



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

## ICCA PROJECTS

**Does a Right to a  
Physical Hearing Exist  
in International  
Arbitration?**

## FINLAND

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### a. Parties' Right to a Physical Hearing in the *Lex Arbitri*

1. Does the *lex arbitri* of your jurisdiction expressly provide for a right to a physical hearing in arbitration? If so, what are its requirements (e.g., can witness testimony be given remotely, etc.)?

Short answer: No.

The *lex arbitri* in Finland is the Finnish Arbitration Act (the “FAA” or the “Arbitration Act”, 967/1992, as amended) which applies equally to domestic and international arbitration proceedings seated in Finland. The Arbitration Act is divided into two parts, the first part (Sections 2-50) dealing with arbitration seated in Finland, while the second part (Sections 51-55) contains provisions on arbitration agreements providing for arbitration outside Finland as well as on the recognition and enforcement of foreign arbitral awards in Finland. The 1985 UNCITRAL Model Law was used as a source in formulating the Arbitration Act and the Act is to a large extent compatible with the Model Law, although the Model Law, as such, was not implemented into Finnish law. Accordingly, Finland is not a so-called Model Law country.<sup>1</sup>

Overall, the FAA is generally considered pro-arbitration and arbitration in Finland has long-established traditions.<sup>2</sup> The Arbitration Institute of the Finland Chamber of Commerce (“FAI”) was established in 1911.<sup>3</sup> Finnish general courts can also be said to have an arbitration-friendly attitude in general.<sup>4</sup>

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<sup>1</sup> See, e.g., MÖLLER, “National Report Finland” in ICCA *International Handbook on Commercial Arbitration* (henceforth *Handbook*) p. 1; Jussi LEHTINEN and Heidi YILDIZ, “Finland” in Damian TAYLOR, ed., *The Dispute Resolution Review*, 9th edn. (Law Business Research 2017) p. 143 at p. 151.

<sup>2</sup> Gustaf MÖLLER, *Välimiesmenettelyn perusteet* (Lakimiesliiton Kustannus 1997) pp. 10-11.

<sup>3</sup> Tuuli TIMONEN, “Overview of Arbitration in Finland” in Tom EHRSTRÖM, Tuuli TIMONEN and Santtu TURUNEN, eds., *Arbitration in Finland* (YACF 2017) p. 15 at p. 20.

<sup>4</sup> See, e.g., KKO 2008:77 where, in paragraph 10 of the judgment, the Supreme Court stated that the usability of arbitration as a method of solving commercial disputes depends largely on the binding nature and enforceability of an arbitral award and that only clear formal errors and relatively grave procedural errors may result in the nullity or setting aside of an arbitral award.

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Arbitration in Finland is based on the doctrine of freedom of contract.<sup>5</sup> The FAA does not expressly provide for a right to a physical hearing as it does not expressly provide for a right to a hearing at all. Hence, the parties may pursuant to Section 23 of the FAA jointly agree on the course of the proceedings as they please, as long as the parties' agreement is not in contradiction with the mandatory provisions of the FAA, including in particular the mandatory requirements of due process.

Regardless of the above, hearings of some sort are regarded as an integral part of arbitration in Finland nonetheless.<sup>6</sup> The FAA contains several provisions that imply that hearings are traditionally an essential element of arbitration. For example, Section 24.2 of the FAA could be used to support an inference that even remote hearings are a possibility due to proceedings not being bound to a single location,<sup>7</sup> as it provides that "[t]he arbitrators may, however, where appropriate, hear parties, witnesses and expert witnesses and conduct judicial inspections also in places other than the place of arbitration agreed upon by the parties or determined by the arbitrators, also outside the territory of Finland". While the said Section does not specifically refer to the taking of evidence remotely, the efficiency of arbitral proceedings and the expediency requirement imposed on the tribunal (as discussed below) could be used to conclude that such taking of evidence may take place remotely.

2. *If not, can a right to a physical hearing in arbitration be inferred or excluded by way of interpretation of other procedural rules of your jurisdiction's lex arbitri (e.g., a rule providing for the arbitration hearings to be "oral"; a rule allowing the tribunal to decide the case solely on the documents submitted by the parties)?*

Short answer: It is not possible to infer from any provision of the Finnish *lex arbitri* that a right to a physical hearing (or to a hearing at all) would exist. However, various provisions of the FAA point towards hearings being an essential element of arbitral proceedings.

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<sup>5</sup> G. MÖLLER, *Välímiesmenettelyn perusteet*, fn. 2 above, p. 2. Pursuant to Section 2 of the FAA, commercial and civil disputes are in general arbitrable in Finland. It must be noted, however, that arbitrability requires that the matter can be settled by agreement between the parties. If a case is not amenable to settlement, it is not arbitrable. Consequently, matters pertaining to, *inter alia*, status or legal capacity of natural persons, divorce, adoption, guardianship etc. are not arbitrable.

<sup>6</sup> According to a survey conducted into Finnish arbitrations in 2005-2008, hearings were conducted in 96.6 per cent of the cases and only two cases out of 58 were concluded on the basis of written proceedings only. See Maarit JAATINEN, *Suullinen käsittely välímiesmenettelyssä* (Gummerus Kirjapaino 2009) p. 46.

<sup>7</sup> MÖLLER, "National Report Finland" in *Handbook*, p. 15.

*The relevant general provisions of the FAA relating to hearings.* As the FAA does not explicitly provide the parties a right to a hearing, it shall be assessed whether such a right can be inferred or excluded based on its other provisions.

Relatively few of the FAA's provisions regulate the conduct of the proceedings before the arbitral tribunal, only Sections 20-30 out of a total of 57 sections. As described above, these provisions do not, however, directly touch upon the question of a hearing but rather provide a flexible framework for conducting the proceedings, the basis of which is the parties' agreement.

