

Enforcement of arbitration agreement under Art II NYC (NYK m. II'ye göre Tahkim Anlaşmasının Uygulama Alanı)



Duty of national courts to stay proceedings (Hakeme Sevketme Ödevi)

NYC, Art II(3)

Bir Âkit Devlet mahkemesi, tarafların, işbu maddenin anladığı manada anlaşma akdettikleri bir konu ile ilgili uyuşmazlıklarına el koyduğu takdirde, anlaşmanın hükümden düşmüş, tesirsiz veya tatbiki imkânsız bir halde olduğunu tespit etmedikçe, bunları, birinin talebi üzerine, hakemliğe sevkeder.

UNCITRAL Model Law, Art 8

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court

Duty of national courts to stay proceedings (Hakeme Sevketme Ödevi)

HMK MADDE 413-Tahkim itirazı - (1) Tahkim sözleşmesinin konusunu oluşturan bir uyuşmazlığın çözümü için mahkemede dava açılmışsa, karşı taraf tahkim ilk itirazında bulunabilir. Bu durumda tahkim sözleşmesi hükümsüz, tesirsiz veya uygulanması imkânsız değil ise mahkeme tahkim itirazını kabul eder ve davayı usulden reddeder. (2) Tahkim itirazının ileri sürülmesi, tahkim yargılamasına engel değildir.

MTK MADDE 5 - Tahkim anlaşmasının konusunu oluşturan bir uyuşmazlıkta dava mahkemede açılmışsa; karşı taraf, tahkim itirazında bulunabilir. Tahkim itirazının ileri sürülmesi ve tahkim anlaşmasının geçerliliğine ilişkin uyuşmazlıkların çözülmesi, Hukuk Usulü Muhakemeleri Kanununun ilk itirazlara ilişkin hükümlerine tâbidir. Tahkim itirazının kabulü halinde, mahkeme davayı usulden reddeder.

Kompetenz-Kompetenz (Hakemlerin Kendi Yetkileri Hakkında Karar Verebilmesi İlkesi)

UNCITRAL Model Law, Art 16(1) Competence of arbitral tribunal to rule on its jurisdiction

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

MTK m. 7 H) Hakem veya hakem kurulu, tahkim anlaşmasının mevcut veya geçerli olup olmadığına ilişkin itirazlar da dahil olmak üzere, kendi yetkisi hakkında karar verebilir. Bu karar verilirken, bir sözleşmede yer alan tahkim şartı, sözleşmenin diğer hükümlerinden bağımsız olarak değerlendirilir. Hakem veya hakem kurulunun asıl sözleşmenin hükümsüzlüğüne karar vermesi, kendiliğinden tahkim anlaşmasının hükümsüzlüğü sonucunu doğurmaz.

HMK m. 422



Kompetenz-Kompetenz (Hakemlerin Kendi Yetkileri Hakkında Karar Verebilmesi İlkesi)

AA96, s 30 Competence of tribunal to rule on its own jurisdiction

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

- (a) whether there is a valid arbitration agreement,
- (b) whether the tribunal is properly constituted, and
- (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

Kompetenz-Kompetenz (Hakemlerin Kendi Yetkileri Hakkında Karar Verebilmesi İlkesi)

MTO Tahkim Kuralları m. 6 (3) Kendisine karşı dava açılan bir taraf cevabını sunmaz ya da tahkim sözleşmesinin varlığı, geçerliliği veya kapsamı hakkında veya tahkimde öne sürülen tüm taleplerin tek bir tahkimde karar verilmesi ile ilgili savunma veya savunmalar ileri sürerse; Genel Sekreter bu hususu Madde 6(4) uyarınca karar vermesi için Divan'a sevk etmedikçe, tahkim devam eder ve yetki ile ilgili itiraz ya da iddiaların tamamına bu tahkimde karar verilip verilemeyeceğine doğrudan hakem kurulu karar verir.

MTO Tahkim Kuralları m. 6 (5) Divan'ın, taraflar ve talepler ile ilgili olarak tahkim davasının devam edemeyeceğine ilişkin karar verdiği konular hariç olmak üzere, Madde 6(4) uyarınca usule ilişkin karar verdiği tüm konulara hakem kurulu karar verir.

