Intervention of State Courts in Finnish Arbitration – An Overview

The central basis for the acceptance and the regulation of arbitration is the recognition of the related principles of autonomy of will and freedom of contract. The basis for regulating arbitration is that State courts and other public authorities are authorized to participate and interfere in as well as contribute to arbitration only in so far as they have an express authorization to do so based on provisions of statutory law. On the other hand, the social significance of arbitration and the legal effects, res judicata and enforceability, of arbitral awards require that arbitration is regulated by law and simultaneously to certain extent submitted to the control of State courts and other public authorities.

1. About the history of judicial regulations of the Finnish arbitration

In 1866 Juridiska Föreningen i Finland r.f. (the oldest association of lawyers in Finland) had as one of its debate topics¹ »Should conciliation courts be introduced also in Finland? and in case this proposition is accepted, which might be the general grounds for the composition and the competence of such authorities?» It appears from the association’s journal, JFT, that the significance of party autonomy and options based on it had at the time not yet been fully internalized in this context in Finland.² However, the majority of the members of the association considered that such conciliation courts would be desirable and useful though difficult to implement, because it was perceived that there were no lawyers that had the requisite skills for such tasks and because of the funding of such authorities.

However, developments towards the end of the 19th century including industrialization, an increase in trade and entrepreneurship as well as a wealth of new legislation necessary for regulating these operations, unavoidably led to provi-

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¹ Tidskrift utgiven av Juridiska Föreningen i Finland (1866), 114–118: »Månne ej förlikningsdomstolar åfven i Finland borde inrättas? och i fall detta medgifves, hvilka vore de allmänna grunderne för dessa myndigheters sammansättning och befogenhet?»
² Then the old Enforcement Code (1734) was still in force and section 4:15 of the Code prescribed »If a dispute has mutually been referred to be settled by credible men and promised to accept their decision, then it can be taken as grounds for execution.«
sions for arbitration being actualised and enacted.3 Sweden enacted its first statutory provisions on arbitration already in 1887.4 In Finland the new Enforcement Act (37/1895) of 1895 included in its section 3:16 provisions on arbitration specifically concerning the enforceability of arbitral awards and the following basic conditions for enforceability:

The arbitration agreement had to be in written form. The question in dispute had to be of such kind that it could be settled by agreement between the parties. The arbitration agreement could be entered into for future disputes arising from a certain legal relationship specified in the agreement. However, if that was the case, the arbitration procedure had to be commenced by a written notice to the other party and the arbitrators were appointed as provided for in the agreement. The arbitrators were obliged to resolve all of the issues in dispute left to their decision and they had no right to »go outside their task». The arbitral award had to be final so that the parties had not in the arbitration agreement reserved a right of appeal. If these requirements were fulfilled, the chief execution authority had the power to order execution of the arbitral award, unless a superior authority or court dealing with an action for avoidance had ordered otherwise. Based on the execution authority’s order the arbitral award became enforceable in the same manner as a court judgment. Section 3:16 of the Enforcement Act also contained provisions for when a court had set aside an arbitral award due to the fact that »arbitrator is disqualified or otherwise unlawful» or »other error has occurred in the procedure». In such cases the execution of the relevant award had to be cancelled in accordance with section 3:14 of the Enforcement Act.

Hence, already in 1895 the scanty and general provisions in section 3:16 of the Enforcement Act contained basic requirements for arbitration and made it possible to use arbitration5 as well as to enforce arbitral awards. These provisions also enabled legal control over arbitration by State courts and execution authorities. However, the provisions were insufficient. They left open a number of issues including for example: the principles that should be observed in arbitration proceedings and when rendering awards, the grounds for compensations of

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4 Lag om skiljemän 28.10.1887. Regarding the history of Swedish arbitration see e.g. Stefan Lindskog, Skiljeförfarande, En kommentar (Visby: Norstedts Juridik AB 2005), 30–40.

5 See Gustaf Norrmén, Samling av Helsingfors skiljenämnds domar under åren 1911–1922 (Helsingfors: Holger Schildts Tryckeri 1922). This book contains summaries of 100 arbitral awards. According to the introduction, the Arbitration Board of Helsinki was established for trade, industry and shipping in 1910 on the initiative of the twelfth General Merchant Meeting held in Vaasa. The meeting simultaneously ratified the rules for the composition and the activity of the Arbitration Board. After the Ordinance on Chambers of Commerce (28.7.1917) had entered into force and the Central Chamber of Commerce had been ordered to act, upon request, as a conciliation court, the Arbitration Board of Helsinki was subordinated to the Central Chamber of Commerce that elected the members of the Board since 1920.
the costs of arbitration, the specific grounds for avoidance of arbitral awards and the specific court procedure for actions for avoidance. In addition, the rules regarding enforcement proceedings were insufficient. Legal scholarship as well as party practice in drafting arbitration agreements and the practice of courts and execution authorities in dealing with arbitration matters in part compensated for the deficiencies in the statutory provisions.

Alexander Frey’s doctoral thesis »Skiljemannainstitutet», the first of its kind, was published in 1911 and examined in detail such topics as arbitration agreements, arbitrator agreements, legal effects of arbitral awards as well as the legal relationship between arbitration and proceedings in State courts. It is notable that Frey had to refer to precedents of the Swedish Supreme Court due to an almost total lack of domestic case law.

During the period in which section 3:16 of the 1895 Enforcement Act was in force the Finnish Supreme Court6 rendered a couple of judgments dealing with arbitration matters. First, confirming that a jurisdictional objection based on an arbitration agreement had to be made in court proceedings prior to submitting the first statement on the substance of the dispute (SOO 1917 II 510).7 Secondly, dealing with the question of whether written notice for initiating arbitration proceedings been made correctly (KKO1920 II 99, 1922 II 1099 and 1928 II 28). Thirdly, addressing the issue of whether arbitrators were entitled to a fee even if the award could not be enforced due to a formal error (KKO 1928 I 3). Fourthly, ruling on whether a party was obliged to enclose the documents on which the arbitration was based to an enforcement application (KKO 1930 II 335). As a fifth matter rejecting an enforcement application in so far as the arbitrators had ordered interest to be paid for a longer period than requested in the relief (KKO 1929 II 824). As a sixth matter confirming that an arbitration clause in a building contract was in force also in favour of those who had guaranteed the fulfilment of the contract (KKO 1930 II 555).8 Finally also confirming that the arbitrators were not authorized to further deal with a dispute after they had finally resolved it (KKO 1930 II 641).

