ARBITRATION IN FINLAND – CHARACTERISTIC FEATURES CURRENTLY UNDER DISCUSSION

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1. INTRODUCTION

Dispute resolution has traditionally been court of law oriented in Finland. However, arbitration has recently become increasingly popular especially among legal persons, i.e. business entities, as an alternative to court of law procedure. Consequently so-called business-to-business disputes are more often submitted to arbitration.

Arbitration is considered to hold certain advantages in comparison with dispute resolution in courts of law. Arbitration provides for speedy resolutions in contrast to generally lengthy proceedings in courts of law. Arbitral proceedings and arbitral awards are generally private, whereas proceedings and judgments in courts of law are public. Furthermore, in arbitration the disputing parties may utilize the best experts as arbitrators on a case-by-case basis, which is not possible in courts of law. Hence, in arbitration the probability of objectively correct resolutions is considered to be greater than in courts of law.

Arbitration is based on the principle of freedom of contract. There are two basic forms or types of arbitration: ad hoc and institutional. Both of these forms are based on the parties' agreement. In *Ad hoc* arbitration the parties agree on the particular arbitration mechanism on a case by case basis. The arbitration will be *ad hoc,* unless the parties have explicitly opted for institutional arbitration. In the latter kind of arbitration the parties submit their disputes to arbitration conducted under the auspices of, or administered or directed by an existing institution. Arbitration proceedings are however not considered institutional if the arbitration institute in question only is competent to appoint the arbitrators, without applying the rules of the institute to the actual arbitral proceedings.

The Arbitration Institute of the Central Chamber of Commerce of Finland is the leading arbitration institute in Finland. During the years 1998–2002 the number of requests for arbitration to the Central Chamber of Commerce of Finland has almost tripled. The number of ad hoc arbitration proceedings is not public. However, the development is presumably similar to that of institutional proceedings, i.e. the number of ad hoc arbitration proceedings is increasing.

In the year 2002, 50 requests for arbitration were submitted to the Arbitration Institute of the Central Chamber of Commerce of Finland. Furthermore the Institute appointed 16 arbitral tribunals for redemption cases under the Finnish Companies Act. The number of requests pending this year (2003) is approximately the same as in 2002.

In 2002 the rules of the institute were applied to 66 per cent of the cases, excluding redemption cases. 23 per cent of the requests concerned international disputes, i.e. one or more of the parties to dispute were from abroad.

The legal issue in the requests for arbitration to the Central Chamber of Commerce indicates that certain types of disputes are most frequently solved by means of arbitration. In 2002, 16 per cent of the requests concerned sale of shares, 16 per cent co-operation agreements, 12 per cent breaches of competition clauses, 8 per cent sale of business operations and 8 per cent shareholders' agreements.

The basic rules of Finnish arbitration are contained in the Finnish Arbitration Act (hereafter the "Act"). Finnish arbitration proceedings have certain characteristics which deviate to some

extent from the major international rules and regulations on arbitration. This should be taken into account when initiating arbitration in Finland.

It should be noted that the present article discusses questions relating to arbitral proceedings based on an arbitration agreement between the parties to the dispute. Arbitrations of a statutory nature, e.g. redemption of shares of minority shareholders ("squeeze out") in accordance with the Finnish Companies Act, are not the subject of this article.

2. CHARACTERISTICS OF FINNISH ARBITRATION

2.1 Arbitration Agreements

2.1.1 General

The principal provisions concerning arbitration agreements are contained in Sections 2 and 6 of the Act.

No general distinction between a submission and an arbitration clause is recognised in Finnish law. An arbitration agreement may concern an existing dispute as well as future disputes. In order to be considered arbitrable a prospective dispute should arise from a particular legal relationship defined in the agreement. A reference to "any dispute, controversy or claim arising out of or relating to this contract" fulfils the requirement in accordance with Finnish law. In certain foreign judicial systems a more specific definition, i.e. "any dispute, controversy or claim arising out of or relating to this contract *or the termination or validity thereof*" may be required. A reference to any dispute arising between the parties, without any defined connection to a specified contractual relationship, may however be invalid also in accordance with Finnish law.

