IBA International Construction Projects Committee

ADR in Construction

Finland

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1. Background

1.1 Which type of dispute resolution is most often used in construction matters in your jurisdiction? Can you give reasons why one type of dispute resolution is preferred above another? If there have been changes in preference in the past ten years, what has caused this?

Construction disputes in Finland largely concern contractual relationships and therefore are mainly focused on the law of contracts. Consequently, they rarely concern absolute legislative questions, but rather ones related to differences in opinion between contractual parties. It could be stated that administration of justice is slowly shifting from the idea of material justice in ordinary court proceedings to the idea of negotiations and pragmatic compromises. Due to this development, the use of alternative dispute resolution mechanisms has increased in recent years, both in Finland and in the other Nordic countries. As in most other countries, arbitration in Finland provides both for more swift proceedings and confidentiality, Therefore, arbitration can be considered one of the most common methods of dispute resolution, alongside ordinary court proceedings.

1.2 Are there special laws on resolving construction disputes in your jurisdiction (for example statutory adjudication)?

No, not directly. The administrative courts have jurisdiction over regulatory matters relating to public authorities, but not over contractual matters involving public authorities. The Arbitration Act (967/1992; amendments up to 460/1999 included) governs arbitration proceedings in Finland and the recognition and enforcement of arbitral awards issued in other countries. Ordinary court proceedings are governed by the Code of Judicial Procedure (4/1734; amendments up to 718/2011 included). These regulations are not, however, specific to construction disputes.

1.3 Are there provisions in the legislation concerning civil procedure or in the civil code (if your jurisdiction has one) or other legislation that would apply to binding decisions of non-statutory dispute adjudicators? What type of binding decisions are known in your jurisdiction that are used for construction disputes (please state the names used in the language of your jurisdiction and describe the main characteristics*).*

Yes, provisions exist relating to both public and private dispute resolution mechanisms. However, few of these are specifically aimed at construction disputes. They rather apply generally to all types of disputes.

As regards public dispute resolution mechanisms:
Ordinary courts in Finland provide for two mechanisms to promote the amicable settlement of disputes: settlement promotion during the course of civil proceedings (in Finnish: *sovinnon edistäminen*), and judicial court mediation (in Finnish: *sovittelu*). The legislative basis for the first lies in the Code of Judicial Procedure, whereas the latter is governed by the Act on Court-annexed Mediation (663/2005). The purpose of

settlement promotion in civil court proceedings is, as its name suggests, to explore the possibilities of the parties reaching an amicable settlement during court proceedings. A settlement reached during court proceedings mitigates costs and promotes procedural efficiency. The purpose of mediation, on the other hand, is to more flexibly help the parties in a dispute to find a solution that is acceptable to both parties. This means that it may be preferable for the result of mediation to be what is reasonable under the circumstances rather than the strict application of law (in contrast to the settlement promotion described above). The role of the judge is more flexible in mediation than settlement promotion.

The public dispute resolution boards and committees relevant for actors in the construction field in Finland are usually divided into two categories: boards and committees with real jurisdiction to render binding decisions on certain issues, on the one hand, and those with the power only to issue recommendations on the other. The differences between committees with real jurisdiction and special courts are mainly formal and administrative. There are no public dispute resolution boards for construction, specifically.

Private dispute resolution mechanisms, arbitration (in Finnish: *välimiesmenettely*), which is governed by the Arbitration Act, is relatively popular in Finland. Certain parts of the Act apply only to arbitrations with seat in Finland, while other parts deal with the effects in Finland of an arbitration agreement concerning arbitration in a foreign state as well as to the recognition and enforcement in Finland of an arbitral award made in a foreign state.

1.4 What are the legal differences in your jurisdiction between arbitration and binding decisions (adjudication)? Are there specific procedural rules for arbitration that do not apply to binding decisions/adjudication/expert determination decisions?

Yes, there are. All the different types of dispute resolution are governed by different procedural rules, as described above. The Arbitration Act applies to an arbitration with seat in Finland, and the effects in Finland of an arbitration agreement concerning arbitration in a foreign state as well as to the recognition and enforcement in Finland of an arbitral award made in a foreign state. In accordance with section 43 of the Arbitration Act, a decision on enforcement of an arbitral award shall be made by a court of first instance, and before such decision is made, the party against which enforcement is sought must be given an opportunity to be heard, unless there is a special reason to the contrary. Pursuant to Section 41 of the Arbitration Act, an arbitral award may be set aside by the court upon request of a party if (1) the arbitral tribunal has exceeded its authority; (2) an arbitrator has not been properly appointed; (3) an arbitrator could have been challenged under section 10, but a challenge properly made by a party has not been accepted before the arbitral award was made, or if a party has become aware of the ground for the challenge so late that he has not been able to challenge the arbitrator before the arbitral award was made; or the arbitral tribunal has not given a party a sufficient opportunity to present his case.

Setting aside the arbitral award in Finland is, however, extremely rare. Adjudications, on the other hand, are not directly enforceable.

1.5 Does your country have special institutions (arbitral or otherwise) dealing with construction disputes? What is the role of these institutions, for example are they supervising the proper conduct of the proceedings or involved in appointments?