In 1928 the first Finnish Arbitration Act (46/1928) was enacted and simultaneously section 3:16 of the 1895 Enforcement Act was amended (47/1928) to correspond to the provisions of the new Act.9 The 1928 Act contained many specific provisions on State court tasks related to arbitration: jurisdictional objections based on an arbitration agreements (section 1); resolving disputes re-

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6 The Supreme Court (KKO) was established by the Supreme Court Act (74/1918) entering into force on 1 October 1918, when the Judicial Division of the Finnish Senate (SOO) was abolished.
7 This principle is still in force according to section 5 of the 1992 Arbitration Act.
8 This principle is still in force. See KKO 1939 II 424 and chapter 3.1 below.
9 Law Proposal 10/1927. In Sweden the arbitration laws were renewed in 1929, when »lag om skiljemän» (1929:145) and »lag om utländska skiljeavtal och skiljedomar» (1929:147) were enacted.
garding whether an arbitration clause had ceased to be in effect (section 4); appointing a missing arbitrator unless otherwise agreed by the parties (sections 10–13); ordering a defaulting arbitrator to fulfil his task or discharging him and deciding on his liability (section 14); hearing of witnesses under oath and issuing orders for document production (section 17); depositing the arbitral awards rendered (section 20); resolving such disputes that arbitrators had not resolved in an arbitral award or when an award was so unclear that it could not be enforced (section 22); deciding actions for avoidance based on allegations that arbitrator was disqualified (section 23); and resolving appeals against the arbitrators’ decision with regard to the amount of their fees (section 24). According to section 3:16 of the Enforcement Act as amended in 1928 the chief execution authority still dealt with applications regarding the enforcement of arbitral awards.

Section 21 of the 1928 Arbitration Act prescribed the grounds for »nullity» of an arbitral award:

- errors concerning the arbitration agreement, the appointment of the arbitrators and the procedure (e.g. violation of the right to be heard);
- dealing with issues that could not be settled by agreement between the parties, and »other exceeding of arbitrators’ authority»; and
- errors in rendering the arbitral award (time limit, promulgation and signing of arbitral award).

A party had the right to apply for the nullification of the award based on these grounds in a general court without any time limit. Section 23 provided that an action for avoidance based on disqualification of an arbitrator had to be taken within 60 days from promulgation of the arbitral award. The chief execution authority investigated ex officio potential nullity grounds and took into consideration also possible court decisions and orders. A party had the right to appeal against the decision of the chief execution authority to the court of appeal and subsequently against the appeal court’s decision to the Supreme Court.

Legal literature on the 1928 Arbitration Act is rather scanty.\textsuperscript{10} However, there are about 80 published Supreme Court precedents dealing with various interpretation issues under this Act. I will consider them below in the context of the 1992 Arbitration Act now in force.

\textsuperscript{10} See Tirkkonen 1943; Tauno Tirkkonen, Suomen siviiliprosessioikeus II, (Porvoo: Suomalainen Lakimiesyhdistys 1977), 516–577; and O. Hj. Granfelt, Välimiesmenettely, (Helsinki: Söderström & C:o 1939). Additionally, there were in legal journals, anniversary publications and other compilations writings about arbitration.
2. The 1992 Arbitration Act

The 1928 Arbitration Act was repealed when the new Arbitration Act (967/1992) was enacted and entered into force on 1 December 1992. Simultaneously section 3:16 of the Enforcement Act was again amended (968/1992) to correspond to the provisions of the new Act. This reform was in essential respects based on the fundamental outlines of the old Act and certain parts were amended mainly to correspond with social, technical and economic developments as well as with international harmonization requirements. The most important amendment constituted the provisions in sections 51–55 of the new Act on arbitration in foreign states and enforceability of awards rendered in such arbitrations.

The reform entailed certain changes to the tasks of courts in relation to arbitration. The most import change was that the provisions on enforcement of awards were included in the new Act (sections 43–45) and that under section 43 of the Act district courts were now empowered to decide on enforcement applications. Hence, section 3:16 of Enforcement Act deals only with the execution of arbitral awards after State courts have already confirmed enforceability. Additionally, the reform meant that arbitral awards are no longer deposited with the State courts, which decreased the public access to arbitration awards.

The 1992 Arbitration Act has up until now been amended four times, but these amendments have been only technical in nature and caused by amendments to ancillary legislation. Additionally, the Enforcement Act has been repeatedly amended and finally repealed when the new Enforcement Code (705/2007) entered into force in 2008. Now the provisions concerning arbitral awards as grounds for execution can be found in sections 2:2 and 19 of the Enforcement Code. Additionally, there are nowadays in section 7:6 (1065/1991) of the Procedure Code (4/1734) certain provisions regulating the relationship between arbitration and precautionary measures ordered by State courts (see chapter 3.3 below).

Until today no large and detailed commentary on the 1992 Arbitration Act has been published in Finland in comparison to the situation in Sweden. Gustaf Möller’s »Välimiesmenettelyn perusteet» (1997) is still the most comprehensive.

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12 This simultaneously means that the significance of the arbitral awards as source of application of substantive law and as object of legal research has been essentially reduced.

13 In 2003 the structure of Enforcement Act was amended (679/2003) so that the provisions of execution grounds were transferred from chapter 3 to chapter 2. See Law Proposal 216/2001.

and trustworthy source of legal literature used by arbitrators and attorneys in their arbitration practice. In law journals, anniversary publications and other compilations one may though find articles pertaining to specific arbitration related topics – an essential part of them being of Möller’s production. Larger research works on certain themes in arbitration have also in recent years been published by the University of Helsinki’s Conflict Management Institute. There is also some new court practice on the 1992 Arbitration Act. Part of the court practice from the time of the 1929 Arbitration Act can still be applied to the situations within the scope of the new 1992 Arbitration Act.