Nevertheless, certain distinctions between a submission and arbitration clause exist in Finnish law as far as consumer contracts and certain transport contracts are concerned. For example an arbitration clause in a consumer contract cannot be invoked against the weaker party, i.e. the consumer. However, an arbitration agreement, which has been concluded after the particular dispute has arisen, is valid and can usually be invoked against the consumer.

In Finland an arbitration clause is considered independent of the agreement containing the clause. Hence the validity and existence of the clause must be determined separately from the agreement itself, irrespective if the clause is in the same document or not. The possible invalidity of an agreement does not in general cause the invalidity of an arbitration clause included in the agreement.

2.1.2 The form of arbitration agreements

An arbitration agreement must be in writing. This formal requirement is not only a matter of proof, but rather a precondition for the validity of the arbitration agreement.

An arbitration agreement is construed as written if it is contained in a document signed by the parties or in an exchange of letters, telegrams, telexes or other documents. The arbitration agreement is in writing also when it is contained in other electronic messages which provide a record of the agreement, or in an exchange of statements of claim and defence in which the

existence of an agreement is alleged by one party and not denied by the other. The requirement of written form corresponds to the requirement in the UNCITRAL Model Law.

That requirement is fulfilled by a reference to general contract terms containing an arbitration clause. If general terms have been incorporated in the individual contract, an arbitration clause included in those terms will usually be valid. In accordance with the ordinary principles of interpretation of contracts general terms do not have to be attached to the individual contract in order to be valid. To some extent these requirements may differ from the corresponding requirement in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereafter the "New York Convention"), which Finland has ratified. Legal literature indicates that in order for the requirement of written form to be fulfilled in accordance with the New York Convention, the general terms must be attached to the individual contract and the individual contract must contain a reference to the arbitration clause in the general terms.

2.1.3 Arbitration agreements vs. mandatory law, case examples

Arbitrability

Arbitration is based on the freedom of contract. Parties to a dispute are in general entitled to settle their disagreements any way they find adequate. According to Section 2 of the Act matters which are amenable to out of court settlement are arbitrable.

There are however certain material exceptions. A general definition of arbitrability in Finnish jurisprudence is that arbitration applies only to non-mandatory disputes, i.e. to matters which can be settled without the intervention of public authorities. Mandatory matters, i.e. matters of public law or public interest, cannot be submitted to final settlement by arbitration. For instance matters concerning the status or legal capacity of natural persons, divorce, adoption or custody of children cannot be submitted to arbitration.

The question of arbitrability has recently been the subject of a judgement by the Finnish Supreme Court (hereafter "KKO"). In the case KKO 2003:45 the plaintiffs were minority shareholders of a public limited liability company, hereafter "Company". They demanded that the Company be placed in liquidation in accordance with Chapter 13 Section 3 of the Finnish Companies Act. According to the Company's articles of association all disputes between the directors and shareholders were to be submitted to arbitration. The question was whether a demand to place the company in liquidation could be settled by arbitration or must be submitted to a court of law.

The Supreme Court ruled that the claim was arbitrable. The Supreme Court established that even though the shareholders and the Company cannot agree to place the Company in liquidation, the general meeting of shareholders was competent to make that decision *without the intervention of courts or of other authorities.*

For these reasons the Supreme Court ruled that the claim could be submitted to arbitration. The court action was rejected.

Adjusting or setting aside an arbitration agreement

The other recent case in the Supreme Court (KKO 2003:60) concerned the application of Section 36 of the Finnish Contracts Act. According to that provision a contract can be adjusted or set aside as unreasonable. The Supreme Court ruled that an arbitration agreement was a contract in the meaning of the Contracts Act and that it could be set aside as unreasonable. However the circumstances were somewhat particular. The party (A) claiming that the arbitration agreement was unreasonable was a private entrepreneur, equivalent to a consumer. A had no assets or income. The Supreme Court considered it impossible for him to provide the security for arbitration costs, which would have been imposed by the arbitral tribunal. Neither was the other party (B) willing to provide the security on behalf of A. In addition A was granted cost-free legal proceedings and legal counsel in another case between the parties in a court of law. Such a facility was not available in arbitration proceedings.

The Supreme Court considered it impossible for A to safeguard his interests and rights in an arbitration proceeding. For these particular reasons the Supreme Court set the arbitration agreement aside and the case was submitted to a court of law.