Yes, but not many. Most dispute resolution institutions deal with all types of disputes. RIL Conciliation (in Finnish: "RIL sovittelu") is, however, a company focusing especially on mediation of construction disputes. RIL Conciliation focuses on dispute resolution and risk management especially in matters related to construction projects. In order to reduce risks relating to disputes in construction projects, RIL Conciliation provides a number of services designed for the different phases of the project. The services include review of contracts, construction site investigation and ad hoc counselling regarding impending disputes. Operations of RIL Conciliation, which is a private entity, are based on a network of technical and legal professionals, and focuses on both private and public sector companies and organizations. The cases cover domestic, commercial or industrial building projects, infrastructure projects as well as water and waste water projects. After receiving an application from a party seeking conciliation, RIL locates suitable and impartial professionals from their network to act as mediators in the dispute in question. Consequently, the mediator, or in more substantial cases one technical and one juridical expert, hears the case in accordance with the rules of RIL and eventually issues either a binding solution, if the parties have earlier agreed thereto in writing, or an inconclusive recommendation. The process itself is not governed by any specific legislation, and therefore the main requirement for the possible binding solution is that it is reasonable and otherwise conforms to Finnish contract law.

It should be mentioned here, that the Arbitration Institute of the Finland Chamber of Commerce (FIA) administers arbitrations conducted under its Rules (the most recent rules have been in force as of 1 June 2013). The Institute appoints arbitrators and conciliators to both domestic and international cases, inter alia, construction cases. The FIA appoints independent individuals to resolve business disputes, when the parties have so agreed. According to the Rules, an award shall be final and binding on the parties. For further information see (http://arbitration.fi/en/).

1.6 How prevalent is mediation for construction disputes in your country? What other forms of non-binding dispute resolution for construction disputes are used in your country (for example dispute recommendation boards)? Are hybrid forms of dispute resolution used for construction disputes (for example recommendations that become binding after some time if not contested).

Ordinary courts in Finland provide for judicial court mediation. According to section 1 of chapter 1 of the Act on Court-annexed Mediation, civil matters may be mediated as provided for in the Act. The objective of "court-annexed" mediation is, pursuant to section 2 of chapter 1 of the Act, an amicable settlement of the matter. The purpose of

mediation is to help the parties to a dispute find a solution that is acceptable to both parties. This means that mediation may result in an outcome that is reasonable under the circumstances, which may be different than an outcome that would result from a strict application of law. Dispute boards and/or dispute resolution boards, as are commonly provided for in international construction contracts, are however not frequently used in Finland. As for mediation intended for disputes in the construction context specifically, especially RIL Conciliation (as explained above) can be mentioned.

1.7 Would FIDIC Red Book type DAB decisions be considered valid evidence in subsequent arbitration or court proceedings in your jurisdiction? What would the role of these DAB decisions be for further proceedings?

This depends on the contract between the parties. In arbitration, the main rule is that the admissibility, relevance, materiality and weight of all evidence is left to the discretion of the tribunal, unless the parties have agreed otherwise. In court proceedings the court will determine the admissibility, relevance, materiality and weight of the evidence. In RIL conciliation, the mediator is required to consider all the evidence brought forward before reaching a solution.

1.8 What form of ADR is considered to be cost effective for construction disputes in you jurisdiction? Please explain what type of costs is usually allocated to which party and how this compares to court litigation.

The cost effectiveness of each form of ADR depends significantly on both the dispute in question and the type of the project in general. Mediation and structured settlement negotiations, as opposed to arbitration, often offer rapid solutions, reducing costs, but tend to lead to compromises instead of yes-or-no type of resolutions. In these types of ADR procedures, the parties usually bear their costs themselves, whereas in arbitration (and in court litigation) it is not uncommon that the losing party bears all the costs of both parties, including the costs for legal representation. In RIL proceedings, parties are usually required to divide the costs in half, however, the applicant of a unilateral application must cover the costs alone. Statistically, according to certain sources, RIL proceedings tend to cost approximately 5 to 15 % of the capital of the dispute.

2. Dispute resolution agreements

2.1 What are the requirements for a valid arbitration agreement and a valid multi-party arbitration agreement? Would clause 20.6 of the FIDIC Red Book be considered a valid arbitration clause? Would this clause prevent a party from seeking interim measures from a competent court?

Pursuant to section 3 of the Finnish Arbitration Act, the arbitration agreement shall be in writing. An arbitration agreement is considered to be “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 if an agreement which has been made in writing refers to a document containing an arbitration clause. Thus the arbitration clause of the FIDIC Red Book would be considered valid under Finnish law if the parties have signed an agreement that refers to these standard conditions of contract.

Interim measures sought from a competent court are governed by chapter 7 of the Finnish Code of Judicial Procedure and the existence of an arbitration clause does not as a rule preclude parties from seeking interim measures from the Finnish courts. This is particularly reflected in Article 36.6 of the rules of the Finnish Chamber of Commerce (FCC), which expressly states that the parties may apply to any competent judicial authority for interim measures of protection "before the case file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter".

2.2 Are there any restrictions on enforceability or validity of arbitration clauses regarding standard forms of contracts, including consumer protection laws or similar laws? Is this the same for other forms of ADR?