3. State courts’ tasks related to arbitration

As noted State courts are authorized to participate and interfere in as well as contribute to arbitration only in so far as they have express authorization to do so based on statutory provisions. The tasks of the courts are connected with arbitration in a manifold and variety of ways. I will below consider these tasks under the following headings: (1) the arbitration agreement, (2) the appointment and discharge of arbitrators, (3) arbitration and precautionary measures, (4) tasks related to the production of evidence, (5) court orders relating to confidentiality, (6) nullity and the setting aside of arbitral awards, (7) deciding on enforcement of arbitral awards, (8) fees of the arbitrators and (9) liability of the arbitrators. I will restrict my analysis only to arbitration taking place in Finland.

3.1. The arbitration agreement

The general courts have jurisdiction over various issues related to arbitration agreements in situations that arise both before and after the rendering of an arbitral award. I will consider the latter situations in chapter 3.6 below. In a civil

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16 It is possible that also the Supreme Administrative Court must now and then resolve issues related to arbitration when it is deciding on matters concerning legal relationships governed by the public law.

17 According to section 1 of the Arbitration Act sections 2–50 apply to arbitration meant to take place in Finland. This means adoption of the territorial principle and a change compared to the 1928 Act in which this principle was not expressly stated. However, it is not necessary that Finnish arbitration de facto takes place in Finland. It is sufficient that the parties have agreed that it shall take place in Finland. See Law Proposal 202/1991 p. 4 and 11.

or a criminal case the court cannot take an arbitration agreement or award into consideration unless a party has referred to it prior to submitting his first statement on the matter of substance (section 5.1). If the court deems that the question at issue falls within the scope of an arbitration agreement, the court is under an obligation to dismiss the suit or the claim without considering its merits as far as it concerns such issue. This means that the court must, as far as requested, consider e.g. whether an arbitration agreement is binding or in force and also interpret the agreement. It is also possible that the court must resolve these issues when a party to an arbitration agreement has taken separate declaratory action with regard to arbitration agreement or when a party has requested the court to appoint an arbitrator on behalf of the other party (section 17) and the other party has raised objections against the arbitration agreement.

A party to an arbitration agreement may challenge the validity of the arbitration agreement by contending either that it is invalid or that it is unreasonably unfair. Invalidity of an arbitration agreement may also be based directly on an express legal provision: According to section 12:1d of the Consumer Protection Act (38/1978) and section 7:3 of the Housing Transaction Act (843/1994) arbitration agreements concluded between an entrepreneur and a consumer before the dispute has arisen is not binding on consumer. Additionally, invalidity can be based on the invalidity grounds in chapter 3 of the Contracts Act (228/1929). However, invalidity of a contract does not usually mean that the arbitration clause is also invalid (KKO 1996:61). Also the fact that the question in dispute cannot be settled by agreement between the parties (sections 2 and 40.1) or that an arbitration agreement does not fulfil the form requirements (sections 3, 4 and 41) causes invalidity of the arbitration agreement.

In principle a court may adjust an arbitration agreement in accordance with section 36 of the Contracts Act, when it deems that applying such agreement or clause is unreasonably unfair. However, such an outcome is possible only in very exceptional situations. Such a situation was at hand when a natural person who had made an investment service contract containing an arbitration clause was totally insolvent and unable to pay an advance or provide security for costs as ordered by the arbitral tribunal (KKO 2003:60). In contrast, a request for adjustment of an arbitration clause in a franchising agreement of a small-scale enterprise was dismissed (KKO 1996:27).

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19 See Juha Lappalainen, Siviiliprosessioikeus II, (Helsinki: Talentum Media Oy 2001), 16.
20 This kind of action can be taken also during an arbitration procedure; see Möller 1997, 66–67.
21 See also section 37 of Act on Guaranties and Third-Party Pledges (361/1999) concerning private guarantor.
22 See Koulu 2008, 88–121; Möller 1997, 18–19; and Gustaf Möller, »Om formkravet vid skiljeavtal», Tidskrift utgiven av Juridiska Föreningen i Finland (1994), 221–236.
Also a contention that an arbitration agreement is no longer in force can be accepted only in very exceptional situations. In fact, the arbitration agreement is in force until the dispute provided in it has been finally resolved in an arbitral award. This is the case even if the relevant contract has expired (KKO 1954 II 11). Time limits set in contracts for presenting claims are usually related only to substantive law. As a general rule arbitration agreements cannot be terminated unilaterally by a party. Thus, the expiry of an arbitration agreement requires that the parties have reached an agreement on it. However, a party can by his own actions forfeit his right to refer to an arbitration agreement. This is the outcome if the defendant does not refer to an arbitration agreement prior to submitting his first statement on the matter of substance (section 5.1) or a party takes action in a State court notwithstanding an arbitration agreement and the opposing party does not refer to it (KKO 1977 II 12).

A court must interpret an arbitration agreement when a defendant has referred to it or when a party has taken separate declaratory action in relation to an arbitration agreement. Interpretation issues usually concern the **objective scope** of an arbitration agreement and the question of whether a certain matter in dispute falls within the scope of the arbitration agreement. These kinds of interpretation issues are fairly common especially in relation to arbitration agreements concerning future disputes. Such interpretation disputes may concern also standard contracts and lead to the application of rules based on the standard contract doctrine (e.g. interpretation *in dubio contra stipulatorem*). Since these disputes are diverse and depend essentially on the individual contract and the circumstances in the given case it is not possible to consider such court practice in this context.