Pursuant to Section 23 of the FAA, "[u]nless otherwise provided in this Act, the proceedings shall be conducted in accordance with what the parties have agreed in respect of the procedure. In the absence of such an agreement, the arbitrators may conduct the arbitration in such manner as they consider appropriate, subject to the provisions of this Act and taking into account the requirements of impartiality and expediency".<sup>8</sup> As there are no provisions in the FAA which would expressly require that a hearing be organised, the parties are therefore free to agree on the question of whether there should be a hearing at all. The broad scope of the parties' freedom of contract is expressly confirmed in the preparatory legislative works of the FAA: "Arbitration is based on freedom of contract, and the disputing parties may solve their disagreements as they see fit".<sup>9</sup> Since arbitration is a method of resolving private disputes and the parties themselves bear all the related costs, the stance taken in Finland is that it is also reasonable that the parties are given extensive freedom of contract concerning the conduct of the proceedings. It is also noteworthy that the parties' freedom to agree on the conduct of the proceedings is not limited to agreements made pre-arbitration, but the parties are free to agree on the procedure even after a dispute has arisen.<sup>10</sup>

In the absence of an agreement by the parties on the conduct of the proceedings, the arbitral tribunal has discretion to conduct the proceedings as it deems fit, as long as the other provisions of the FAA are respected (such as the mandatory requirements of due process) and taking into account the requirements of impartiality and expediency. Hence, the arbitral tribunal's discretionary power to conduct the arbitration is not unlimited, but it exists only in the absence of an agreement by the parties and subject to the provisions of the FAA and within the confines of mandatory requirements of due process and the requirements of impartiality and expediency. However, since the FAA does not explicitly provide for a right to a hearing, it seems likely that the arbitral tribunal's decision on the conduct of the proceedings is likely to be focused not on whether the hearing is physical or remote, but whether the proceedings are conducted in such a way as to grant the parties a sufficient opportunity to present their respective cases (as

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<sup>8</sup> This and subsequent citations from the Finnish Arbitration Act are derived from its unofficial translation, which is available at <[https://finlex.fi/en/laki/kaannokset/1992/en19920967\\_20150754.pdf](https://finlex.fi/en/laki/kaannokset/1992/en19920967_20150754.pdf)> (last accessed 1 December 2020).

<sup>9</sup> Government Bill HE 202/1991, p. 3.

<sup>10</sup> MÖLLER, "National Report Finland" in *Handbook*, p. 15.

discussed below) and balanced against the requirements of impartiality and expediency imposed upon the tribunal.

As for the principles concerning the tribunal's impartiality and expediency under Section 23 of the FAA, impartial treatment requires that an arbitral tribunal cannot be biased towards any of the parties. This means that an arbitral tribunal cannot generally conduct the proceedings in a way that would disadvantage or give unfair benefit to only one of the parties. Accordingly, it is due to this requirement of impartial treatment that an arbitral tribunal must consider how, for example, the presentation of evidence, the exchange of written submissions or the structure of hearings may affect the parties' position vis-à-vis one another.<sup>11</sup>

The arbitrators must also take into account the requirements set by expediency when conducting the proceedings. In addition to being included in Section 23 of the FAA, the principle of expediency is further reinforced in Section 27 where it is stated that "[t]he arbitrators shall promote an appropriate and expedient settlement of the matter". Therefore, should the principle of expediency so require, the extensive procedural discretion granted to the arbitral tribunal suggests that (in the absence of an agreement by the parties) an arbitral tribunal is allowed to order the hearings to be conducted by any means it deems appropriate, including remotely. It is unlikely that Finnish courts, should the question be posed to them in a setting-aside action, would find that the parties are entitled to a physical hearing, if it was not expressly agreed on.<sup>12</sup>

In addition to Sections 23 and 27 of the FAA, another important provision concerning the arbitral tribunal's discretionary power is Section 22 of the FAA. Section 22 of the FAA has been described as the most important mandatory requirement of the Act as it states that the arbitrators shall provide the parties sufficient opportunity to present their respective cases.<sup>13</sup> Considering that the same requirement of providing the parties sufficient opportunity to present their cases, if not fulfilled, is one of the grounds on which parties can seek to set an arbitral award aside under Section 41 of the FAA, it underlines the parties' fundamental procedural right to a fair trial.

It therefore follows from FAA Section 22 that the parties must be granted a sufficient opportunity to actually present their claims, argumentation and evidence as well as respond to the opposing party's claims, argumentation and evidence. However, the provision does not require that the parties actually seize this opportunity. It is enough that they have had a sufficient opportunity to be heard.<sup>14</sup>

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<sup>11</sup> Aapo SAARIKIVI, "Arbitral Proceedings" in T. EHRSTRÖM, T. TIMONEN and S. TURUNEN, eds., *Arbitration in Finland*, fn. 3 above, p. 63 at p. 74.

<sup>12</sup> See, e.g., KKO 2008:77, fn. 4 above, paragraph 10. The Supreme Court specified that only clear formal errors as well as relatively grave procedural errors may constitute grounds for the nullity or setting aside of the award.

<sup>13</sup> Mika SAVOLA, *Guide to the Finnish Arbitration Rules* (Helsingin Kauppakamari Oy 2014) p. 17.

<sup>14</sup> A. SAARIKIVI, "Arbitral proceedings", fn. 11 above, p. 73.

In respect of Section 22 of the FAA, it is also important to note the subtle difference between the wording of the FAA and the UNCITRAL Model Law: under the FAA, a “sufficient” opportunity is enough, whilst under Article 18 of the Model Law it is required that “[...] each party shall be given a *full* opportunity of presenting his case” (emphasis added). Thus, arbitrators operating under the FAA appear to have a broader degree of discretion than the UNCITRAL Model Law would allow. They must assess the necessity of such sufficient opportunity based on objective criteria.<sup>15</sup>

To summarize, the arbitral tribunal has broad procedural discretion under the FAA, but it cannot deviate from the parties’ agreement, and such agreement by the parties is subject only to a few mandatory requirements of due process, e.g., that the parties shall be treated impartially.<sup>16</sup> If the parties’ agreement does not include a right to an oral hearing (or if it cannot be inferred through means of interpretation), it is not mandatory for the arbitral tribunal to hold a hearing, provided that each party is still given a sufficient opportunity to present its case and the parties receive impartial treatment. Consequently, it is under these conditions possible under the FAA to conduct the arbitration completely without any oral hearings at all, whether physical or remote. However, if either party requests an oral hearing, and unless the parties have expressly agreed that the procedure shall be conducted in writing, the arbitral tribunal will usually not reject this request and will hold either a physical or a remote hearing, as long as under the circumstances either one complies with mandatory requirements of due process.<sup>17</sup> The right to a hearing is usually granted since rejecting a request for a hearing would increase the risk that the arbitration award is later contested due to a party not receiving sufficient opportunity to present his or her case.<sup>18</sup>

*The provisions of the FAA regarding the taking of evidence.* While the conclusion above is that the FAA does not explicitly grant the parties a right to a physical hearing, the question can also be addressed by determining whether oral evidence can be presented remotely in order to assess whether the right to a physical hearing could nonetheless be inferred from such provisions – again in the absence of an agreement by the parties governing the question of a physical / remote hearing.

As regards evidence submitted by the parties in general, the arbitrators have the freedom to “determine the admissibility, relevance, materiality, and weight of the evidence submitted by the parties”.<sup>19</sup>

Section 27 of the Arbitration Act gives the arbitrators a general mandate to decide on the proceedings relating to evidence: “The arbitrators shall promote an appropriate and expedient settlement of the matter. To this end, the tribunal may request that a party, a witness or any other person appear to be heard in the matter as well as request a party or any other person in possession of a document or other object which may have relevance as evidence to produce the document or object”. Unless otherwise agreed by the parties,

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<sup>15</sup> M. JAATINEN, *Suullinen käsittely välimiesmenettelyssä*, fn. 6 above, pp. 40-41.