As mentioned above, an arbitration agreement is considered to have been made in writing if an agreement in writing refers to a document, e.g. a standard form of contract, containing an arbitration clause. As for consumer contracts, pursuant to section 1d of chapter 12 of the Finnish Consumer Protection Act (38/1978; amendments up to 29/2005 included), an arbitration clause in a contract between a business and a consumer concluded before a dispute arises is not binding on the consumer. Pursuant to the provision, consumers can always refer disputes between them and a business to the general courts of first instance. The provision therefore renders inapplicable agreements in consumer contracts referring to all other forms of ADR. In Finland, a "consumer" is defined as a natural person who acquires consumer goods and services primarily for a use other than business or trade (Section 4 of Chapter 1 of the Consumer Protection Act (38/1978; amendments up to 29/2005 included)).

2.3 In the standard conditions that are mostly used for construction projects in your country, is there a clause on arbitration? If so, is reference made to an arbitral institution and the rules of this institution? Are other forms of dispute resolution more common in these standard conditions?

The standard conditions which are widely used in (especially domestic) construction projects in Finland are the General conditions for building contracts ("YSE 1998"). Pursuant to §92 of these conditions, disputes are primarily referred to the district court, "unless otherwise specified in the Contract of Construction", and if arbitration has been agreed on, the parties may, pursuant to the general conditions, agree that the arbitral tribunal will comprise of one sole neutral arbitrator. Thus no reference is made to specific arbitration institutions. In more internationally-oriented projects, the FIDIC conditions of contract, providing for arbitration under the rules of either the ICC or the FCC, are frequently used.

2.4 May arbitration agreements bind non-signatories (for example subcontractors)? If so, under what circumstances? Is this different for other forms of ADR?

As a general rule arbitration agreements will not bind non-signatories, as the arbitration agreement must always be made in writing between the parties. The question may, however, be subject to interpretation in exceptions to the privity of contract doctrine. The privity of contract doctrine has been the subject of vivid discussion in the Finnish legal literature in recent years. The prevailing view is that under certain circumstances, an owner could bring claims directly against a subcontractor on the basis of a chain of contracts. Recent jurisprudence of the Finnish courts has, however, been somewhat stricter on the matter and the issue remains open. If, however, it is possible for an owner to bring claims before the Finnish courts on the basis of a contract between a subcontractor and a contractor which contains an arbitration clause, it may be possible for the subcontractor to contest the court's jurisdiction on the basis of the arbitration clause, although this has not been confirmed yet.

2.5 If expert determination is not supported by legislation and the binding nature of expert determination derives solely from the agreement of the parties to submit their dispute to the expert, is this process mandatory and is any resulting determination binding on the parties? What needs to be in the contract to ensure this?

The freedom of contract is a fundamental principle of Finnish contract law. Thus, the general rule is that within the limits set by mandatory law, the provisions of the contract prevail over discretionary statutory provisions. In practice, it is deemed that the determination is a settlement agreement between the parties. The process for concluding such settlement agreement itself is not governed by any specific legislation, and therefore the main requirement for the resulting agreement is that it is reasonable and otherwise conforms to Finnish contract law. It is very difficult to distinguish in general what the contract needs to include in order to be reasonable, but the general rule is that the threshold for adjustment of the contract is high.

2.6 Construction contracts may contain dispute resolution clauses requiring several tiers of dispute resolution processes typically culminating in arbitration or court litigation. In your jurisdiction, would a party be allowed to skip one or more tiers before starting litigation or arbitration? How would a contractual multi-tiered dispute resolution process be characterized in your jurisdiction? Is the multi-tiered dispute resolution clause common in construction contracts and if so, are there problems with the use of this type of clause?

In principle, the parties must always honor the contract and cannot skip tiers of the resolution process. Multi-tiered dispute resolution clauses in Finland however most commonly are limited to two tiers, namely negotiations followed by arbitration or court proceedings. Since the legal definition and concept of "negotiation" may be

rather vague, it might in practice be possible to skip the step. In any event, the opposing party may consider that it does not draw any benefit from forcing a reluctant counterparty to negotiate. Although the FIDIC conditions of contract are rather frequently used in projects located in Finland, the DAB provisions are in practice usually replaced with an ordinary arbitration clause in the special conditions.

3 ADR and jurisdiction

3.1 Are there disputes that can only be decided by a court or by an administrative law tribunal/court? What type of disputes regarding construction projects cannot be subjected to ADR? (For example, are disputes relating to decennial liability arbitrable?)

In principle all dispute resolution methods compliant with mandatory legislation are allowed. In particular, section 2 of the Finnish Arbitration Act provides that any dispute in a civil or commercial matter which can be settled by agreement between the parties can be referred to one or more arbitrators for a final decision. Settlement in non-discretionary matters is, however, restricted. Disputes arising from some legal relationships involving a specific public interest cannot be submitted to any form of ADR, as they must be referred to civil court proceedings. Agreements contrary to mandatory legislation, e.g. providing for illicit restrictions on competition, may lead to significant sanctions or even criminal liability.

3.2 Is there a restriction on the matters that may be the subject of a binding expert determination or other binding third party decision?