MTO Tahkim Kuralları m. 6 (9) Aksi kararlaştırılmış olmadıkça, hakem kurulu tahkim sözleşmesinin geçerli olduğuna karar vermiş olması kaydıyla, sözleşmenin yokluğuna veya geçersiz olduğuna dair bir iddia hakem kurulunun yetkisini ortadan kaldırmaz. Esas sözleşme yok hükmünde veya geçersiz olsa dahi, hakem kurulunun tarafların ilgili hakları ile iddia ve savunmaları hakkında karar verme hususundaki yetkileri devam eder.

Kompetenz-Kompetenz (Hakemlerin Kendi Yetkileri Hakkında Karar Verebilmesi İlkesi)

UNCITRAL Arbitration Rules, Art 23, etc.

UNCITRAL Arbitration Rules Article 23 Pleas as to the jurisdiction of the arbitral tribunal

The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

UNCITRAL Tahkim Kurallarında Hakemlerin veya Hakem Kurullarının Kendi yetkileri Hakkında Karar Verebilme gücü bulunmaktadır. Asıl sözleşmeye dercedilmiş bir UNCITRAL Tahkimini öngören bir şartın, bu sözleşmenin diğer hükümlerinden müstakil bir anlaşma sayılacağı ve bu yüzden hakem kurulunca asıl sözleşmenin batıl olduğunun tespitinin, kendiliğinden tahkim şartının butlanı sonucunu doğurmayacağı ifade edilmiştir.

- **Note that the tribunal's ruling is, as a general principle, subject to review by the courts •**



Kompetenz-Kompetenz and role of the courts: England and Wales

AA96, s 9(4) On an application under this section the court shall **grant a stay** unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

CPR, r 62.8(3)

(3) Where a question arises as to whether –

(a) an arbitration agreement has been concluded; or

(b) the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement, the court may decide that question or give directions to enable it to be decided and may order the proceedings to be stayed pending its decision.



Kompetenz-Kompetenz and role of the courts: England and Wales

Waller LJ said in *Al-Naimi v Islamic Press Agency*:

Mahkemelerin davaya müdahale etme gücüne sahip oldukları gözden kaçırılmamalıdır. I would in fact accept that on a proper construction of s. 9 it can be said with force that a Court should be satisfied (a) that there is an arbitration clause and (b) that the subject of the action is within that clause, before the Court can grant a stay under that section. But a stay under the inherent jurisdiction may in fact be sensible in a situation where the Court cannot be sure of those matters but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter first. If for example, the Court thinks that it would take a trial with oral evidence to decide whether matters the subject of the action were actually within the scope of an arbitration clause, but that it was likely that on detailed inquiry the subject matter of the action will be found to be covered by the arbitration clause; and particularly if an arbitration was bound to take place in relation to some issues between the parties, and where having explored the details necessary to found jurisdiction, it would only be a short step to deciding the real issues, it will often be sensible for the Court not to try and resolve that question itself but leave it to the arbitrator.

It is true that since the matter goes to jurisdiction there is a risk that the matter might come back to the Court under **s. 67**, but since costs and time are, in the example given, going to be expended on matters that relate to jurisdiction and once the tribunal who hears that evidence will be in a strong position to move quickly on to resolve the main issues - the risk will often be worth taking. This seems to me in accordance with the spirit of the 1996 Act and in particular ss. 30 and 32(2)



Kompetenz-Kompetenz and role of the courts: England and Wales

Possibly a different approach in Lombard North Central plc v GATX Corporation [2012] EWHC 1067 (Comm), [2012] 1 Lloyd's Rep 662, per Andrew Smith J, paras 27 – 29:

27 If I am wrong that these proceedings meet the “threshold requirements” of section 9(1) , then I would conclude ... that they should be stayed under the inherent jurisdiction in order to uphold the parties' agreement that the jurisdiction of an arbitral tribunal should be decided only by the tribunal, although the court might achieve the same end by making an injunction to restrain the claimant from pursuing the proceedings in so far as this involves a breach of the agreement ... If necessary, I would categorise [these circumstances] as “exceptional” or even “very exceptional”. I would also suppose that the statutory provisions did not contemplate an agreement including such a term.