<sup>16</sup> MÖLLER, “National Report Finland” in *Handbook*, p. 15.

<sup>17</sup> *Ibid*, p. 16.

<sup>18</sup> M. JAATINEN, *Suullinen käsittely välimiesmenettelyssä*, fn. 6 above, pp. 46-47.

<sup>19</sup> MÖLLER, “National Report Finland” in *Handbook*, p. 16.

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it is up to the tribunal to decide how the witnesses should be examined. If a remote hearing promotes appropriate and expedient settlement of the matter, and organising a remote hearing does not endanger the tribunal's impartiality towards the parties and the parties are given a sufficient opportunity to be heard, remote witness hearings are within the tribunal's margin of discretion (and again in the absence of the parties' agreement to organise a physical hearing).

It is also important to note that (unless the parties have otherwise agreed), the arbitral tribunal is not bound by the rules regarding evidence that apply to litigation in Finnish general courts. Moreover, contrary to court proceedings, witnesses cannot be compelled to appear before the arbitral tribunal under the FAA. If a person refuses to appear, the arbitral tribunal cannot use any coercive methods. This, however, leaves the arbitral tribunal freedom to infer what could be the logical reasoning behind the refusal to comply with a proper request to attend.<sup>20</sup> In addition, pursuant to Section 29.1 of the Arbitration Act, "[i]f the arbitrators deem it necessary that a party, a witness or an expert witness be heard in court or that a party or any other person be ordered to produce a document or object which may be of relevance as evidence in the case, then a party may submit an application to the court to this effect". Pursuant to Section 29.2, this request shall be submitted to the court of first instance with jurisdiction over the place where the person to be heard or otherwise concerned in the matter is located. If a hearing occurs in court, the court will apply the general procedural rules for taking evidence<sup>21</sup> (these will be discussed later in more detail in sub-paragraph b.3).

As regards expert witnesses, unless the parties have otherwise agreed, the arbitrators may, on their own discretion, appoint experts to give their statements pursuant to Section 28 of the Arbitration Act.<sup>22</sup> The parties are entitled to prevent such appointment by mutual agreement, as expert opinions can be rather expensive and the parties themselves bear the costs. Expert opinions are generally always in writing, though this is not a legal requirement. It is also possible that the arbitral tribunal invites the expert to give his or her opinion at a hearing where the parties are given the opportunity to question and examine the expert.<sup>23</sup>

In conclusion, it also cannot be inferred from the FAA's provisions concerning the taking of evidence that the FAA requires that a hearing be physical.

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<sup>20</sup> *Ibid.*

<sup>21</sup> Section 29.3 of the FAA provides that: "The court shall, unless there is a barrier thereto, execute the request according to the provisions on taking evidence in Chapter 17 of the Code of Judicial Procedure".

<sup>22</sup> Section 28.1 of the FAA provides that: "Unless otherwise agreed by the parties, the arbitrators may, if special professional knowledge is needed to evaluate certain issues relevant to the determination of the case, appoint an expert witness to conduct examinations and report to the arbitrators".

<sup>23</sup> MÖLLER, "National Report Finland" in *Handbook*, p. 17.

*Summary.* To summarize, it is not possible to infer from any provision of the Finnish *lex arbitri* that a right to a physical hearing (or to a hearing at all) would exist. However, the FAA encompasses various provisions that nonetheless point towards hearings of some sort being an essential element of arbitral proceedings.

In the absence of a provision granting the parties a right to a physical hearing, the FAA however provides the disputing parties strong party autonomy. Therefore, the parties may themselves decide whether they want to agree to arrange a physical hearing or not. Unless the parties have agreed to a physical hearing, it falls within the broad discretion of the arbitral tribunal whether to organise a remote hearing.

*The FAI Rules.* Before analysing the requirements of hearings in litigation, however, and while recognising that the question only concerns the right to a physical hearing under the *lex arbitri*, the Authors would nonetheless also like to briefly address the Arbitration Rules of the Arbitration Institute of Finland Chamber of Commerce (the “FAI Rules”), which have been specifically confirmed to enable remote hearings by the FAI.<sup>24</sup> Under the FAI Rules, the arbitral tribunal has broad procedural rights to decide how hearings should be organised. When the arbitral tribunal exercises such right, it shall take into account the requirement of equal treatment of the parties, give each party a reasonable opportunity to present its case and avoid unnecessary costs and delays, as is evident from the following extracts.

However, strong party autonomy prevails also under the FAI Rules. Pursuant to Article 26 of the FAI Rules,<sup>25</sup> “[t]he arbitral tribunal shall, subject to the FAI Rules and any agreement of the parties, decide on the manner in which the arbitration shall be conducted. The arbitral tribunal shall ensure that the parties are treated with equality and that each party is given a reasonable opportunity to present its case. All participants in the arbitral proceedings shall make every effort to contribute to the efficient conduct of the proceedings in order to avoid unnecessary costs and delays” (emphasis added).

As for hearings, Article 36.1 of the FAI Rules states that “[t]he arbitral tribunal, at any stage of the proceedings, may hold hearings for the presentation of evidence by fact or expert witnesses, or for oral argument by the parties. The arbitral tribunal fixes the date, time and place of the hearing after consulting with the parties”. Pursuant to Articles 36.3 and Art. 36.5 of the FAI Rules, “[t]he arbitral tribunal may, after consulting with the parties, direct that witnesses be examined through means that do not require their physical presence at the hearing, including by videoconference or by telephone. [...] The arbitral tribunal establishes the sequence and schedule of the hearing after consulting with the parties. Any witness who gives oral evidence may be questioned by the parties in such manner as the arbitral tribunal shall determine”.

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<sup>24</sup> The Arbitration Institute of the Finland Chamber of Commerce, “COVID-19 Pandemic and FAI Arbitrations” (28 April 2020) at <<https://arbitration.fi/2020/04/28/covid-19-pandemic-and-fai-arbitrations/>> (last accessed 24 November 2020).

<sup>25</sup> FAI, Arbitration Rules of the Finland Chamber of Commerce in force as of 1 January 2020 (2020 FAI Arbitration Rules), available at <<https://arbitration.fi/wp-content/uploads/sites/22/2020/01/arbitration-rules-of-the-finland-chamber-of-commerce-2020.pdf>> (last accessed 20 November 2020).