In matters concerning contractual issues or discretionary legislation, in principle all dispute resolution methods compliant with non-discretionary legislation are allowed, as mentioned above. It is, however, noteworthy that all contracts are subject to the Finnish Contracts Act, pursuant to which an unreasonable provision may be settled. According to Section 36 of the Act, a provision may be amended or annulled, if it is of unreasonable nature or its application would lead to an unreasonable result. When considering the unreasonableness, regard should be put, inter alia, on the entire content of the contract, the positions of the parties involved and on the circumstances prevailing at and after the conclusion of the other contract. Thus, for example, an arbitrator may amend or annul a provision in a contract in accordance with section 36 of the Finnish Contracts Act. However, it should be noted that the threshold for an adjustment or an annulment is very high.

3.3 Are there any restrictions on the type of arbitral awards or binding decisions that may be issued (For example, may a FIDIC Red Book type DAB rule on questions of fact only or also on questions of law and are there any restrictions on the issues that this DAB may decide)?

As mentioned above, all dispute resolution methods compliant with non-discretionary legislation are, in principle, allowed. Again, it is noteworthy that all contracts are subject to the Finnish Contracts Act, pursuant to which an unreasonable provision may be settled as explained above.

3.4 Are public entities barred from settling disputes by ADR (arbitration, DAB/DRB and/or mediation)?

If the public entity, for example a municipality constructing a school building, is acting purely as a contractual party, then the dispute may be referred to settlement by ADR. Purely administrative issues, such as permits, are handled in administrative courts.

3.5 Do state parties enjoy immunities in your jurisdiction? Under what conditions?

State parties do not enjoy immunities when acting as contractual parties in Finland.

3.6 Can procurement disputes be decided by ADR? If so, are there special requirements for this type of dispute or is only arbitration allowed?

Public procurement disputes may not be decided by ADR. Any cases regarding market law, for example certain issues under consumer protection legislation, public procurement and competition fall under the jurisdiction of the Market Court, which is a special court with a limited jurisdiction over the aforementioned matters. Procurements conducted by contracting authorities, such as state and municipal authorities, relating to public works and public works concessions contracts, the estimated value of which, net of Vat, exceeds EUR 150.000, fall under the Act on Public Contracts (348/2007).

3.7 In the FIDIC Red Book, Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated "The Employer and the Contractor empower the DAB, among other things to (b) decide upon the DAB's own jurisdiction and as to the scope of the dispute referred to it,". In your jurisdiction, in a situation where there are several interrelated contracts between the employer and the contractor (not all with a DAB clause), would the DAB be allowed to decide on issues outside the contract with the DAB clause? If the DAB purports to make a decision on a matter not referred to it, will that decision be deemed to have been made outside its jurisdiction?

This matter is purely contractual and depends on the agreement between the parties. It is noteworthy that the DAB is, as a concept, rarely used in Finland, and dispute resolution clauses referring to a DAB are often replaced with a normal arbitration clause. As a result, the issue does not often arise in Finland.

4 Arbitrators, adjudicators, dispute board members, mediators

4.1 Are there special rules on arbitrator appointment or the appointment of tribunals or entities issuing binding decisions (like for example DAB's) regarding construction disputes in your jurisdiction? Do arbitrators, adjudicators etc. need to have special qualifications?

Pursuant to section 8 of the Finnish Arbitration Act, "unless otherwise agreed by the parties", anyone of legal age who is not bankrupt and whose competence has not been restricted may in principle act as an arbitrator. In addition, a person who is not a Finnish citizen may act as an arbitrator in Finland. The parties are thus free to choose their arbitrators, although it is important to pay attention to the competence of the arbitrators on one hand, and their independence and impartiality, on the other. An arbitrator shall be disqualified, if a party to the proceedings discloses any circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality and independence, e.g. a particularly close relationship to a party to the proceedings. Recently, the president of the Supreme Court of Finland gave a statement to the Chancellor of Justice on the current legal status of the custom of judges acting as arbitrators and the possible need for changes. Currently, court judges and state officials are allowed to act as arbitrators in the form of perquisite positions subject to license. The normal practice is that judges will only act as arbitrators as either chairmen of the arbitration tribunal or sole arbitrators. In principle, judges may also act as arbitrators in only one dispute at a time. According to the statement of the president of the Supreme Court, the current regulations applying to judges acting as arbitrators are insufficient, especially concerning transparency and public confidence. Incompetence due to the likelihood of bias is however, according to the statement, an issue that should not be addressed out of context, but rather from the perspective of transparency and public confidence mentioned above.

4.2 If there are special arbitral institutions for construction arbitrations, do these have a system of lists with names of arbitrators? Do these institutions appoint the arbitrators or do the parties appoint the arbitrators? Do the parties have to choose from these lists or are they free to have arbitrators that are not on the list? How are these lists composed? Is there a difference with other forms of ADR?

According to the Finnish Arbitration Act, the parties are free to choose their arbitrator(s). The rules of the FCC have, however, recently been slightly revised in this respect. Pursuant to the new Article 17, the Board of the Arbitration Institute of the Finland Chamber of Commerce must confirm the arbitrator(s) nominated by the parties, making the parties' choice(s) subject to an additional confirmation, as opposed to the direct nomination which was the practice prior to the revision of the rules.