Interpretation disputes may also concern the **subjective scope** of an arbitration agreement. It is important to note that an arbitration agreement can bind also other persons than the signatories under certain conditions. This concerns especially universal successions (death estates, mergers) but under certain conditions and in certain situations also singular successions and even bankruptcy estates when the bankruptcy debtor had prior to bankruptcy entered into an arbitration agreement. The Supreme Court has held e.g. that a guarantor is entitled to refer to an arbitration agreement that is binding on the debtor whose debt he has guaranteed (KKO 1930 II 555 and 1939 II 424, compare 1953 II 103).

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26 As concerns bankruptcy receivable, see Law Proposal 26/2003 p. 50–51 in regard to section 3:4 of the Bankruptcy Act (120/2004) and compare KKO 1952 I 1.
3.2. The appointment and discharge of arbitrators

The number of arbitrators and how they are appointed are matters that are primarily to be determined by the relevant arbitration agreement. Under sections 7–20 of Arbitration Act the State courts have certain tasks related to the appointment and the discharge of arbitrators, unless otherwise agreed by the parties. These tasks concern the time before arbitral award has been rendered and are of a secondary nature, for such situations where a party has or both parties have been unable to carry out such measures.

According to section 17 of the Act the court shall upon the request of a party appoint an arbitrator: if the other party has not appointed him within 30 days from the date when the other party received written notice of commencement of arbitration (sections 12, 15 and 21); the parties have not reached an agreement on the appointment of a sole arbitrator within 30 days from such notice (section 16); or the appointed arbitrators have not reached agreement on the chairman within 30 days from the date when they had been appointed (section 15). Additionally, a court may appoint a new arbitrator when an arbitrator has died or has been discharged (section 14). According to section 19, the parties can agree on discharging an arbitrator and also the court can, upon the request by a party, discharge an arbitrator, if he is unable to perform his functions in an adequate manner or if he without just cause delays the arbitration.

When deciding on the appointment of an arbitrator the court must ensure that he fulfils the qualifications; especially that he is impartial and independent. According to section 10 of the Act, the grounds on which judges are considered disqualified, prescribed in chapter 13 (441/2001) of the Procedure Code are applicable also to arbitrators. Disqualification can also be based on other circumstances that give rise to justifiable doubts as to the arbitrator’s impartiality or independence. There are only a few precedents concerning disqualification of an arbitrator rendered in cases for setting aside of an arbitral award (see chapter 3.6.2 below).

3.3. Arbitration and precautionary measures

Arbitrators have no right to exercise public powers. Hence, the parties must turn to the general courts e.g. when there is a need to apply for an attachment or any of the other precautionary measures referred to in chapter 7 of Procedure Code. This has been taken into account in the provisions of both the Arbitration Act

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28 However, according to section 6 of Arbitration Act a party has, notwithstanding the arbitration agreement, an alternative right to bring his action before a court, if e.g. the other party refuses to refer the subject-matter to arbitration or despite a request has not within time limit agreed, provided for or lawfully set, fulfilled his obligations to appoint an arbitrator.
and chapter 7 of the Code. According to section 5 of the Arbitration Act a court may, despite the arbitration agreement, grant such interim, including protective, measures which the court has power to grant. According to section 7:6.1 of the Procedure Code, when the application for a precautionary measure has been granted, the applicant shall within one month of the order bring an action on the main issue before a court or in other proceedings that may result in a decision enforceable in accordance with section 2:2 of the Enforcement Code. Hence, commencing arbitration within the above time limit fulfills the requirements necessary for retaining the granted precautionary measures in force. Arbitration is commenced when a party receives a written notice referred to in section 12.1 of the Arbitration Act (section 21).

3.4. Tasks related to the production of evidence

Taking of evidence forms a natural part of the arbitrators’ basic tasks. However, arbitrators have no powers to administer oaths or affirmations as prescribed in section 17:29 of the Procedure Code. Nor do they have powers to order someone to produce documents as prescribed in sections 17:12–17 of the Code. Arbitrators do not either have the power to order coercive means against recalcitrant witnesses as prescribed in sections 17:37 and 18.3 of the Procedure Code. Due to this lack of public powers the provisions in section 29 of Arbitration Act are necessary, because they entitle the parties to turn to the courts when there is a need for the exercise of such public powers.

Under section 29.1 of the Act the precondition for a party to have the right to turn to a general court for the production of evidence is that the arbitrators find it necessary that the witness be examined in court or that a party or other person be ordered to produce a document or other object, which may be of relevance as evidence. In practice this means that the arbitrators give a written statement to the relevant party that is appended to the request that the party submits to the court. According to section 29.2 of the Act the request shall be submitted to the district court in the place where the relevant person is domiciled.

According to section 29.3 of the Arbitration Act the court must execute the request according to the rules regarding taking of evidence in chapter 17 of the Procedure Code. In practice the district courts have adopted quite a flexible attitude to their tasks that relate to producing evidence for arbitration. There are no precedents of the higher courts on these tasks in part due to this attitude. The

29 Law Proposal 179/1990 p. 17–18. There are in section 7:6.2 of Procedure Code also provisions for the sake of such situations where arbitral award, due to no fault of the applicant, has not been rendered or the award is null and void or it is annulled. Then the applicant shall within the prescribed time limit bring his action before the court or commence arbitration.

30 Corresponding provisions were already in section 28.1 of the 1928 Arbitration Act.
lack of precedents is in part, however, also due to the fact when executing these requests the district courts are seldom rendering decisions against which one could or would appeal.

3.5. Court orders on confidentiality

According to my understanding of section 29.3 of the Arbitration Act, courts are authorized to exercise the same powers and coercive means as in civil cases when dealing with the production of evidence for arbitration. Hence, a court has the discretion to order that the hearing of a witness shall be held in camera without the presence of the public or that the documents produced shall be kept confidential in accordance with sections 10 and 15 of the Act on the Publicity of Court Proceedings in General Courts (370/2007). Such decisions can be based e.g. on the grounds of confidentiality of business secrets. An order of a court on confidentiality is binding on the parties, their attorneys and the arbitrators as prescribed in sections 22 and 23 of the Act on Openness of Government Activities (621/1999). Confidentiality entails both a duty of non-disclosure and a prohibition of use in other matters. The right to use the information or document is limited to the matter on which the access to information of the party is based.

