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Contracting Finland

Guide for international construction projects

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Finnish contracting practice in a nutshell

The Finnish legal system is part of the Nordic legal family. Hence, business people from Scandinavia will find many things familiar in Finnish contract law. For everybody else, there is a couple of key traits that are good to keep in mind when making contracts in Finland.

Maybe the most prominent trait of Finnish contract law is that it always places fact over form. A Finnish court will never decide a case simply based on the parties using a specific word or phrase in the contract. In fact, Finnish law is distinctly uninterested in terms and wordings. Lawyers like to look at the whole of the contract, what the parties actually intended, but also simply what makes sense.

Accounting for judicial discretion

Judges in Finland (under Finnish contract law) have wide discretion of adjusting contract terms or setting them aside if they find that such clause is inadequate. This is a blessing and a curse. It relieves parties, particularly such that are in a weaker bargaining position, from part of the worries about contract terms: If things get too absurd, one can rely on judicial help.

On the other hand, this system makes the outcome of possible disputes far less predictable.

Consequently, the basic drafting paradigm is different in Finland than in many other countries. It is not feasible to determine with any surety how far one can go, for example in terms of reducing the other party's rights, without the contract terms being set aside by courts.

Instead, it is of particular importance to have the contract reflect as precisely as possible the actual project at hand, and the actual justified interest of each party. It is only against such background that it is possible to make the desired shifts, for example in terms of liability, termination rights, or the like. Only if clauses can be recognized (by a judge) as being firmly rooted in the project's framework and nature, can one be reasonably confident that the clause will withstand judicial scrutiny.

Form of contracts

Finnish contract law is mostly free of any compulsory form requirements. Contracts can be made in any form that appears convenient for the parties (and satisfies the parties' need for evidencing existing agreements).

In practice, even business contracts of substantial value are routinely made by e-mail, exchanging scans of the signed documents. An emerging trend is to forego the physical signature altogether and use electronic signatures. Originals are sometimes exchanged after the fact for documentation purposes, but this is not required (and increasingly less common).

Remedies

Contract parties are largely free to agree on the contractual remedies that they want to apply in case of breaches of contract or other disturbances in the contractual performances. As far as they do not agree on anything specific, the normal remedies of Finnish contract law apply. A few key observations on these remedies:

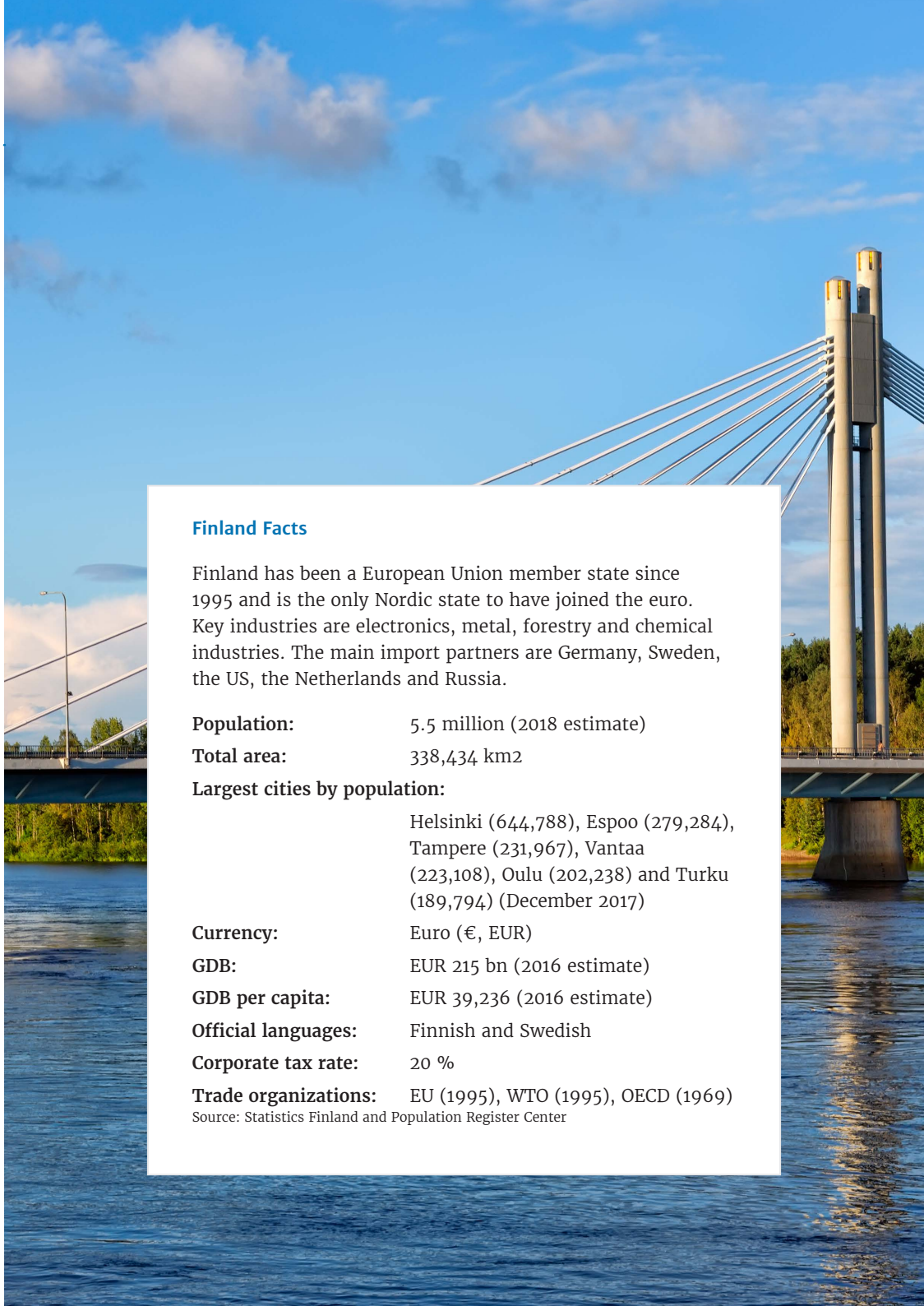
- Specific performance can be enforced in court, i.e. the other party can claim actual fulfilment of the contract instead of only financial damages. This includes, for example, the right to enforce non-competition commitments by court injunction.
- In the absence of appropriate limitation clauses, damages for negligent breach of contract generally cover full compensation of all damages that can be shown to have been caused by the breach, including consequential damages such as loss of production.
- Termination of the contract is possible in case of material breaches, with the definition of material breach being somewhat ambiguous unless appropriate contract clauses clarify the matter.

Use of standard terms

Another distinctive feature of Finnish contracting practice is the widespread use of standardized contract terms. Such terms are generally drafted by groups of interested parties in the relevant industry, with the purpose of creating a balanced framework that may be applied to most of the relevant contracts.

For construction contract, it is the YSE 1998 terms that are used in the vast majority of building projects. As Finnish law completely lacks dedicated provisions concerning work or construction contracts, the YSE 1998 terms are sometimes perceived as if they themselves were the law. In any case, the terms are a strong expression of the expectations that Finnish parties have when entering into construction contracts.

The YSE 1998 terms are not directly applicable unless they are explicitly referenced in the contract. However, their wide acceptance gives the terms substantial weight when interpreting unclear contract terms or filling gaps in the contract, even if they are not referenced. It is a good idea to take them into account when drafting the contract.



Finland Facts

Finland has been a European Union member state since 1995 and is the only Nordic state to have joined the euro. Key industries are electronics, metal, forestry and chemical industries. The main import partners are Germany, Sweden, the US, the Netherlands and Russia.