4.3 In your jurisdiction, do arbitral tribunals and tribunals issuing binding decisions regarding construction disputes usually include a lawyer? If not, are there requirements that the secretary added to the tribunal must be a lawyer?

Would the presence of a lawyer, either as member of the tribunal or as secretary added to the tribunal, be required if these tribunals are to rule on issues of law?

Finnish arbitral tribunals usually include at least one lawyer, and are often composed exclusively of lawyers, but there is no requirement in this respect. There is also no requirement for the tribunal's secretary to be a lawyer. In particular, under the rules of the FCC, Article 25.5 only provides that the arbitral tribunal may appoint a secretary who shall "meet the same requirements of impartiality and independence as any arbitrator".

4.4 In construction industry arbitrations, how often do arbitrators belong to the engineering/construction profession? Are panels integrated both by lawyers and construction professionals possible/common? Is there a difference with other forms of ADR?

Arbitrators are usually lawyers with some experience of construction disputes, but may also belong to the engineering and/or construction profession. Arbitrators are generally appointed based on their experience and expertise, especially taking into account the key qualifications required by the parties and the specific subject matter of the dispute. If the nature of the dispute is more technical than legal, it may be beneficial for all parties that the arbitrator be an engineer or construction professional instead of a lawyer.

4.5 Are arbitrators and tribunals issuing binding decisions allowed to use their own technical expertise without consulting the parties regarding the results of using this expertise?

Pursuant to section 22 of the Arbitration Act, the arbitral tribunal shall give the parties a sufficient opportunity to present their case. Whether or not the arbitrators must consult the parties before relying on their own technical expertise largely depends on the extent and significance of the expertise they intend to rely on. It should of course be noted that arbitrators are usually appointed as the result of their relevant expertise, thus parties seldom oppose to arbitrators exercising their know-how regarding the matter in question.

4.6 Do the most used rules for construction arbitrations contain a rule for the tribunal to apply the rules of law to the merits of a case or do these rules contain a rule that the tribunal decide "ex æquo et bono", as "amiable compositeur", or in "equity"? Is there a difference with other forms of ADR?

Pursuant to section 31 of the Finnish Arbitration Act, the arbitral tribunal shall decide the dispute in accordance with the rules of law applicable to the substance of the dispute and may decide *ex aequo et bono* only if the parties have expressly authorized it to do so. Similarly, pursuant to Article 28.3 of the rules of the FCC, which are the most widely used arbitration rules in Finland, the arbitral tribunal shall decide the dispute *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so. The Arbitration Institute has no special rules for

conciliation, and the parties may thus freely agree on the conciliation rules applicable to their dispute.

5. ADR procedure

5.1 Are arbitrators and others making binding decisions required to follow any minimum due process rules? Does a party usually have a right to have legal representation?

The procedure for arbitration is described in sections 21-30 of the Finnish Arbitration Act. The arbitration procedure itself is not largely regulated by the Act and, pursuant to section 23, the proceedings shall be conducted in accordance with the procedure agreed to by the parties. Failing such agreement, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, subject to the provisions of the Finnish Arbitration Act (e.g. pursuant to section 22 of the Arbitration Act, the arbitral tribunal shall, always, give the parties a sufficient opportunity to present their case) and taking into account the requirements of impartiality and speed. Similar provisions are included in the rules of both the FCC and RIL Conciliation. Parties to arbitrations almost always have legal representation.

5.2 Is the focus in the arbitral procedure and the procedure for tribunals issuing binding decisions on written submissions or on oral presentations?

The focus can be on both, depending on the case. Proceedings, both in arbitration and RIL Conciliation, always include written statements, and tend to include hearings, as well, but the latter are not mandatory. Pursuant to section 27 of the Finnish Arbitration Act, the arbitral tribunal shall promote an "appropriate and speedy settlement of the matter". To this end the arbitral tribunal may require a party, a witness or any other person to appear for examination. Similar provisions are included in the rules of both the FCC and RIL Conciliation. Under Article 29 of the FCC rules, the tribunal shall arrange a preparatory conference, which shall be held orally.

5.3 Are there rules on evidence in the laws of your country and/or the arbitration rules and/or the rules for tribunals issuing binding decisions most commonly used or is this left to the discretion of the tribunal?

The administration of evidence is mostly left to the discretion of the arbitral tribunal. For example, pursuant to Article 33.1 of the FCC rules, the arbitral tribunal "shall determine the admissibility, relevance, materiality and weight of the evidence".

5.4 Is a hearing mandatory for all forms of ADR?

No, it is not. For example the FCC rules refer only to the possibility of holding hearings. In practice, however, proceedings tend to include hearings. Conciliation

procedures also usually include a hearing (e.g. RIL Conciliation), although a hearing is not mandatory.

5.5 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (c) conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these Rules,". Under your jurisdiction, would the DAB still be bound to conduct a hearing according to rules of "natural justice"? If so, what would this mean for conducting the hearing?