There is no legal provision specifically concerning confidentiality in arbitration. Hence, the above mentioned court measures could offer grounds for a strict though limited confidentiality of the arbitration material. Upon request the court has the discretion to make an order on confidentiality before commencing or during arbitration and after the arbitral award has been rendered e.g. in the following situations: (a) application for a precautionary measure ancillary to arbitration; (b) request that the court appoints an arbitrator; (c) application for declaratory action in court demanding either that arbitral award is set aside (section 41) or declared null and void (section 40); (d) appeal against a decision of the arbitrators with regard to the amount of compensation due to them (section 47); and (e) application for the enforcement of an arbitral award (section 43).


32 Violation of the court’s secrecy order is punishable according to section 38:1 or 30:5 of the Criminal Code.
3.6. Nullity and the setting aside of arbitral awards

Section 2 of the Arbitration Act prescribes that «any dispute governed by private law which can be settled by agreement between the parties may be referred to final decision by one or more arbitrators». The significance of this provision is twofold. First, it excludes disputes which the parties cannot settle by agreement from the competence of the arbitrators. Secondly, it means that there is no right of appeal to the State courts against arbitral award rendered in arbitrations under the Arbitration Act. These basics appear also from the provisions of the Arbitration Act regulating the grounds on which the courts may confirm or declare an arbitral award null and void (section 40) or set aside an arbitral award (section 41). These provisions prescribe (in principle) exhaustively the grounds on which the courts control the legality of arbitration and of awards. The State courts have no jurisdiction to interfere in arbitration proceedings before the rendering of an arbitral award. During arbitration proceedings both the substantive and the formal conduct of the proceedings belongs exclusively and primarily to the (unanimous) parties and secondarily to the arbitrators (section 23).

Both sections 40 and 41 of the Act are mandatory in nature although the significance of that mandatory nature differs. The grounds for nullity prescribed in section 40 are based on requirements of public interest. Nullity is based directly on law (ipso jure) and means that an award is originally (ex tunc) null and void. It is also possible that only a certain part of an award is null and void (KKO 1953 II 74). State courts are (in principle) under an obligation to review and take into consideration grounds for nullity ex officio in all situations when someone has before them referred to an arbitral award. Nullity of an award does not require that a court has confirmed or declared it null and void. However, in practice

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34 What kind of disputes can be referred to be decided by arbitrators; see Möller 1997, 15–18.
36 However, the exhaustiveness of section 40 is not quite complete. See Koulu 2007, 233–238. See also what has been said below in chapter 3.6.1 about possibility to prohibit enforcement of an arbitral award on the grounds of competition law.
37 See decision of Helsinki Court of Appeal 6.7.1999 No 2051: Defendant B gave arbitrators his complete response to plaintiff A’s claims, but removed from the copy he gave to A price information stating that these were his and third party’s business secrets. Arbitrators decided that they cannot give A price information. A turned to the court and demanded that the court orders B to give him price information. The Court of Appeal stated: «The question, to which extent a party has right to get information from the material given to arbitrators, belongs to the substantive conduct of proceedings. Thus, when the arbitrators have exclusive competence to decide on such matter, this issue cannot be considered at court during the time the arbitration procedure is pending.» Supreme Court rejected application for leave of appeal. After this the arbitrators gave A complete copy of the response. See further Peltonen 2005, 307.
a declaratory court judgment is necessary, if the grounds for nullity in question are open to interpretation.

The mandatory nature of the grounds for actions for avoidance prescribed in section 41 entails that the parties to an arbitration agreement cannot validly beforehand waive their right to refer to these grounds. However, because these grounds are based on what are perceived as private interests, the parties may where arbitration is already at hand under certain conditions and in certain circumstances accept procedural measures and arbitral awards in spite of the grounds mentioned in section 41 being at hand. This appears from section 41.3 according to which a party must apply for the setting aside of an arbitral award within three months of receipt of the award. Courts are not entitled to take the grounds in section 41 into consideration *ex officio*. They can be brought before a court for its decision and into its jurisdiction only in an action for avoidance and only to the extent that the plaintiff refers to these grounds.

Finally, it is important to note that nullity or the setting aside of an arbitral award does not cause the avoidance or expiry of the arbitration agreement (see also chapter 3.1 above). Thus, the dispute falling within the scope of an arbitration agreement should, unless agreed otherwise by the parties, be retried by new or the same arbitrators.\(^38\)

There is only very little court practice on sections 40 and 41 of the 1992 Arbitration Act. For example there are no Supreme Court or court of appeal judgments concerning the *ordre public* ground referred to in paragraph 2 of section 40.1.

### 3.6.1. Grounds for nullity\(^39\)

The wording of section 40.1 is as follows:

»An arbitral award shall be null and void:
1) to the extent that arbitral tribunal has in the award decided an issue not capable for settlement by arbitration under Finnish law;
2) to the extent that the recognition of the award would be contrary to the public policy in Finland (*ordre public*);
3) if the arbitral award is so obscure or incomplete that it does not appear in it how the dispute has been decided; or
4) if the arbitral award has not been made in writing or signed by the arbitrators.«

The ground for nullity in *paragraph 1* is derived from section 2 of the Arbitration Act. According to section 2 arbitrators have competence only over private law disputes, which can be settled by agreement between the parties

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\(^39\) See Koulu 2007, 231–268.
(arbitrability). A dispute is not of a private law nature if the relevant obligation is based on a legal relationship governed by provisions of public law (KKO 1986 II 162). When an obligation is considered to be of a private law nature, it is still necessary to judge, whether the parties can settle the dispute by agreement. The Supreme Court has held e.g. that the demand of a shareholder that a limited liability company be placed in liquidation could be settled by agreement between the parties. Since the dispute fell within the scope of an arbitration clause in the articles of association of the company, the Supreme Court dismissed the action without considering its merits (KKO 2003:45).

