resolution in its jurisdiction. Dittmar & Indrenius also strives to be the best long-term law firm partner in Finland for demanding corporate clients.

Dittmar & Indrenius’ dispute resolution practice covers commercial litigation, arbitration and alternative dispute resolution. The firm represents a wide variety of clients in all types of commercial disputes ranging from litigation closely related to the ordinary course of business of a client to complex arbitration proceedings threatening the continuation of a business. The expertise necessary for each case is secured by establishing teams consisting of litigators and experts of the relevant sector of substantive law.

The partners of Dittmar & Indrenius frequently act as arbitrators in commercial arbitration proceedings.
**Jussi Lehtinen**  
Dittmar & Indrenius  
Jussi Lehtinen, partner at Dittmar & Indrenius, is the firm’s head of dispute resolution practice. His practice focuses on complex international arbitration and litigation and he has extensive experience in advising and representing corporate clients in a broad range of international arbitration disputes under the ICC, SCC and FCC Rules, as well as in litigation disputes at general and specialised courts. Mr Lehtinen has also been involved in numerous minority share squeeze-out arbitration proceedings in Finland. Prior to joining Dittmar & Indrenius, he gained commercial and legal experience from working in the legal departments of Nokia and the Helsinki Stock Exchange. Mr Lehtinen is a member of the Finnish Bar Association, the International Bar Association and the Finnish Arbitration Association.

**Heidi Yildiz**  
Dittmar & Indrenius  
Heidi Yildiz is a senior associate in Dittmar & Indrenius’ dispute resolution practice. Her experience includes working on international commercial arbitration disputes under the ICC, LCIA and DIS Rules. Ms Yildiz is an English qualified Solicitor. She trained and qualified in WilmerHale’s London office, where she practised international arbitration as a solicitor until she joined Dittmar & Indrenius in 2011. Ms Yildiz has previously also worked in the London office of Herbert Smith (from 2004 to 2005). She obtained her LLB with honours from City University, London and postgraduate diploma in legal practice from BPP Law School, London. She is a member of the Law Society of England and Wales and the LCIA’s Young International Arbitration Group.