As described above, the freedom of contract as a rule prevails over non-mandatory legislation. All contractual relationships are, however, subject to the Finnish Contracts Act. Section 33 of this Act in particular states that "a transaction that would otherwise be binding shall not be enforceable if it was entered into under circumstances that would make it incompatible with honour and good faith for anyone knowing of those circumstances to invoke the transaction". Thus, a settlement resulting from and entirely unfair or gravely prejudiced hearing might be subject to adjustment. The threshold for adjustment is, however, very high. Furthermore, by means of analogy, it is noteworthy that pursuant to the Finnish Arbitration Act, a foreign arbitral award shall not be recognized to the extent that it is contrary to the public policy of Finland.

5.6 What types of experts are mostly used in construction arbitrations (for example, technical experts, delay and disruption experts etc.)? Is there a difference on this topic between arbitration and court litigation in your jurisdiction? Are experts used in the same manner in procedures for tribunals issuing binding decisions?

Experts are used largely in the same manner in arbitration as they are in court litigation. Technical as well as delay and disruption experts are commonly used. Legal experts are frequently used, especially if Finnish law is applicable and the arbitrator happens not to be Finnish or familiar with Finnish law.

5.7 Are these experts mostly party appointed or appointed by the tribunal? Is there a difference as to the evidential value? How are the costs of experts allocated?

Experts may be appointed by the parties or by the tribunal. The arbitral tribunal determines the admissibility, relevance, materiality and weight of the evidence. The costs of an expert are usually considered as costs of the party that has appointed the expert, or are shared equally if the expert was appointed by the tribunal. It is fairly common that the losing party compensates the costs of the winning party.

5.8 Is the expert supposed to be independent to the parties/counsel?

Yes. For example, pursuant to Article 35.1 of the FCC rules, any tribunal-appointed expert shall be impartial and independent of the parties, their counsel and members

of the arbitral tribunal. Pursuant to Article 35.3 of the FCC rules, parties may present party-appointed expert witnesses to testify on the points examined by the tribunal-appointed expert.

5.9 Does the expert normally give written evidence or oral evidence?

Normally, experts give written evidence, but the issue is left to the discretion of the tribunal and the parties submitting the evidence. The other party must be given the opportunity to comment on the evidence, which may be done either by cross-examination and/or in a written submission.

5.10 Can the tribunal ignore the expert statements in its decision, even if the tribunal has appointed the expert? Does the tribunal need to give reasons for following or not following the statement of an expert? Can part of the decision by the tribunal be "delegated" to the expert?

The matter depends on the credibility of the expert. The arbitral tribunal determines the admissibility, relevance, materiality and weight of the evidence, and may decide not to give the evidence of any expert any weight if it considers that it is not relevant or is not credible. The tribunal will usually give reasons in such a case. The tribunal may not delegate its decision to an expert, but in practice it may, of course, rely as heavily on the expert as it sees fit.

5.11 Is "hot tubbing" (this involves experts from the same discipline, or sometimes more than one discipline, giving evidence at the same time and in each other's presence) a feature in construction arbitrations or procedures of tribunals issuing binding decisions in your jurisdiction?

Hot tubbing is not common practice in Finland, but it is also not unheard of, especially in international cases, and is not prohibited.

5.12 Are site visits by the arbitral tribunal and tribunals issuing binding decisions regulated by the laws of your country and/or by the arbitration and other rules most used in your country? If not, are they allowed/mandatory?

ADR site visits are not specifically regulated but are not only allowed, as a rule, but also somewhat customary. The tribunal shall proceed in the manner agreed by the parties and always comply with the Finnish Arbitration Act. Pursuant to Clause 26.2 of the FCC rules, the arbitral tribunal may, after consulting with the parties, conduct hearings at any location it considers appropriate.

5.13 Do all parties need to be present during the site visit and be given an opportunity to comment on the findings of the tribunal?

The obligation to be present depends on the agreement. Generally, the parties shall have the right to present their case. Thus it seems probable that the arbitral tribunal

would require the parties to be present during the site visit and provide them with an opportunity to comment on the findings.

5.14 How common and how important are generally witness testimonies in construction arbitrations and other forms of ADR in your jurisdiction? Under the rules most often used in your jurisdiction for construction disputes, are there any restrictions on either not admitting testimony, or not giving value to the declaration of witnesses that are employees or consultants of the party presenting their testimony?

Witness testimonies are very common and fairly important, since many issues involve much more than purely legal questions and the arbitrators are usually lawyers. It is, however, up to the arbitral tribunal to determine the admissibility, relevance, materiality and weight of the evidence. The parties shall also be given a sufficient opportunity to present their case, which commonly includes the opportunity to adduce witness evidence. The arbitral tribunal is, however, pursuant to section 27 of the Finnish Arbitration Act, not entitled to administer oaths or equivalent affirmations.

5.15 Under the rules most often used in your jurisdiction for construction disputes, what degree of discretion do the arbitrator(s) or tribunals issuing binding decisions have in weighing evidence, including balancing potentially contradictory pieces of evidence or disregarding any piece of evidence? Are there any rules on valuation of evidence in the law or in such rules?

Under Article 33.1 of the FCC rules, it is for the arbitral tribunal to determine the admissibility, relevance, materiality and weight of the evidence. Thus no specific rules exist. Corresponding provisions can be found, for example, in the rules of RIL Conciliation.