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Therefore, absent an agreement by the parties on a physical hearing, the FAI Rules confirm that arbitral tribunals have wide procedural discretion to decide on the organisation of hearings, including with respect to holding hearings remotely. When exercising such discretion, the arbitral tribunal shall take into account the requirement of equal treatment of the parties, give each party a reasonable opportunity to present its case and avoid unnecessary costs and delays.<sup>26</sup>

### **b. Parties' Right to a Physical Hearing in Litigation and its Potential Application to Arbitration**

3. *In case the lex arbitri does not offer a conclusive answer to the question whether a right to a physical hearing in arbitration exists or can be excluded, does your jurisdiction, either expressly or by inference, provide for a right to a physical hearing in the general rules of civil procedure?*

Short answer: Yes. However, on the court's order and upon a party's acceptance, the hearing can be remote.

*The general principles applicable to Finnish civil proceedings.* Finnish court proceedings and civil proceedings are largely based on the principles of *audiatur et altera pars* / *audi alteram partem*, orality and immediacy.

The Code of Judicial Procedure (4/1734, as amended, the "CJP") does not contain a clear-cut rule as to when physical and remote hearings shall be organised. However, in practice, hearings have as a main rule prior to the pandemic been held physically and remote hearings have served as an alternative under certain circumstances. All Finnish courts of law are equipped with videoconferencing equipment, so the technical infrastructure required for organising remote hearings is up and running.<sup>27</sup> As for the principle of *audiatur et altera pars*, it requires that remote hearings shall also be organised in a way where all participants may simultaneously take part in the session and hear each other's comments and so that all that is said and shown comes to the attention of everyone at the same time. Furthermore, due to the requirements of publicity of hearings under Finnish law, even a remote preparatory session has to be organised so that physical access can be granted, so that the debate is publicly available.<sup>28</sup>

*The requirements for a physical / remote hearing regarding preparatory and main hearings.* Finnish civil court proceedings are usually two-phased in the first instance, i.e., for District Courts, first an optional hearing during the preparatory phase and then a

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<sup>26</sup> 2020 FAI Arbitration Rules, fn. 25 above.

<sup>27</sup> See, e.g., Oikeus.fi, "Videoconferencing in court proceedings", (3 November 2020) at <<https://oikeus.fi/en/index/oikeuslaitos/videokuuleminennoikeudenkaynnissa.html>> (last accessed 23 November 2020).

<sup>28</sup> Government Bill HE 32/2001, p. 44.

mandatory main hearing (unless the case has been decided in the preparatory phase). The provisions of the CJP are not, however, identical as to whether these two hearings shall be physical or remote.

Pursuant to Chapter 5, Section 15 of the CJP, “[u]nless the case has been decided in accordance with previous sections of the act,<sup>29</sup> the preparation shall continue in writing or orally in a hearing (‘preparatory session’) or the case shall be transferred directly to the main hearing”. In other words, the preparatory phase before the main hearing can take place entirely in writing. In contrast, as explained below, the possibility of a written main hearing does not exist in Finland.

If the preparation is continued orally in a hearing, this refers to a hearing that is primarily physical. It can be inferred from Chapter 5, Section 15d of the CJP, where it is stated that “[a] preparatory session *may also* be held by telephone or other technical means, in which the parties present at the session have a voice contact with one another, if the court deems such measures appropriate” (emphasis added). Thus, it is within the court’s discretion to decide, whether the hearings in a preparatory session should be physical or remote. According to the preparatory works to the CJP, a physical preparatory hearing should prevail over a remote preparatory hearing, since when the parties are physically present in the same location, their conversation is more natural and structured.<sup>30</sup> It is also possible that one party is physically present and the other is present via electronic means.

As stated above, contrary to the preparatory phase, main hearings are always oral.<sup>31</sup> In practice, main hearings have traditionally and prior to the pandemic primarily been held physically. However, due to relatively recent legislation, main hearings can now be organized remotely through electronic means as well.<sup>32</sup> Chapter 12, Section 8.1 of the CJP states that “[a] party to a civil case can participate in the oral hearing by using technical means of communication, whereby the parties present at the session have both visual and voice contact with one another, *if the party agrees to this and if the court deems such measures appropriate*. The hearing of a party for the purposes of providing evidence shall be conducted in accordance with Sections 52 and 56 of Chapter 17” (emphasis added).

It is important to note the slight difference between this provision and the one relating to the preparatory phase. As the preparatory phase can also take place only in writing, a remote preparatory session does not under the CJP explicitly require visual contact

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<sup>29</sup> In some situations, the CJP provides grounds to decide the case without continuing the preparation, if, e.g., the respondent has not responded to the claim. Unofficial translation of the Code of Judicial Procedure (10 January 2016) available at <[https://finlex.fi/fi/laki/kaannokset/1734/en17340004\\_20150732.pdf](https://finlex.fi/fi/laki/kaannokset/1734/en17340004_20150732.pdf)> (last accessed 1 December 2020). Please note that the unofficial translation is not up to date as of December 2020.

<sup>30</sup> Government Bill HE 32/2001, p. 45.

<sup>31</sup> As stated in CJP Chapter 6, Section 3: “The main hearing is oral. A party may not read out or submit a written statement to the court or otherwise make his or her case in writing”.

<sup>32</sup> Government Bill HE 200/2017. This legislation has been in effect since 1 January 2019.

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between the parties present at the session. In main hearings, however, visual contact is required in addition to voice contact.

Pursuant to CJP Chapter 12, Section 8.2, the provision on using electronic (or “technical”) means also applies to a party’s legal representative and, with the party’s consent, his attorney or counsel. A party to a civil case and his or her counsel do not have to be present in the same remote location subject to the party’s acceptance. It is possible that, e.g., the counsel is physically present at the session and the client is present through electronic means as long as the client accepts this.<sup>33</sup>

Furthermore, there are several provisions in the CJP providing that a party should actually be present in the session under threat of a fine.<sup>34</sup> Pursuant to Chapter 12, Section 8.3 of the CJP, this appearance of a party is also fulfilled when a party participates in the oral hearings by electronic means.

It should be noted, however, that the CJP does not address whether judges can attend main hearings remotely. In this regard, the Supreme Court of Finland has issued two precedents relating to separate cases where one of the judges (and, in the other case, even parties and witnesses) attended the main hearing remotely.<sup>35</sup> The Supreme Court stated clearly in both precedents that a judge cannot participate remotely to a main hearing, since this possibility is not recognised by law. While both precedents concerned criminal cases, the wording of the rulings does not leave room for interpretation that would allow judges to participate remotely to the main hearing of a civil case. Thus, in the context of Finnish court proceedings, the concept of remote hearing refers to a hearing, where the parties, their counsel, and witnesses (or at least some of them) attend the hearing remotely, whereas the members of the court are physically present in a courtroom.