Notwithstanding the fact that the judgment might possibly result in similar procedural pleas in the future in disputes between business entities, it is evident that the Supreme Court restricted its ruling to concern only situations where the party claiming that an arbitration agreement is unreasonable must be considered to be a private entrepreneur, equivalent to a private person or consumer to succeed with the claim.

This interpretation of the decision is in conformity with established Finnish jurisprudence and case law (See the judgement KKO 1996:27). It is also in conformity with the travaux préparatoires of the Contracts Act, which indicate that the application of Section 36 of the Act is in general limited to situations where one contracting party is a legal person or a business entity and the other party a consumer or private person. In a commercial contract between legal persons, in particular if the contract is international, an arbitration clause would hardly in practice be set aside as unreasonable by virtue of Section 36 of the Contracts Act.

2.2 The Arbitral Tribunal

2.2.1 Appointment of arbitrators

General

Section 7 of the Finnish Arbitration Act provides for a three member Arbitral Tribunal, unless the parties have agreed otherwise. The parties are free to establish the number of arbitrators they find appropriate.

Parties appoint persons whom they wish to act as arbitrators either jointly in the case of one single arbitrator, or separately in case each party appoints an arbitrator in an arbitral tribunal of more than one arbitrator. However, if the parties are not able to agree on the appointment of one single arbitrator, a court of law, i.e. the local district court, shall have the competence to decide on the appointment.

Personal qualifications for appointment

Parties are in general free to appoint anyone as arbitrator, whatever his or her nationality, education or age. Nevertheless an arbitrator must be over 18 years of age.

According to Section 8 of the Act, the arbitrator must have "full legal capacity".

Independence and impartiality are generally considered the primary prerequisites of a prospective arbitrator. When a person is approached in view of his or her appointment as an arbitrator, he or she shall immediately disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality and independence, unless he or she refuses to accept the appointment. From the time of his or her appointment and throughout the arbitral proceedings an arbitrator shall without delay disclose any circumstances of which the parties have not previously been informed.

The arbitrator must be independent of all parties, including the nominating party. The independence of an arbitrator may also be endangered in cases of indirect relationships between an arbitrator and a third person. For example an arbitrator's connection to a party's representative or even its counsel, or a party's connection to an arbitrator's law firm may constitute an indirect relationship, which can endanger the requirement of independence.

In addition to being independent an arbitrator must also be impartial. An arbitrator may be financially and otherwise independent, but nevertheless partial. Impartiality is rather a subjective qualification, contrary to independence, which should be based on objective criteria. Thus it may not be easy to detect the partiality of an arbitrator who is independent by objective criteria, but who has subjective prejudices against one of the parties. It is also possible that the neutrality of an arbitrator is put in doubt. The neutrality of an arbitrator is frequently considered in connection with his or her nationality. A party may for instance be inclined to select one of its own nationals as arbitrator in order to obtain the understanding by a member of the Arbitral Tribunal of a behaviour which obstructs or delays the proceedings, although such an attitude is not acceptable.

The independence and impartiality of an arbitrator has recently been under discussion in the International Bar Association. The Committee on Arbitration and ADR (Committee D) of the Association has appointed a working group of 19 experts in international arbitration from 14 countries to study national laws, judicial decisions, arbitration rules and practical considerations and applications regarding impartiality, independence and disclosure in international arbitration. The purpose of the exercise was to promote and improve the decision making process in arbitral tribunals. The Working Group has prepared a draft "IBA Guidelines on impartiality, independence and disclosure in international commercial arbitration" (hereafter the "Draft"). The Draft (second draft 22 August 2003) contains certain provisions which to some extent are different from the provisions of the Finnish Arbitration Act.

The Draft lists categories of situations which can occur in arbitral proceedings and which concern the independence and impartiality of arbitrators. Based on the categorisation the Working Group has drafted three specific lists, i.e. the Red list, the Orange list and the Green list, of reasons which may or may not cause unacceptable dependence or non-impartiality of arbitra-

tors. In comparison with the Finnish Arbitration Act a significant point is that the Red list contains both "non-waivable" and "waivable" grounds of dependence and/or non-impartiality.