When judging the arbitrability of a claim, one must take into account that arbitrators are entitled to apply mandatory norms and resolve disputes concerning claims based on such norms, when the claims are private law in nature and the parties have right to settle them by agreement. Thus, arbitrators may on certain conditions and under certain circumstances resolve e.g. a dispute concerning private law claims based on a violation of the obligations under mandatory competition law. In this context it is important to note that the Market Court, having jurisdiction over competition cases, may prohibit the enforcement of an arbitral award to the extent that it violates certain mandatory provisions of the Act on Competition Restrictions (480/1992). In case the Market Court has already resolved an issue which is of a preliminary nature in the arbitration dispute, the arbitrators are obliged to comply with the decision of the Market Court.

Ordre public as a basis of nullity prescribed in paragraph 2 of section 40.1 is in many ways problematic. The principle of ordre public has been adopted from generally accepted principles of private international law (conflict of laws). The fact that an arbitral award is contrary to a mandatory norm is not

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40 See Möller 1997, 15–17; Peltonen 2005, 298–303; and Mika Savola, »Kilpailuioikeuden soveltamisesta välimiesmenettelyssä«, in Erkki Havansi – Risto Koulu – Heidi Lindfors (eds.), Oikeudenkäyntejä ja tuomioistuimia Juhlakirja Juha Lappalainen 60 vuotta (Helsinki: Edita Publishing Oy 2007), 483–515. See also the judgment of Helsinki Court of Appeal 22.8.2003 No 2419 (Peltonen 2005, 311): The plaintiff contended that arbitral award was null and void, because it violated mandatory provisions of Act on Competition Restrictions. However, action was dismissed already because arbitrators’ decision was based on breach of contract.

41 See decisions of Competition Council 1.6.1998 (dnro 22/359/96) and Supreme Administrative Court 9.6.1999 T 1540: The issue was, whether the price differences based on separate arbitral awards violated the prohibition of abuse of dominant position prescribed in Act of Competition Restrictions. See further Peltonen 2005, 312–313. – Appeals against such Market Court’s decisions belong to Supreme Administrative Court’s jurisdiction.

42 There are only two Supreme Court’s decisions that touch ordre public though without mentioning it in the reasoning. Supreme Court dismissed a claim based on a first demand guarantee, because presenting that claim was abuse of justice (1992:145). Enforcement application of a judgment rendered in foreign state was dismissed, because it was contrary to paragraph 2 in article 27 of the Lugano Convention (2002:34). Court of Appeal had based the dismissal on paragraph 1 of the article (ordre public).

43 About ordre public principle generally see Kaarina Buure-Hägglund – Timo Esko, Ulkomaisen välitystuoimion tunnustaminen ja täytäntöönpano New Yorkin konvenion mukaan,
sufficient as grounds for nullity based on *ordre public*. Such nullity requires that the significance of the mandatory norm is of a higher level. Being contrary to *ordre public* requires namely being contrary to the fundament of the judicial system and its basic principles.\(^{44}\) The question must be resolved separately in relation to each conclusion of the award *in casu*, by interpreting the concept restrictively and by judging it against a particular kind of *opinio communis* of the experts in the area of law in question.

The grounds for nullity prescribed in paragraphs 3 and 4 of section 40.1 are seldom actualised in practice. The significance of paragraph 3 is additionally reduced by sections 38 and 42. Section 38 entitles arbitrators to correct errors in computation, clerical or typographical errors and any other similar errors in an award on their own initiative or upon a party’s request within the short time limits mentioned in this section. According to section 42 a court may upon request, when asked to declare an award null and void or set it aside, give the arbitrators an opportunity to resume the arbitration proceedings or to take such other action which eliminates the ground for declaring the award null and void or for setting it aside. The significance of paragraph 4 is reduced by section 40.2 which prescribes that the absence of the signature of one or more of the arbitrators does not make the award null and void, if it has been signed by a majority of the members of the arbitral tribunal and they have in the award stated the reason why the minority has not signed the award.

3.6.2. Grounds for avoidance

According to section 41.1 an arbitral award may be set aside by court upon request of a party if: 1) the arbitrators have exceeded their authority; 2) an arbitrator has not been properly appointed; 3) there have been, according to section 10, grounds for disqualifying an arbitrator or 4) the arbitrators have not given a party a sufficient opportunity to present his case.

There are various ways in which the arbitrators may exceed their authority referred to in paragraph 1.\(^{45}\) For example they may have resolved a dispute which does not fall within the scope of an arbitration agreement, there is no arbitration agreement,\(^{46}\) they have exceeded a deadline for rendering the award provided in the relevant arbitration agreement, or the award includes relief that

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\(^{44}\) Such basic principles may relate to both substantive law and fairness of proceedings. See Peltonen 2005, 313–314.

\(^{45}\) See Koulu 2007, 126–140 and Möller 1997, 85–86.

\(^{46}\) These issues in regard to interpretation and existence of an arbitration agreement are often considered and decided by general courts already prior to the commencement of arbitration.
has not been requested. Under section 31 of the Arbitration Act the arbitrators are obliged to decide the dispute in accordance with the rules of law applicable to the substance of the dispute, unless the parties have expressly agreed that the dispute shall be decided ex aequo et bono. If the arbitrators decide ex aequo et bono without proper authorisation by the parties, they exceed their authority in a manner referred to in paragraph 1. In the following cases a party’s contention that arbitrators had exceeded their authority has been dismissed: KKO 1975 II 69 and 2008:77 and Helsinki Court of Appeal 13.10.1998 No 3068 (see below for more information).

The grounds for avoidance prescribed in paragraph 2 are at hand, if an arbitrator has not been properly appointed.47 There is only one old precedent on this paragraph (KKO 1941 I 10).