Nonetheless, while it is always at the court’s discretion to consider whether there should be a remote hearing (even when everyone else agrees to a remote hearing), the court cannot order a remote hearing if a party to a civil case does not consent to being present remotely. Therefore, by default, there does exist a right to a physical hearing in civil proceedings in as much as a party maintains the ability to veto a non-physical hearing.

Making remote hearings available to main hearings promotes expediency, as pursuant to the CJP, the case shall be dealt with in the main hearing without interruption.<sup>36</sup> The purpose of the preparatory phase, in turn, is to ensure that the main hearing can be completed without interruptions. The provision to deal with the main hearing without interruption protects the principle of immediacy and fosters handling

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<sup>33</sup> *Ibid.* p. 40.

<sup>34</sup> See CJP Chapter 12, Section 6.

<sup>35</sup> See KKO 2021:91 and 2021:92.

<sup>36</sup> See CJP Chapter 6, Section 5.1.

the case orally without written pleadings. It is especially important that evidence is presented in a centralized manner prior to resolution of the case.<sup>37</sup>

*Taking of evidence in civil proceedings.* Evidence is governed by Chapter 17 of the CJP. In general, evidence must be presented orally when all parties are present. This also means that written evidence (or its key points) is presented orally to the court. Moreover, it is expressly stated in the CJP (Chapter 17, Section 24) that written statements that have been prepared for the purposes of pending or already commenced court proceedings may not be used as evidence, unless an exception applies such as the parties agree to their use, it is provided elsewhere in the law or the court allows their use for a special reason. An exception to the oral principle, however, is the presentation of evidence by expert witnesses. Under Chapter 17, Section 36 of the CJP, expert witnesses give their statements in writing as a general rule, and hearing them orally at the hearing is possible only when certain requirements are met.<sup>38</sup> In practice, however, more often than not, experts are permitted to give testimony at the oral hearing on the basis of their expert statement.

Although presenting evidence in a physical location is the primary choice, it is also possible to present evidence remotely. Under Chapter 17, Section 52 of the CJP, “[a] party being heard for probative purposes and a witness and expert witness may be heard in the main hearing without being present in person, through the use of a video conference or other suitable technical means of communication by which the persons participating in the hearing have audio and video contact with one another, if the court deems this appropriate and if, e.g. (i) the person to be heard cannot arrive in person in the main hearing due to illness or another reason, (ii) the arrival in person of the person to be heard in the main hearing would, in comparison with the significance of the testimony, cause considerable expenses or inconvenience, (iii) the reliability of the statement of the person being heard can be assessed in a credible manner without his or her presence in the main hearing”.<sup>39</sup> While the hearing of a witness in the above circumstances may also take place by telephone according to Chapter 17, Section 52.2 of the CJP, it can be implied that the legislator has intended videoconferencing to be the preferred method. This is likely due to the fact that the parties might wish to examine the person being heard and this can take place more efficiently by videoconference.

In conclusion, the relevant provisions on taking evidence in litigation suggest that while a party has the right to appear before the court in a physical hearing and not accept the court’s proposal for a remote hearing, Finnish civil proceedings are very much

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<sup>37</sup> Juha LAPPALAINEN and Jaakko RAUTIO, “Yleistä todistelusta” in Dan FRÄNDE et al., eds., *Prosessioikeus* (Alma Talent 2017) p. 603 at p. 630.

<sup>38</sup> CJP Chapter 17, Section 36.2 states that: “An expert witness shall be heard in court in person if: (1) this is necessary in order to remove ambiguities, deficiencies or inconsistencies in his or her expert statement; (2) the court deems it necessary for another reason; or (3) a party requests this and the hearing would apparently not be meaningless”.

<sup>39</sup> This list is not exhaustive as there are other provisions as well in Chapter 17, Section 52 of the CJP.

designed to allow remote hearings and the taking of evidence remotely when the court deems this appropriate.

*Summary.* To sum up, the parties do have a right to a physical hearing in litigation. Although it is within the court's discretion to decide how the hearings shall be conducted, the court cannot order that a party is to be heard remotely if the party does not consent to this. If one of the parties does not accept a remote hearing, the court can nonetheless organise a hybrid hearing, where some of the parties are present in a physical location and others are present remotely through technical means. The judges, however, cannot participate remotely to a main hearing. Therefore, even if the parties, their counsel and/or witnesses attend the hearing remotely, the court members still have to convene in a courtroom.

In light of the current pandemic, the Finnish courts and officials have published several notices on how the pandemic affects the course of proceedings under the circumstances. Some of the 20 District Courts of Finland have published their own communications sporadically throughout the pandemic, as have the five Courts of Appeal, the Supreme Court of Finland and the National Courts Administration.

The Supreme Court of Finland announced in late March 2020 that physical hearings in the Supreme Court will be organized only when necessary (however not specifying what would constitute such necessity).<sup>40</sup> The Supreme Court has not to date issued additional notices regarding the pandemic after March 2020. The National Courts Administration issued guidelines in October 2020 in which remote work and remote hearings are recommended whenever possible.<sup>41</sup> Also the Helsinki Court of Appeal recently published its own announcement encouraging use of remote hearings.<sup>42</sup>

4. *If yes, does such right extend to arbitration? To what extent (e.g., does it also bar witness testimony from being given remotely)?*

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<sup>40</sup> The Supreme Court of Finland, "Korkein oikeus sopeuttaa toimintaansa koronavirustilanteeseen" (20 March 2020) at <<https://korkeinoikeus.fi/fi/index/ajankohtaista/tiedotteet/2020/korkeinoikeussopeuttaatoimintaansakoronavirustilanteeseen.html>> (last accessed 23 November 2020). Hearings in the Supreme Court are rare as most of the proceedings are solely based on written material.

<sup>41</sup> The National Courts Administration, "Use of masks in courts" (30 October 2020) at <<https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/useofmasksincourts.html>> (last accessed 23 November 2020). The National Courts Administration is, *inter alia*, responsible for the central administrative functions of all courts.

<sup>42</sup> Helsinki Court of Appeal, "Koronavirustilanteen vaikutuksista Helsingin hovioikeuden toimintaan" (20 November 2020) at <[https://oikeus.fi/hovioikeudet/helsinginhovioikeus/material/attachments/oikeus\\_hovioikeudet\\_helsinginhovioikeus/tiedotteet2014/2020/ADJwdHY3j/Koronavirustilanteen\\_vaikutuksista\\_Helsingin\\_hovioikeuden\\_toimintaan\\_20.11.2020.pdf](https://oikeus.fi/hovioikeudet/helsinginhovioikeus/material/attachments/oikeus_hovioikeudet_helsinginhovioikeus/tiedotteet2014/2020/ADJwdHY3j/Koronavirustilanteen_vaikutuksista_Helsingin_hovioikeuden_toimintaan_20.11.2020.pdf)> (last accessed 25 November 2020).