6 Interim measures and interim awards

6.1 Are measures devoted to preserving a situation of fact or of law, to preserving evidence or ensuring that the ultimate award in a case will be capable of enforcement allowed in your jurisdiction? Are these measures usually decided by the arbitral tribunal or by a judge?

Yes, they are allowed. The measures are usually granted by a judge and are governed by chapter 7 of the Finnish Code of Judicial Procedure. Measures may also be granted by an arbitral tribunal, for example pursuant to Article 36.1 of the FCC rules. The arbitral tribunal may not, however, pursuant to section 27 of the Finnish Arbitration Act, impose any penalty for non-compliance with interim measures, nor use other means of constraint.

6.2 In the FIDIC Red Book Appendix General Conditions of Dispute Adjudication Agreement, Annex procedural rules under 8 is stated (g) decide upon any provisional relief such as interim or conservatory measures (...) The FIDIC Red Book has no explicit provisions for DAB decisions that have a provisional nature. It is not clear if, how and when these should be followed by decisions that are meant to be final and binding. Would this lead to problems in your jurisdiction?

Between the parties, these decisions, whether interim or not, should be followed because they are contractual in nature. The issue depends on the contract between the parties. A different question is whether these decisions are binding on the courts. It is, again, noteworthy that the DAB is, as a concept, rarely used in Finland, and that dispute resolution provisions providing for the use of a DAB are often replaced with a normal arbitration clause.

7 Awards, decisions, recommendations, negotiated agreement

7.1 Is a binding decision (for example the decision of a DAB) enforceable in your country? If not directly enforceable, what steps must be taken to get a binding decision enforced? Would FIDIC Red Book clause 20.7 allow enforcing a DAB decision directly through court in your jurisdiction (skipping the arbitration)?

All enforcement matters in Finland are governed by the Finnish Enforcement Code (705/2007; amendments up to 987/2007 included). A court judgment in a civil or criminal matter, a court order on precautionary measures, and an arbitral award that has been handed down in arbitral proceedings under the Finnish Arbitration Act (967/1992) or some other Act can all be enforced. Thus, pursuant to section 54 of the Finnish Arbitration Act, an arbitral award made in a foreign state shall be enforced upon request in Finland provided that said award is recognized under the Finnish Arbitration Act. A settlement confirmed by a court or in an arbitral award shall be enforced in the same manner as a final judgment. Thus the decisions of a DAB must be confirmed by a court in order to be enforceable. Unless otherwise stated in the special conditions of a construction contract, the Red Book clause 20.7 would seem to require that any failure to comply with a DAB decision be referred to arbitration, meaning that the DAB decision may not be directly enforced by a court.

7.2 Does the award or binding decision have to be reasoned?

Reasoning is not required by law, although decisions are, in practice, always reasoned. An award is, pursuant to section 40 of the Arbitration Act, null and void only if the arbitral award is so obscure or incomplete that a statement regarding how the dispute has been decided does not appear in the award. In other words, there is no clear outcome, rather than a lack proper reasoning. Pursuant to clause 41.1of the FCC rules, the tribunal shall state the reasons upon which the award is based, unless the parties have agreed otherwise, so the premise is that every award is reasoned.

7.3 Are dissenting opinions in arbitral awards allowed in your jurisdiction and if so, can they be added as a separate opinion to the award? Are they allowed in other forms of ADR?

Pursuant to section 32 of the Finnish Arbitration Act, if there is a divergence of opinion among the arbitrators, the award shall be made by a majority of the arbitrators. If the divergence concerns the amount claimed, the votes for the highest amount shall be added to the votes for the nearest lower amount until the number of votes exceeds half of the total number of the votes. If no majority of votes is attained for any opinion, the opinion of the chairman shall prevail, unless otherwise agreed by the parties. An arbitrator may, although not specifically stated under the Finnish Arbitration Act, add a separate dissenting opinion to the award.

7.4 Can an award or (binding) decision be corrected, clarified or reconsidered? If so, can the tribunal do this on its own accord or only if parties request it to do so?

Pursuant to section 38 of the Finnish Arbitration Act, a party may request the arbitral tribunal to correct any computation errors in the award, any clerical or typographical errors, and any other errors of a similar nature. A party must request such a correction within 30 days of receipt of a copy of the award, unless some other period of time has been agreed upon by the parties. If the arbitral tribunal considers the request to be justified, it must make the correction without delay. The arbitral tribunal may also, at its own initiative, correct any error within 30 days of the date of the award. However, before such a correction is made, the parties must, where necessary, be given an opportunity to submit comments on the correction to be made.

8 Enforcement of and challenges to awards and decisions

8.1 What steps would a party have to take to get to the enforcement of binding third party decisions in your jurisdiction?

Decisions on enforcement are to be made by the courts of first instance. An application for the enforcement of an arbitral award must be accompanied by the originals or certified copies of the arbitration agreement and the arbitral award. A document drawn up in any language other than Finnish or Swedish must be accompanied by a certified translation into either of these languages, unless the court grants an exemption. Before an application is granted, the party against whom enforcement is sought must be given an opportunity to be heard, unless there is a special reason to the contrary. When enforcement has been granted by the court, the further enforcement process is governed by the provisions of the Finnish Enforcement Code.