The non-waivable Red List sets out situations of incapacity deriving from the overriding principle that no person can be his or her own judge. According to the list such situations would occur for example when "there is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration".

The Finnish Arbitration Act does not, however, contain any provision according to which a party cannot waive his or her right to invoke a particular ground of disqualification of an arbitrator. The parties are in principle entitled to appoint even one of the parties as sole arbitrator. According to the Draft such an appointment is not possible even in theory because a party cannot waive his or her right to invoke such grounds of disqualification.

It is important to note that the IBA Guidelines are not a legal code and by themselves they lack any legal or contractual status. As the IBA is a private body it has no legislative competence. Thus the IBA Guidelines are not a source of law or of legal rules. It is uncertain, what effect - if any - the Draft and the future final Guidelines will have on national or international rules and regulations on arbitration.

Irrespective whether the provisions set out in the Guidelines were to be to some extent implemented in the Finnish Arbitration Act or not, it cannot be excluded that the provisions could at least be used to present arguments when an arbitrator's impartiality or independence is under consideration. Neither can it be excluded that the Guidelines may have even more impact on international arbitration and court practice reflecting the overriding principle of *fair trial*. In the words of the Working Group:

"These Guidelines are not rules of law and do not override any applicable national law or arbitral rule by the parties. However, the Working Group hopes that these Guidelines will find general acceptance within the international arbitration community (as was the case with the IBA Rules on the Taking of Evidence in International Commercial Arbitration) and that they thus will help practitioners, arbitrators, institutions and the courts in their decision-making process on these very important questions of impartiality, independence, disclosure and objections and challenges made in that connection."

So far the Draft has not received all that far-reaching approval – on the contrary many of its provisions have faced criticism. Partly because of the current discussion another revised Draft is expected to be made by the Working Group.

2.3 Arbitral proceedings

The Finnish Arbitration Act sets out party autonomy as the main principle in arbitration proceedings. Section 23 of the Act sets out that:

"Unless otherwise provided in this Act, the proceedings shall be conducted in accordance with the agreement of the parties..."

There are few provisions and principles in the Act which are of a mandatory nature and which restrict party autonomy. The wording of the Section 23 refers primarily to the principle of *audiatur et altera pars* which is set out in Section 22 of the Act:

"The arbitrators must reserve the parties sufficient opportunity to plead their case"

This means that each party must be given an opportunity to respond to the claims and evidence presented by the other party. A violation of the principle of *audiatur et altera pars* may lead to the setting aside and the non-enforceability of the arbitral award. Similar provisions are contained in the New York Convention.

One of the recently discussed aspects of Finnish arbitral proceedings is the production of documents. There are few provisions on the subject in statutory law and institutional rules in Finland. The Act and the Arbitration Rules of the Arbitration Institute of the Central Chamber of Commerce of Finland (hereafter the "Rules") do not contain such detailed provisions concerning the production of documents as for example article 3 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

The production of documents in Finnish arbitral proceedings is governed by Section 27 of the Act, which provides that the arbitral tribunal shall promote an appropriate and expedient settlement of the matter. The tribunal may request a party or another person in possession of a document or other object relevant as evidence to produce it.

As regards requests made by the parties, an admissible request must fulfil three preconditions. The document must be identifiable, relevant and in possession of the party to whom the request is directed. Thus arbitral tribunals generally require identification of the issue to be proved, the type of the document and in some cases the date of preparing the document.

In a recent three-member tribunal arbitral proceeding conducted under the Act the tribunal decided that particularly extensive data, i.e. more than 100.000 pages of documents relating to a reinsurance arrangement, could not be considered as a *written document* and the request to produce such evidence was denied.

The party requesting the production of a document must also present prima facie evidence that the document is in the possession of the party to whom the request is directed and that it can be assumed to have relevance as evidence. Relevance means that the requested documents must prove facts which directly or indirectly constitute the legal basis of the claim or the reply.

The arbitrators do not have the authority to impose a penalty on or give enforceable procedural orders to a person who fails to comply with the tribunal's decision on procedure. This applies even if the tribunal's procedural order is based on a specific institutional rule or regulation. Despite the fact that inter alia Section 30 a of the Rules provides that an arbitral tribunal is entitled to give procedural orders, such as injunctions and orders to produce evidence, such orders are not enforceable. Nor is the tribunal entitled to support such orders by imposing a penalty.