Short answer: No.

The CJP or other Finnish general rules of civil procedure are not applicable or transposable, as such, to arbitration.<sup>43</sup> Accordingly, unless the parties have agreed otherwise, the right to a physical hearing in arbitration cannot be derived from the general rules of civil procedure. This also applies to the taking of evidence, as the arbitrators are, in general, not bound by the rules of evidence prevailing in Finnish courts, unless the parties have so agreed.<sup>44</sup> Despite the above, however, the CJP is, from time to time, used as an unofficial benchmark in arbitration proceedings seated in Finland.<sup>45</sup>

**c. Mandatory v. Default Rule and Inherent Powers of the Arbitral Tribunal**

5. *To the extent that a right to a physical hearing in arbitration does exist in your jurisdiction, could the parties waive such right (including by adopting institutional rules that allow remote hearings) and can they do so in advance of the dispute?*

Short answer: N/A

As stated above, the FAA does not directly recognise a right to a hearing (physical or remote), but various provisions of the FAA nonetheless hint at hearings being an essential element of arbitral proceedings. Moreover, the FAA is built on strong party autonomy encompassing the conduct of the proceedings and the parties can agree that hearings may (or shall) take place remotely, or to adopt institutional rules that allow arbitrators to order a remote hearing (such as the FAI Rules).<sup>46</sup> Such agreement by the parties can take place either before or after the dispute has arisen and has been referred to arbitration.

6. *To the extent that a right to a physical hearing in arbitration is not mandatory or does not exist in your jurisdiction, could the arbitral tribunal decide to hold a remote hearing even if the parties had agreed to a physical hearing? What would be the legal consequences of such an order?*

Short answer: No. The likely consequence would be the possibility of the award being set aside due to excess of mandate by the arbitral tribunal.

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<sup>43</sup> Gustaf MÖLLER, “Todistelusta välimiesmenettelyssä” in Heikki HALILA, Mika HEMMO and Lena SISULA-TULOKAS, eds., *Juhlajulkaisu Esko Hoppu 1935-15/1-2005* (Suomalainen Lakimiesyhdistys 2005) p. 248.

<sup>44</sup> MÖLLER, “National Report Finland” in *Handbook*, p. 16.

<sup>45</sup> M. JAATINEN, *Suullinen käsittely välimiesmenettelyssä*, fn. 6 above, p. 92.

<sup>46</sup> See sub-paragraph a.2 above.

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As described above,<sup>47</sup> the FAA does not expressly provide that arbitration hearings shall be physical. It is primarily within party autonomy and secondarily within the arbitral tribunal's procedural margin of discretion to decide whether hearings shall take place physically.

An arbitral tribunal's decision to hold a remote hearing contrary to the parties' agreement to organise a physical hearing seems to be in contradiction with the literal interpretation of the wording of Section 23 of the FAA. Pursuant to Section 23 of the FAA, the proceedings must be conducted in accordance with the parties' agreement. Consequently, if the parties have mutually agreed on a physical hearing, the arbitral tribunal is bound by the parties' agreement ("*In the absence of such agreement*, the arbitrators may conduct the arbitration in such manner as they consider appropriate [...]"; emphasis added), as long as it does not violate the mandatory requirements set out in the FAA. However, depending on the precise wording of the parties' agreement, the tribunal could also consider organising a remote hearing despite the parties' agreement under exceptional circumstances, such as the COVID-19 pandemic, when the other circumstances of the case would so necessitate. The discretion of the tribunal could, of course, result in a different interpretation in particular if the parties had agreed on a physical hearing but only one party would agree to a remote hearing. The extent of the tribunal's procedural margin of discretion under such circumstances is unclear.

The relationship between party autonomy and the arbitral tribunal's procedural discretion can be assessed in two different scenarios: (i) the parties, prior to the commencement of the arbitration, agree that the arbitral tribunal shall hold physical hearings; or (ii) the parties agree on physical hearings after the commencement of the arbitration proceedings.

In the first scenario, should the agreement be included, for example, in a dispute resolution clause in an agreement out of which the dispute has arisen years after the agreement was executed, it is fair to argue that the parties could not have foreseen the circumstances resulting from the current pandemic. The arbitrators could therefore first try to reason with the parties, were the tribunal to consider that, for example, expediency of the proceedings requires a remote hearing. However, should one of the parties still not agree with the tribunal's proposal on a remote hearing, were the tribunal to proceed with such a hearing despite the parties' specific agreement, the tribunal would risk having exceeded its mandate. It is also noteworthy that Section 19.1 of the FAA provides the parties the opportunity to agree to remove the arbitrator or the tribunal. Moreover, in scenario (ii) since the parties are free to agree on the conduct of the proceedings also once a dispute has arisen,<sup>48</sup> if the parties reach their agreement to hold a physical hearing with knowledge of the current pandemic, while the tribunal could also in this situation address the parties to see if they would agree to a remote hearing, should they insist on a physical hearing, the tribunal should respect such decision.

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<sup>47</sup> See paragraphs a and b above.

<sup>48</sup> MÖLLER, "National Report Finland" in *Handbook*, p. 15.

On the other hand, as one of the arbitral tribunal's most important duties is to produce an enforceable final award, if the tribunal were to consider whether to make a decision contrary to the parties' specific agreement, for example because the parties' agreement is inconvenient or close to impossible to abide by, the arbitral tribunal would need to take into account the risk of such decision endangering the award being challenged due to, most likely, excess of mandate under Section 41.1,1 of the FAA.

Under the FAA, the grounds for challenging the arbitral award can be divided into, first, grounds on which a party can request that a competent court set the arbitral award aside on the basis of Section 41 of the FAA and, second, grounds on which the arbitral award is to be regarded as null and void under Section 40 of the FAA.

While there is no authoritative case law as to the application of public policy, it can be assumed that the Finnish courts would apply a very restricted criterion as far as *ordre public* is concerned when enforcement of a foreign award is sought in Finland.<sup>49</sup> Therefore, considering that the FAA specifically grants the parties a right to agree on the conduct of the proceedings and a physical hearing cannot be regarded to be in contradiction with the mandatory requirements of due process under the FAA, pursuing a nullity claim against the award on the grounds that such award would be against Finnish public policy (*ordre public*) would not succeed. Out of the two, an action to set the arbitral award aside on the basis of Section 41 would seem the most likely ground in this case.