Paragraph 3 concerns situations where grounds for disqualification have been at hand during the arbitration. The grounds for disqualification of an arbitrator must be judged in accordance with section 10 (see chapter 3.2 above), but the additional requirements provided in paragraph 3 must also be taken into consideration. A party has the right to refer to the grounds for disqualification he knew only if he has properly challenged the arbitrator in question, but such a challenge has not been accepted before the arbitral award was made, or if he has become aware of such ground so late that he has not been able to challenge the arbitrator before the arbitral award was made. The duties of the arbitrators under section 9 of the Arbitration Act decrease the possibility of situations of this kind arising. According to section 9, when a person has been asked to accept an appointment he shall immediately disclose any circumstances likely to give rise to justifiable doubts as to his impartiality and independence and this obligation continues up until the rendering of the arbitral award. In addition, a party forfeits his right to refer to grounds for disqualification that he becomes aware if he has not challenged the arbitrator within 15 days of knowledge of the grounds.

Helsinki Court of Appeal decision of 10.10.1997 in case No 3650 concerns paragraph 3. In that case the arbitral award was set aside based on disqualification of an arbitrator, when a party had become aware of the grounds in question first after the award had been rendered (see chapter 3.9 further about this case and related Supreme Court’s decision). In another case (KKO 2001:11) an action for avoidance based on alleged grounds for disqualification was dismissed.49

and can be brought to be decided in general court even during arbitration, as described above in chapter 3.1.

49 From the Swedish court practice it is worth mentioning two fresh Supreme Court judgments: 2007-11-19 T 2448-06 (arbitral award was set aside) and 2010-06-09 T 156-09 (action for avoidance was dismissed).
The significance of the grounds for avoidance in paragraphs 1–3 is additionally reduced by section 41.2. Under this section a party may not apply for the setting aside of an arbitral award on these grounds if he by taking part in proceedings without stating his objection or otherwise, shall be considered to have waived his right to refer to them.

The grounds for avoidance in paragraph 4 are the most important and critical from the point of view of the arbitrators’ conduct of proceedings, because they refer to the right to be heard (audiatur et altera pars). It’s importance is evidenced by the fact that most of the actions for avoidance in Finland are based on the grounds in paragraph 4:

In KKO 2008:77 (decided by a vote 3–2) the Supreme Court dismissed the action. The lower courts had in contrast decided to set aside the award; district court because arbitrators had exceeded their authority (1) and the court of appeal additionally based on violation of the right to be heard (1 and 4). One of the members of the Supreme Court agreed with the court of appeal. There are also a couple of unpublished judgments from the courts of appeal. In one case a party contended that the arbitrators had both exceeded their authority (1) and violated the right to be heard (4), but the action was dismissed (Helsinki Court of Appeal 13.10.1998 No 3068). In another case the action was also based on both of these grounds (1 and 4) but the award was set aside only because arbitrators had violated the right to be heard (4). The arbitrators had decided that the plaintiff’s claim was time-barred without giving the plaintiff an opportunity to be heard, though the defendant’s plea of limitation of action was unclear (Helsinki Court of Appeal 26.6.2003 No 1942). In a third case the application was based only on an alleged violation of the right to be heard (4), but the action was dismissed (Helsinki Court of Appeal 15.2.2007 No 490; see further below in chapter 3.8). The above mentioned judgments of the courts of appeal are final.

3.7. Deciding on enforcement of arbitral awards

Under section 43 of the Arbitration Act decisions on enforcement of arbitral awards are made by district courts. This section further prescribes that an application for enforcement shall be accompanied by the original arbitration agreement and the original arbitration award or certified copies thereof. A certified translation to either Finnish or Swedish shall be appended to the application if

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51 See also the decision of Helsinki Court of Appeal 6.7.1999 No 2051 mentioned above in chapter 3.6 (footnote 38), because it concerns a situation where the right to be heard is quite central.
the above mentioned documents have been drawn up in any other language, unless the court grants an exemption.53

According to section 44 a court may refuse enforcement only if it finds that the award is null and void on one of the grounds referred to in section 40, if the arbitral award has been set aside by a court (section 41) or if a court due to an action for nullity (section 40) or for setting aside (section 41) has ordered that enforcement be suspended. Thus, the court’s own obligation and competence to review an enforcement application are restricted to the grounds for nullity in section 40. It is clear that the court has no jurisdiction to reconsider the subject-matter resolved in an arbitral award (see KKO 1953 II 134 and 1984 II 63).

Section 43 leaves the question of territorial jurisdiction of the general courts open. It is hence determined according to the provisions in chapter 10 of the Procedure Code prescribing jurisdiction in civil cases (135/2009). The forum for an enforcement application can be the district court at the domicile or habitual residence of the enforcement defendant (sections 10:1 and 2 of the Procedure Code) and probably also the district court at the place where the award has been rendered (section 50.1 of the Arbitration Act).54 The forum for an enforcement application is non-mandatory and the parties may thus agree on it. There is a right of appeal against the decision of the district court to the court of appeal and against the decision of the court of appeal further to the Supreme Court, if the leave to appeal is granted.

3.8. Fees of the arbitrators

According to section 47 of the Arbitration Act the arbitrators may, unless otherwise provided in a manner binding on the arbitrators, fix the compensation due to each arbitrator and order the parties to pay it in the award. Section 46 prescribes that the parties shall, unless otherwise agreed or provided, be jointly and severally liable to compensate the arbitrators for their work and expenses. In practice the arbitrators may also order in the award how the liability for such compensations shall be divided between the parties.

Under section 47 a party has the right to appeal against the decision of the arbitrators on compensation within 60 days of receipt of the award. The arbitrators must provide instructions in the award on the steps that the parties must take if they want to lodge an appeal. The appeal must be made to the district court at the place where the award was made and a copy of the arbitral award must be submitted together with the appeal. Before the court decides on appeal it must

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53 According to Law Proposal 202/1991 p. 27 it would often be sufficient that only the statement of decision has been translated into the Finnish or Swedish language.
54 See Koulu 2007, 277.
give the other parties to the arbitration and the arbitrators, whose fees are concerned by the appeal, an opportunity to be heard.

According to the wording of section 47, the right to appeal concerns »the amount of compensation«. However, based on legal literature and court practice this provision also concerns an appeal when a party, e.g. in connection with declaratory action based on section 40 or 41, demands that the court decides that the arbitrators have no right to compensation. In a case where an action including such appeal had been made after the expiry 60 days time limit provided in section 47.2, the court of appeal dismissed the appeal without considering its merits (Helsinki Court of Appeal 15.2.2007 No 490).