Population:	5.5 million (2018 estimate)
Total area:	338,434 km2
Largest cities by population:	Helsinki (644,788), Espoo (279,284), Tampere (231,967), Vantaa (223,108), Oulu (202,238) and Turku (189,794) (December 2017)
Currency:	Euro (€, EUR)
GDB:	EUR 215 bn (2016 estimate)
GDB per capita:	EUR 39,236 (2016 estimate)
Official languages:	Finnish and Swedish
Corporate tax rate:	20 %
Trade organizations:	EU (1995), WTO (1995), OECD (1969)

Source: Statistics Finland and Population Register Center

Changes in building contracts governed by the YSE 1998 terms

The Finnish General Conditions for Building Contracts (YSE 1998) govern the majority of construction contracts concluded in Finland. One of the most relevant issues covered by the terms is how to deal with changes to building plans during a construction project. Depending on the type of project and the level of detail of the plans the typical amount of modifications occurring during a construction project is estimated at 2–10% of the contract price.

The most common types of disputes involve

- whether the requested works constitute a modification,
- whether the requested change is permitted under the contract or under the governing law,
- and ultimately the contractor's right to claim additional compensation.

Obligation to implement a modification

Changes to the design, deficiencies in the plans or surveys or changes in construction regulations may, among other things, trigger the need to make changes to a construction contract in the course of the project. The YSE terms stipulate a procedure which applies when the original contract does not contain a mechanism to handle changes to the building plans or other additional works.

The YSE terms draw a distinction between modification works and additional works. *Modification works* result from a change in a plan referred to in the contract. The modification may be either a change, increase or reduction of works. *Additional works*, on the other hand, are works carried out by the contractor which did not originally form part of the obligations agreed under the contract. For example, if the parties agreed on the installation of piping in a building, piping works in the yard area would likely qualify as additional works. On the other hand, the addition of further piping interfaces to the systems installed inside the building could be considered as modification works.

Under the YSE terms, the contractor is obliged to carry out the *modification works* requested by the client. The contractor may refuse to do so only if the requested modification would significantly alter the nature of the building contract work.

Under the YSE terms, the contractor is entitled to an increase in the contract price provided that there is an increase in contractor's obligations due to modification of the building plan. Such modification must be first indicated to the contractor by the client. In order to agree on the price adjustment, the contractor must submit a tender for the modification work. No modification work may be commenced before agreement in writing has been reached on the content of the modification and its effect on the building contract – unless execution of the relevant works is instructed as disputed works (see below).

The YSE terms contain no obligation to implement requested *additional works*. The parties may freely agree on the price, the time of completion and the impact on the project schedule. If no agreement is reached the contractor is not obliged to

carry out the additional works – again with the exception that disputed works may be instructed.

Disputed works

If the parties are in dispute over the nature of the work – i.e. whether it qualifies as modification or additional work – or if the parties cannot agree on the consequences of a modification in terms of price and/or schedule, the YSE terms provide that if the client so requests the contractor must complete the requested work.

The idea is that the dispute should not endanger the project under any circumstances. The consequences in terms of costs and schedule must then be determined later – if necessary, in litigation or arbitration.

If the client orders the execution of disputed work, the contractor should in any event provide the client with an offer in respect of the work the contractor regards as additional. The client then bears the risk that the work is to be compensated as if an agreement regarding reasonable compensation has been achieved.

If it is entirely obvious that the work demanded by the client is additional work, the contractor may also in some cases have grounds to terminate the contract instead of carrying out the additional work. But this is a risky road to take.

Procedural requirements

In practice it has often proven difficult to follow the formal procedural rules and the written requirements of YSE terms at the construction site. There could be several reasons for the parties to deviate in practice from YSE's formal requirements. For example, the project schedule may be so tight as to make it impossible for the parties to follow the formal agreement procedure, the client may have failed to indicate a modification

to the contractor, or the parties have decided to agree on the modification verbally.

If no written agreement on the price of the modification is concluded, the contractor risks losing the right to claim payment for the work done – even if it is not disputed that the works were modifications to the original plans.

Furthermore, even if the client fails to indicate a modification to a contractor, the contractor may under certain circumstances lose its right to claim payment if no written agreement is made. The Supreme Court has highlighted the contractor's responsibility to identify and price the modifications involved.