An action for setting the award aside would most likely be based on the arbitral tribunal having exceeded its mandate (Section 41.1,1 of the FAA) as the tribunal's mandate is specifically based on the parties' arbitration agreement and including possible agreements on the conduct of the proceedings. However, the deviation from the parties' agreement must be significant under Section 41.1,1 of the FAA.<sup>50</sup>

Alternatively, the setting aside action could also be based on the tribunal not having provided a party a sufficient opportunity to present its case (Section 41.1,4), but considering the widespread use of remote hearing techniques (also in litigation in Finland), the circumstances would have to clearly establish why a party has been deprived of sufficient opportunity to present its case specifically because of the remote hearing. This could perhaps be the case when, for example, the remote connection between a party and the tribunal has been unstable thus depriving a party of the opportunity to sufficiently present its case. Furthermore, considering the Finnish Supreme Court's recent case law on setting aside actions, the Supreme Court has been reluctant to revisit arbitral tribunals' procedural decisions and, instead, it has recognised that tribunals have broad discretion to make procedural decisions.<sup>51</sup> While the circumstances of the previous Supreme Court precedents are different from the physical / remote hearing question, the Supreme Court can be seen to have set a relatively high

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<sup>49</sup> MÖLLER, "National Report Finland" in *Handbook*, p. 31.

<sup>50</sup> G. MÖLLER, *Välimesmenettelyn perusteet*, fn. 2 above, p. 85.

<sup>51</sup> See KKO:2018:48, Case No. S2017/54 (26 June 2018).



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threshold for finding that a party was not given sufficient opportunity to present its case.<sup>52</sup>

### d. Setting Aside Proceedings

7. *If a party fails to raise a breach of the abovementioned right to a physical hearing during the arbitral proceeding, does that failure prevent that party from using it as a ground for challenging the award in your jurisdiction?*

Short answer: Likely yes.

As explained above, the FAA does not recognise a right to a physical hearing, but assuming that the parties had specifically agreed on a physical hearing and the tribunal had ordered a remote hearing, the relevant provisions for setting the award aside seem to be Sections 41.1,1 and 41.1,4, i.e., excess of mandate and possibly also failure to provide a party a sufficient opportunity to present its case.

In challenges based on Section 41.1,1 i.e., excess of mandate, a party would on the basis of Section 41.2 of the FAA have to object to such a decision by the tribunal during the arbitral proceedings to preserve its right to a subsequent petition to challenge the award. This follows from Section 41.2 of the Arbitration Act, according to which a party may not request the setting aside of an arbitration award, if by responding to the principal claim or in some other manner, the party is to be deemed to have waived its right to rely on the ground during the proceedings. This prevents the possibility that, depending on the outcome of the arbitration, a party makes a tactical decision to postpone invoking excess of mandate later during the proceedings or after the award is rendered.<sup>53</sup>

However, the above does not apply to a failure to provide a party a sufficient opportunity to present its case under Section 41.1,4 of the FAA and, therefore, that ground for setting aside action does not require a party raising a breach during the proceedings (however, as explained above in sub-paragraph c.6, the more likely ground for the setting aside action would be excess of mandate).

Regarding both grounds, Section 41.3 of the FAA requires that the party challenging the award commence proceedings within three months: “A party shall bring his or her action for setting aside an arbitration award within three months of the date on which he or she received a copy of the award [...]”.

8. *To the extent that your jurisdiction recognizes a right to a physical hearing, does a breach thereof constitute per se a ground for setting aside (e.g., does it*

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<sup>52</sup> Kirsi KANNASTE and Laura TUURE, “Recent Finnish Supreme Court Case Law in the Arbitration Landscape” in Axel CALISSENDORFF and Patrik SCHÖLDSTRÖM, eds., *Stockholm Arbitration Yearbook 2020* (Wolters Kluwer 2020) p. 81.

<sup>53</sup> G. MÖLLER, *Välimiesmenettelyn perusteet*, fn. 2 above, p. 88.

*constitute per se a violation of public policy or of the due process principle) or must the party prove that such breach has translated into a material violation of the public policy/due process principle, or has otherwise caused actual prejudice?*

Short answer: N/A

As stated above, the FAA does not provide a right to a physical hearing. As also stated above, it is clear that depriving a party of a physical hearing when this is contrary to the parties' agreement, would not constitute a violation of public policy. However, in that circumstance, a party may seek to have the award set aside under Section 41.1,1 of the FAA on the ground that the arbitral tribunal has exceeded its mandate and the award may possibly be set aside on this ground. A party seeking to set aside an award must establish one of the grounds enumerated in Section 41.1 but does not have to prove that the breach caused actual prejudice.

9. *In case a right to a physical hearing in arbitration is not provided for in your jurisdiction, could the failure to conduct a physical hearing by the arbitral tribunal nevertheless constitute a basis for setting aside the award?*

Short answer: Possibly.

As stated above,<sup>54</sup> the Finnish *lex arbitri* does not provide for a right to a physical hearing in arbitration. To be more exact, the FAA does not explicitly provide for a right to an oral hearing at all, and the arbitrators may also render an award that is solely decided by written proceedings. Considering that Finnish courts have ordered remote hearings during the pandemic, it would at the outset seem unlikely that a court hearing the setting aside action would question an arbitral tribunal's decision to hold a remote hearing (absent the parties' agreement on a physical hearing).

A failure to conduct a physical hearing could nonetheless constitute a basis for setting aside the award if the parties had specifically agreed within their party autonomy that a physical hearing would be held and the tribunal had refused to respect such agreement. As also explained above in sub-paragraph c.6, the possible grounds for challenging the award under such circumstances would primarily focus on excess of mandate (Section 41.1,1 of the FAA) or possibly, under certain specific circumstances, the challenging party may argue it was deprived of a sufficient opportunity to present its case (Section 41.1,4).<sup>55</sup>

#### **e. Recognition/Enforcement**

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<sup>54</sup> See sub-paragraph a.2 above.

<sup>55</sup> See sub-paragraphs c.6 and d.7 above.

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10. *Would a breach of a right to a physical hearing (irrespective of whether the breach is assessed pursuant to the law of your jurisdiction or otherwise) constitute in your jurisdiction a ground for refusing recognition and enforcement of a foreign award under Articles V(1)(b) (right of the party to present its case), V(1)(d) (irregularity in the procedure) and/or V(2)(b) (violation of public policy of the country where enforcement is sought) of the New York Convention?*

Short answer: It depends.