8.2 In your opinion, would the New York Convention allow recognition and enforcement of FIDIC Red Book DAB-type awards deemed to be the equivalent to arbitral awards through contractual arrangement?

Yes, provided that the DAB award would indeed be deemed equivalent to an arbitral award by contractual arrangement. Pursuant to section 2 of chapter 2 of the Finnish Enforcement Code, only a court judgment, a court order on precautionary measures, and an arbitral award that has been handed down in arbitral proceedings under the Finnish Arbitration Act (967/1992) can be enforced. As the DAB expressly "shall be deemed to be not acting as arbitrators" (see FIDIC Red Book clause 20.4), in order to be enforceable, it should be expressly stated in the particular conditions that the award is indeed equivalent to an arbitral award, in addition to which the Finnish Arbitration Act shall have been complied with. In any event, recognition and enforcement is always subject to the Finnish Enforcement Code, pursuant to which a court shall confirm the decision prior to enforcement.

8.3 Would your country allow the enforceability of a foreign arbitration award which in turn enforces a FIDIC Red Book type DAB decision?

Yes, provided that the enforcement procedure complies with the applicable mandatory legislation. Sections 51—55 of the Finnish Arbitration Act apply to the enforcement in Finland of an arbitral award made in a foreign state. Pursuant to section 52, a foreign arbitral award shall not be recognized to the extent that it is contrary to the public policy of Finland. The award also cannot be recognized if the opposing party furnishes proof that

1) it did not have the capacity to enter into the arbitration agreement or that it was not properly represented when the arbitration agreement was entered into, or that an arbitration agreement is not valid under the applicable law;
2) it was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case;
3) the arbitral tribunal exceeded its authority;
4) the composition of the arbitral tribunal or the arbitral proceedings substantially deviated from the agreement of the parties or, failing such agreement, from the law of the state in which the arbitration took place; or
5) the arbitral award has not yet become binding on the parties or it has been declared null and void or set aside or suspended in the state in which, or under the law of which, the award was made.

In other events than the five exceptions referred to above, pursuant to section 54, the arbitral award which has been made in a foreign state and which under this Act shall be recognized in Finland shall be enforced here upon request. An application for enforcement shall be submitted to the court of first instance. However, before an arbitral award made abroad is declared enforceable, the court shall give the party against whom enforcement is sought an opportunity to be heard, unless there is a special reason to the contrary, thus granting the party a chance to furnish proof that the arbitral award should not be recognized in Finland said hearing shall be

processed in the office of the district court, unless there is need for hearing a witness or someone else in person.

8.4 Are there any remedies (which possibly cannot be waived) to challenge a FIDIC Red Book type DAB decision in case of fraud, failure to follow minimum due process or other serious irregularity? Will these remedies make a DAB decision unenforceable in court without first having to go through arbitration (clause 20.6 FIDIC Red Book)?

In addition to the answer to question 8.3 above, and as already mentioned above, all contractual relationships, such as a DAB decision, must comply with the mandatory provisions of the Finnish Contracts Act. The invalidity and adjustment of contracts is governed by chapter 3 of the act. Pursuant to this act, a transaction into which a person has been coerced is not binding (subject, naturally, to certain preconditions). Moreover, a transaction that would otherwise be binding shall generally not be enforceable with regard to anyone with knowledge that it was entered into under circumstances that are incompatible with honour and good faith. Finally, if a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside. It should of course be noted that the threshold for applying these provision is rather high.

8.5 Would a binding expert determination be subject to review on the merits by the law courts on your jurisdiction?

The matter is contractual and depends on the agreement between the parties. All contractual matters are also subject to the Finnish Contracts Act, as described above.

9 Trends and developments

9. Please comment on any new trend or developments relating to ADR in construction in your country.

The Finnish construction sector is growing steadily, and the diversity of types of projects has increased. The resolution of construction disputes is, as stated above, governed mainly by contractual principles rather than legislation. This provides for a quite interesting setting for dispute resolution, as the issues arising are often more relative and less definite, i.e. providing more room for argumentation, than in other industries. The aforesaid is rather well illustrated by recent case law, as well. The alternatives for dispute resolution mechanisms are, in contractual matters, significantly more widespread than in purely legislative questions, which makes the Finnish construction industry well prepared for customized projects in the future.

Consequently, they rarely are those regarding absolute legislative questions, such as issues towards third parties, but rather ones concerning differences in opinion

between contractual parties. This makes the solutions more flexible than simply "yes or no", and possibly provides more room for argumentation.

10 Other Important Issues

10. Please comment on any other important topics affecting ADR in construction in your jurisdiction.

The rules of the FCC were recently revised (as per 1.6.2013). The revised rules contain significant changes to the previous rules as concerns appointing the arbitral tribunal. Previously, the nomination and appointment of the tribunal was entirely in the realm of the parties, whereas under the new rules the FCC must confirm the arbitrators nominated by the parties. The rules do not set out any standards or guidelines for such confirmations, which gives the FCC practically total freedom of choice as regards the arbitrators, independent of the parties' choice. This makes the appointment of the arbitral tribunal very different from the previous, totally party-based appointment. Naturally, parties have an opportunity to challenge an arbitrator and the Board shall release an arbitrator from appointment if all parties jointly agree to release the arbitrator from appointment.