The setting aside of an arbitral award does not directly mean that the arbitrators lose their fees. The arbitrators are not parties in an action between the parties to arbitration and hence their right to compensation should be resolved separately. However, the arbitrators may lose their right to compensation e.g. if the award is null and void (KKO 1984 II 63) or if there was no valid arbitration agreement.

3.9. Liability of the arbitrators

General courts may also have to deal with cases in which a party to an arbitration claims damages alleging that an arbitrator has neglected his duties. There is no special legal provision on arbitrators’ liability. However, by accepting the appointment as arbitrator a person is bound by certain legal obligations the breach of which may cause the parties economic loss especially in the form of increased or wasted legal costs. The grounds on which liability for such losses is to be determined differs depending on whether the loss is considered to have been caused within or outside a contractual relationship. Contractual liability covers economic loss. Extra-contractual liability for economic loss requires that one of the special grounds provided in section 5:1 of the Tort Liability Act (412/1974) is at hand. In the Finnish legal literature different opinions have been presented with regard to whether the relationship between an arbitrator and a party to an arbitration is contractual or not.

The Supreme Court has in one case (KKO 2005:14) held that the relationship between an arbitrator and a party can due to its special nature be considered comparable to a contractual relationship. Hence, the liability of arbitrators shall be determined according to the principles applicable to contracts. The Supreme

55 See Juha Lappalainen, »Välimieskustannukset ja välitystuomion pätemättömyys», in Heikki Halila – Mika Hemmo – Lena Sisula-Tulokas (eds.), Juhlajulkaisu Esko Hoppu 1935 – 15/1 – 2005 (Jyväskylä: Suomalainen Lakimiesyhdistys 2005), 187. It is important to note that the time limit for an action referred to in section 41 is three months. See also above chapter 3.6.2 on this judgment from the point of view of the declaratory action for avoidance.

Court held in the mentioned case that an arbitrator had neglected to provide information to the parties in accordance with the requirements in section 9.2 of the Arbitration Act in relation to other assignments for a party. Based on these circumstances and paragraph 3 of section 41 of the Arbitration Act the court of appeal had set aside the arbitral award (Helsinki Court of Appeal 10.10.1997 No 3650 discussed above in chapter 3.6.2). The Supreme Court decided that based on this breach the arbitrator was liable to compensate the party for its increased costs caused by the new arbitration.

4. The *res judicata* effect of an arbitral award

In principle an arbitral award has the same *res judicata* effect as a State court judgment in civil cases, because both arbitral awards and court judgments are binding on the parties in the future. However, there are certain differences in respect of when this effect comes into existence and how it may be taken into consideration. Firstly, an arbitral award is *res judicata* at once when it has been properly rendered, unless it is null and void. Secondly, the *res judicata* effect of an arbitral award can be taken into consideration in court or in another arbitration only when a party has properly referred to it. In such a case the State court is, in principle, under obligation to *ex officio* consider possible grounds for nullity of the award before recognising the legal effects based on it.

The significance of *res judicata* of an arbitral award that has been properly referred to by a party can appear in two different ways. If a dispute brought before a State court has already been decided in an arbitral award, the court is under an obligation to dismiss the suit without considering its merits (*negative effect*). If an issue that is decided in an arbitral award is preliminary in nature in relation to the dispute brought before a State court, the court is obliged to take the award as the basis for its judgment (*positive effect*).

5. Extraordinary rights of appeal and arbitration

Finally, a party to arbitration may after the arbitral award has been rendered find that he needs to resort to one of the extraordinary rights of appeal prescribed in chapter 31 of the Procedure Code. Reversal of a final judgment in a civil case...

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57 See Tirkkonen 1943, 267–272; Tirkkonen 1977, 562–563; Möller 1997, 77–78; Lappalainen 2001, 415–419; and Koulu 2007, 273–274. In Finland the basis for *res judicata* is to be found in customary law. The main rule is that a third party is not affected by *res judicata* effect. One of the few exceptions is that a guarantor may in his own favor refer to an arbitral award that is binding the debtor whose debt he has guaranteed (see chapter 3.1 above).

58 What has been said below about State courts applies in principle also to another arbitration tribunal.
(sections 31:7 and 10–16) or granting a new procedural deadline (sections 31:17 and 18) are the extraordinary rights of appeal that would mainly be relevant. These extraordinary rights of appeal belong as far as they could be applicable to arbitral awards and related deadlines exclusively to the jurisdiction of the Supreme Court.

First, the need may arise due to the fact that a party has exceeded the deadline prescribed in section 41.3 of the Arbitration Act for bringing an action for avoidance (chapter 3.6 above) or the deadline prescribed in section 47.2 of the Act for appeal against the decision of the arbitrators with regard to their compensation (chapter 3.8 above).\(^59\) The Supreme Court has decided that a new deadline can be granted in both cases provided that the application fulfils the requirements set in sections 31:17 and 18 of the Code (KKO 1990:123 and 1996:123).

Secondly, a party, who wants to annul an arbitral award might try to resort to reversal of a final judgment in a civil case instead of bringing a declaratory action based on section 40 or 41 of Arbitration Act or based on some other serious violation of his rights. The Supreme Court has decided that an arbitral award cannot be annulled on the grounds prescribed in section 31:7 of the Procedure Code because an arbitral award cannot be regarded as a legal decision comparable to a final judgment referred to in section 31:16 of the Code (KKO 1953 I 2 and 1964 II 78). However, both these precedents were decided by vote and based on narrow reasoning and the legal doctrine does not unanimously support their outcome.\(^60\) Furthermore, one must take into consideration that when a general court decides on the enforcement of an arbitral award such a decision is comparable to a final judgment referred to in section 31:16 and may thus be annulled on the grounds prescribed in section 31:7 of the Code.

\(^{59}\) See Koulu 2007, 201–206 and Möller 1997, 81 and 88.