Section 29 of the Act however provides that the party requesting the production of evidence may request court of law assistance. The request shall be made to the arbitral tribunal and if the

tribunal finds it necessary the party can be authorized to request court assistance. With the consent of the tribunal the party is then able to have a court of law order on the production of evidence under penalty of a sanction.

In accordance with Section 27 of the Rules an arbitral tribunal may refuse evidence which concerns irrelevant or already established facts. The tribunal may also refuse evidence if it can be produced by other means in a considerably less burdensome way or at considerably less expense. Chapter 17 Section 7 of the Finnish Code of Judicial Procedure contains a similar provision. Also in arbitral proceedings conducted under the Act tribunals have in practice rejected requests which are admissible as such, but which would be evidently irrelevant in a particular case, although there is no such provision in the Act.

2.4 Arbitral Award

A final arbitral award on the merits constitutes *res judicata* immediately when rendered. It is final and binding on the parties and must be recognised by courts of law, other authorities and arbitral tribunals as a final decision on the issues submitted to the arbitration. If one party later brings a court action against the other party in relation to the subject matter of the arbitration, the court will dismiss the action because the issues have been finally settled and are *res judicata*. The same applies if the case were brought for trial before another arbitral tribunal, unless otherwise agreed by the parties.

The award is *enforceable* immediately when issued. The award will also qualify for recognition and enforcement under the relevant international conventions (i.e The New York Convention).

In addition the award marks the beginning of the time period within which a party must bring an action for setting aside the award, or to appeal against the arbitrators' decision regarding their remuneration. That time period commences on the date the party in question received the award.

The mandate of the arbitrators is terminated after the final award has been issued. Certain exceptions relating to amending and supplementing the award exist in Sections 38-39 of the Act, but they cannot be further discussed in this context.

With respect to form, there are two statutory requirements which the award must fulfil in order to be valid. The award must be in writing and it must be signed by all arbitrators (Section 36 of the Act; Section 37 of the Rules). Failure to fulfil these requirements induces invalidity. The award is however valid if a majority of the arbitrators have signed it and stated in the award the reason why all the arbitrators have not signed it.

There are no statutory requirements in Finland that the arbitrators shall state the reasons for the award. Hence the award cannot be successfully challenged only on the basis of lack of reasons. This is in contrast for example with the provisions of the UNCITRAL Model Law.

The Act provides that certain defects and inaccuracies in the arbitral award result in its invalidity, irrespective of a party invoking them or not. If the award is for example in conflict with *ordre public* or if the award is incomplete and incoherent to the extent that its content is unclear, the award is null and void.

Certain errors have to be invoked by a party in order to set aside the award. Section 41 of the Act provides that an arbitral award may be set aside, inter alia, when the arbitrators have exceeded their powers, an arbitrator is not appointed in due process or is incompetent. Furthermore an arbitral award may be set aside if the arbitrators have not granted the parties sufficient opportunity to plead their case.

Such a division where certain grounds induce nullity by law and other grounds require a party to invoke the nullity is not known in the leading international rules and regulations concerning arbitration proceedings and the difference should be noted when initiating Finnish arbitration proceedings.

It must also be noted that even though Section 31 of the Act explicitly sets out that "the arbitrators must base the arbitral award on law" the award is not challengeable, nor void by law, solely on the basis that the arbitrators are considered to have applied substantive law wrongly, i.e. objective incorrectness of an award does not constitute a basis for a successful contestation nor for nullity by law.

3. CONCLUSION

Today there is a certain preference for arbitration in Finland and it is considered to be an advantageous substitute for court of law proceedings.

Increasing numbers of business-to-business disputes are submitted to final settlement in arbitration. This trend is expected to continue and even to gain momentum in the future, especially if and when proceedings in more complex disputes in courts of law remain extremely lengthy, i.e. over five years in the worst case.

The essential prerequisite for successful arbitration proceedings is that the appointed arbitrators are competent and proficient enough to perform their task properly and that they hand down a well reasoned and substantively correct arbitral award. With such arbitrators also the potential savings in time and costs are considerable in comparison with corresponding proceedings in a court of law.