Foreign arbitral awards are recognised in Finland under Section 52.1 of the FAA. The legal effect of foreign awards is similar to that of awards rendered in Finland and they may be enforced in Finland upon leave for enforcement (*exequatur*) being granted by the court of first instance.<sup>56</sup> The provisions in the second part of the FAA, i.e., Sections 51-55 of the FAA, which are to a large extent identical with the provisions of the New York Convention, oblige the Finnish courts to recognise an arbitration agreement and to recognise and enforce an arbitral award whenever the New York Convention obliges them to do so and are even more favourable as to recognition and enforcement than the provisions of the Convention. Thus, Sections 51-55 of the FAA will usually be applied *in lieu* of the New York Convention whenever the recognition and enforcement of a foreign arbitral award are sought.<sup>57</sup> Very briefly, the party, against whom the award is sought to be enforced, has the burden of proof to establish that a ground to refuse the enforcement under Section 53 exists.<sup>58</sup> (This does not, however, apply to Section 52 of the FAA which governs situations where the foreign award would be contrary to Finnish public policy (*ordre public*) as the courts examine such ground *ex officio*.)

No relevant published case law exists on the New York Convention Articles concerned in the question.

Article V(1)(b) of the New York Convention has been implemented into Finnish legislation by Section 53.1,2 of the FAA, which states that a foreign award is not enforceable in Finland against a party that claims that it was unable to present its case.<sup>59</sup> To the extent the party can establish that it was deprived of its right to present its case

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<sup>56</sup> MÖLLER, "National Report Finland" in *Handbook*, p. 27.

<sup>57</sup> *Ibid.* p. 30.

<sup>58</sup> G. MÖLLER, *Välimiesmenettelyn perusteet*, fn. 2 above, p. 98. See also KKO 1992:112, where the Supreme Court took a stand on the burden of proof.

<sup>59</sup> Pursuant to Section 53.1,2 of the FAA, "[a]n arbitration award referred to in section 52 shall, however, not be recognised in Finland against a party who furnishes proof that [...] he or she was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case".

(but not only because of a remote hearing having been organised), the enforcement of such a foreign award would be refused under Section 53.1,2 of the FAA, without the court examining whether a right to a physical hearing existed at the seat and without the party opposing enforcement having to establish actual prejudice.

Article V(1)(d) of the New York Convention has been implemented into Finnish law by Section 53.1,4 of the FAA whereby a foreign arbitral award “[s]hall, however, not be recognised in Finland against a party who proves that the composition of the arbitral tribunal or the arbitration proceedings substantially deviated from the agreement of the parties or, in the absence of such agreement, from the law of the state where the arbitration took place”. It is noteworthy that this provision is only applicable if the arbitration proceedings have *substantially*<sup>60</sup> deviated from the parties’ agreement or from the law of the state where the arbitration took place. Furthermore, it should be noted that the deviation from the law of the state in which the proceedings took place cannot lead to denial of recognition and enforcement in Finland, if failure to comply with the law resulted from an agreement between the parties unless the award has been set aside in that state. This is the case even in the event that those provisions are mandatory in the state where the arbitration was seated.<sup>61</sup> Therefore, should the proceedings have been conducted against the parties’ specific agreement on a physical hearing and the conduct of the hearing would constitute a substantial deviation from the parties’ agreement, a Finnish court hearing the enforcement application would refuse enforcement.

Lastly, Section 52.2 of the FAA implements Article V(2)(b) of the New York Convention into the FAA and, as stated above, is the only ground on which the court or another authority could refuse recognition and enforcement on its own motion.<sup>62</sup> However, a breach of a right to a physical hearing would not constitute a violation of public policy under Finnish law. Although no relevant published case law exists, it can be assumed that the courts interpret *ordre public* very narrowly when enforcement of a foreign award is sought in Finland.<sup>63</sup>

## **f. COVID-Specific Initiatives**

*11. To the extent not otherwise addressed above, how has your jurisdiction addressed the challenges presented to holding physical hearings during the COVID pandemic? Are there any interesting initiatives or innovations in the legal order that stand out?*

Short answer: N/A

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<sup>60</sup> See Government Bill HE 202/1991, p. 31. All procedural errors do not constitute grounds for an award not being enforceable. Procedural errors will need to be severe for the Finnish courts to interfere.

<sup>61</sup> G. MÖLLER, *Välímiesmenettelyn perusteet*, fn. 2 above, p. 99.

<sup>62</sup> G. MÖLLER, *Välímiesmenettelyn perusteet*, fn. 2 above, p. 97 and MÖLLER, “National Report Finland” in *Handbook*, p. 30.

<sup>63</sup> MÖLLER, “National Report Finland” in *Handbook*, p. 31.

There have not been any COVID-19-specific legislative initiatives or other innovations relating to the challenges of holding physical hearings in Finland, although the courts, officials and the FAI have all been promoting safety measures in physical hearings as well as the possibility to organise remote hearings.<sup>64</sup> The National Courts Administration published a guide on remote hearings in order to encourage their use<sup>65</sup> and the FAI has actively assisted parties with the practical aspects of advancing arbitration proceedings during the pandemic as well as encouraged both parties and arbitrators to make use of the opportunity of organising remote hearings.<sup>66</sup>

The reason for the lack of COVID-19-specific initiatives or innovations may be that the technical infrastructure for taking evidence remotely has already existed for close to 20 years in Finnish civil proceedings. However, the biggest leap so far in reaping the benefits of modern technology took place in the beginning of 2019, when the novel legislation relating to videoconferencing in court proceedings came into force.<sup>67</sup> Thus, the fact that remote hearings have existed as an alternative even before the pandemic may explain the lack of initiatives during the pandemic.

Regardless of the available technical solutions enabling remote hearings, there is still a noticeable backlog of suspended cases, judgments and other court decisions, although their number has been steadily decreasing since May 2020.<sup>68</sup> Meanwhile, remote sessions are becoming quite popular as a consequence of the COVID-19 outbreak, and this is gradually easing the backlog of cases.

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<sup>64</sup> See sub-paragraph b.3 above.

<sup>65</sup> National Courts Administration, “The National Courts Administration gave instructions on remote sessions – the aim is to lower the threshold” (15 April 2020) at <<https://tuomioistuinvirasto.fi/en/index/ajankohtaista/2020/thenationalcourtsadministrationgaveinstructionsonremotesessions-theaimistolowerthethreshold.html>> (last accessed 24 November 2020).

<sup>66</sup> The Arbitration Institute of the Finland Chamber of Commerce, fn. 24 above.

<sup>67</sup> See sub-paragraph b.3 above.

<sup>68</sup> See, e.g., National Courts Administration, “Suspended cases, verdicts and decisions due to the coronavirus epidemic” (3 June 2020, last update on 15 November 2020) at <<https://tuomioistuinvirasto.fi/en/index/ajankohtaista/qwlqgymkm.html>> (last accessed 1 December 2020). As of 22 November 2020, 582 civil cases in the District Courts were suspended. The trend is improving, however, as as of 5 May 2020, 1,338 civil cases had been suspended. Of course, it is not just because of the COVID-19 outbreak that the cases are put on hold, as there are other reasons as well.