28 The dispute in this case is, after all, about the scope of the arbitration agreement, and it was recognised by Judge Humphrey Lloyd QC in *Birse Construction Ltd v St David Ltd* [1999] BLR 194 (whose judgment Waller LJ cited with approval in *Al-Naimi (trading as Buildmaster Construction Services) v Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522 , 524) that such cases are more likely to be stayed than cases where it is disputed whether the parties made an arbitration agreement at all .. .

29 I would not have exercised the inherent jurisdiction to stay the proceedings if I had been satisfied that the arbitration agreement is “inoperative” within the meaning of section 9(4). It would go against the statutory scheme to stay proceedings for arbitration if the scheme so categorised the arbitration agreement.



Kompetenz-Kompetenz and role of the courts: USA

United States: the issue of jurisdiction is for the courts to decide unless the parties clearly and unmistakably provide otherwise.

See **Federal Arbitration Act, s 3**: if any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Kompetenz-Kompetenz and role of the courts: USA

Position in the United States

► In *Prima Paint*, Fortas J said:

Under s 4, with respect to a matter within the jurisdiction of the federal courts save for the existence of an arbitration clause, the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.' Talep edilen konular dolandırıcılık ile Tahkim Anlaşmasının yapma iradesinin dolandırılmasını içeriyorsa Mahkeme davaya müdahale eder.

► **First Options of Chicago v Kaplan 514 US 938 (1995)**

Tahkim yargılamasında hakemlerin yetkisine ilişkin karar vermeye öncelikli olarak mahkemeler yetkilidir. Hakemlerin böyle bir yetkisi yoktur, meğer ki taraflar açıkça ve şüpheye yer vermeyecek şekilde Hakem Kurulunun yetkili olduğunu kararlaştırmamış olsun.

Kurumsal tahkim kuralları genellikle hakem kurulunun yargı yetkisini kabul eder.



Kompetenz-Kompetenz and role of the courts: Canada

The position in Canada may be exemplified in **Gulf Canada Resources Ltd v Arochem International Ltd 1992 CarswellBC 95, British Columbia Court of Appeal, per Hinkson JA (Cumming JA concurring)** Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

See also Masterfile Corp v Graphic Images Ltd, 2002 CarswellOntb2181, Ontario Superior Court of Justice, per Hoy J The Agreement is in some respects poorly drafted. Given that it seems to have been intended that Mr. Berthold was to have some obligations under the Agreement as Owner, it is not clear to me that he was not intended to be a party for the purpose of the submission to arbitration. In the circumstances, I think that it is appropriate for the arbitral tribunal and not this court to make the determination.



Kompetenz-Kompetenz and role of the courts: France

Art 1448 of the French NCCP

When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable. A court may not decline jurisdiction on its own motion

Note that, in domestic arbitrations only, any stipulation contrary to art 1448 'shall be deemed not written'. However, art 1448 is not mandatory in international commercial arbitration

Conclusion / Sonuç

Milletlerarası Ticari Tahkimde aşağıdaki genel ilkelere görüş birliği vardır.

- Tahkime müdahale etmeme yükümlülüğü, Hakeme gönderme ödevi
- Tahkim Anlaşmasının İstiklali Prensipleri
- Kompetenz-Kompetenz (Hakemlerin Kendi Yetkileri Konusunda Karar Vermesi)

Fakat, aşağıdaki konularda bir çok farklı yaklaşım mevcuttur:

- Tahkim Anlaşmasının Oluşturulması
- Yargı yetkisi konusunda mahkemelerin rolü (Özellikle hakem yetkisine ilişkin karardan önce)
- Tahkim yargılamasına uygulanabilecek hukuk.
- Geçerlilik ve Etkinlik

Tahkim anlaşmasının dikkatle ve itina ile hazırlanması gerekir.