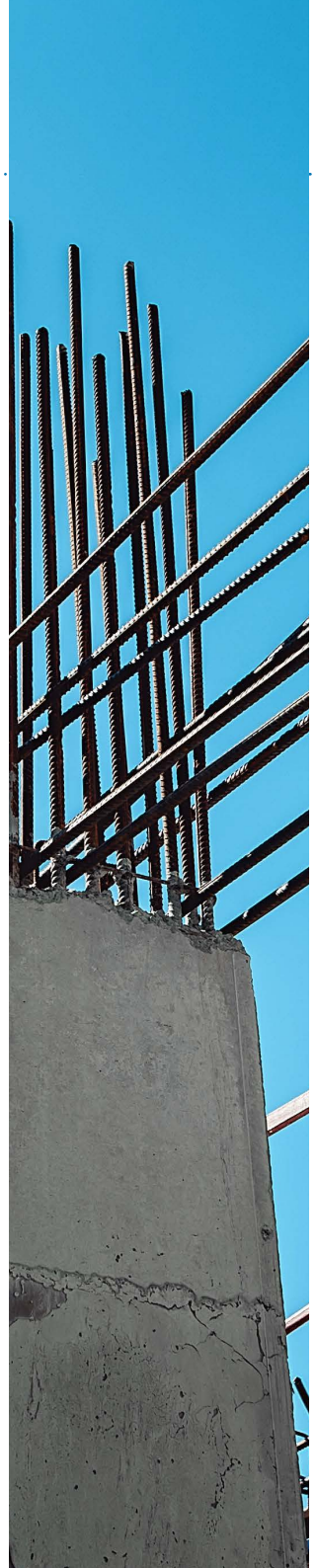
The parties may, however, agree on a procedure that differs from the YSE requirements. Whether, and to what extent, a verbal agreement or an established site practice for contract modifications can overrule the formal written requirements laid down in the YSE terms, depends on the factual circumstances. The previous practice of the parties, the necessity of carrying out the work, and the benefit of the work to the client may all be of importance when considering setting aside contractual procedures.

Obviously, these considerations are mostly relevant for evaluation after the fact. In a prudently managed project, if it is anticipated that it will be impossible to follow the requirements set out in the YSE terms (or the contract), it is advisable to agree in advance in writing on any deviations from such requirements.

Selecting your project partners: Keeping the chain strong

In international construction projects, very different players come together on the various levels of the delivery chain, each with their own expectations and preconceptions. The contractors' degree of professionality may vary as well as their financial soundness. Probably the most effective tool of risk management is the careful selection of business partners.

When you are selecting a subcontractor for a crucial portion of your delivery scope, you may want that subcontractor to be liable for mistakes, and you also want them to be financially capable to actually pay the bill if something goes wrong.



Workability over liability

But what you want most, of course, is that nothing goes wrong in the first place. After all, in the delivery chain, you yourself are liable towards your own client for that same delivery. It is highly likely that your liability will be higher than the liability of your subcontractor.

Many contracts directly state a limitation of liability that is calculated as a certain portion of the value of the delivery – and your delivery is bigger than the chunk that you contracted out to the subcontractor. If you were to impose on the subcontractor liability that is measured against your own delivery scope rather than theirs, there is a good chance that a Finnish court, with their substantial power to adjust contracts that they consider unjust, would cut the subcontractor's liability, with results that are impossible to foresee.

Hence, making the project work is priority rather than relying on liability clauses. It is obvious that you will want to check your contractor's background – reference projects, financial data, and the like. When the subcontract is important for you, you may also want to check the actual acting persons. Carefully drafted contractual procedures will ensure that the contractor sends the project managers that have the experience they need, and that you have a say in the case of necessary changes in key personnel.

No weak links in the chain

Your subcontractor may again bring subcontractors, and that is fine and normal. However, you must be aware that your risk increases with the size of the deliveries that your subcontractor contracts out. Your subcontractor should be obliged to provide the core of the relevant services themselves.

When looking at the value added on each level of the delivery chain, a healthy chain is thickest at the top and only becomes thinner towards the bottom. If you have a subcontractor who does not add relevant value themselves but contract most works out to another player, then the chain becomes to thin at that point. It will probably break.

Why? Much of a project's success depends on successful communication. Communication of relevant specifications, communication of changed circumstances and their impacts, communication between various contractors working on interdependent parts of the project. The weak link in the delivery chain will probably remain passive in communications, or at least you will not know what the subcontractor and the sub-subcontractor have discussed internally. With the sub-subcontractor, you do not have contractual mechanisms to ensure that they get the right messages and will be held liable. But in order to make things work, you will anyway have to talk directly to them. When something goes wrong, it will be hard to know who said what and what that means for liability.

Allocating permitting responsibilities in the delivery chain

The timely issuance of public permits and licenses has a direct influence on the project time schedule. A supplier that has accepted responsibility for licensing will have to compensate for the consequences of late delivery if the delay is due to licensing issues. For contractors it is an important decision whether to apply for the necessary licenses themselves or to hand these responsibilities down to subcontractors. Here, the apparently easiest solution is not always the best.

Most industrial projects depend on a variety of public permissions and licenses, such as

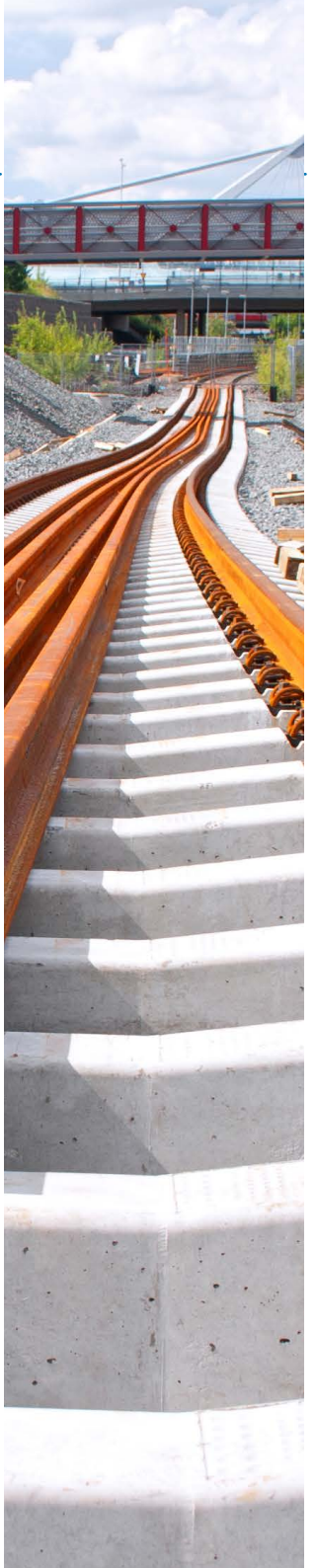
- land use planning and building permits
- Environmental Impact Assessment and environmental permits
- licences for landscaping measures, mobilisation of the site and waste disposal procedures;
- import and transport licences which may possibly be required; or
- licenses for the storage and handling of dangerous goods

It is not always feasible to shift responsibility for licence procedures to sub-suppliers. After all, if any delays occur in the licensing process, this commonly leads to a standstill in the whole project. Even more fatal are the consequences if a necessary license is simply forgotten. A subcontractor will not be likely to be able to carry these consequences under its contractual liability.

The general contractor, as well as any contractor down the delivery chain should consider independently which licences will be needed, what is the quickest and most effective way to obtain them, and how much time should be allowed for the process. One should not make assumptions on these issues based on experiences in one's home country.

Various issues have a bearing in this regard:

- Often the party who has the best technical know-how will also be in a position to prepare application procedures effectively.



- On the other hand, a local company acting as applicant might be the most effective door-opener.
- The applicable public law may restrict the group of possible applicants.
- Some licences can be applied for by way of a simplified procedure if the applicant already holds certain general licences. General operation licences often include licences for transport and storage of dangerous goods, whereas an applicant not holding an operation licence would have to run through the full procedure.
- In order to protect business secrets one will often have an interest in the centralised handling of applications.

The issues noted above may sometimes point in different directions. The most effective solution may demand a tailored division of responsibilities in which the internal responsibility is borne by one party, but the external representative function is fulfilled by the other.

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