ARBITRATION AGREEMENT
TAHKİM ANLAŞMASI

Definition and general requirements (Tanımı ve genel şartları)

UNCITRAL Model Law, Art 7(1)

- *Option 1*

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

There follow five sub-sections requiring the agreement to be in writing and defining what 'in writing' means

- *Option 2*

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Definition and general requirements (Tanımı ve genel şartları)

New York Convention, Art II(1)

Each Contracting State shall recognize an agreement in writing, under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

NYC Madde II(1)

Âkit devletlerden her biri, tarafların akte dayanan veya akdî olmayan, belli bir hukuk münasebetinden aralarında doğmuş veya ileride doğabilecek, hakemlik yolu ile halledilmesi mümkün bir konu ile ilgili uyuşmazlıkların tamamını veya bir kı'smını hakeme hallettirmek üzere birbirine karşı taahhüde girişmelerine dair yazılı anlaşmalarını muteber addeder.

Definition and general requirements (Tanımı ve genel şartları)

Swiss Private International Law Act Article 178 - III. Arbitration agreement

1 The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.

2 Furthermore, an arbitration agreement is valid if (1) **it conforms either to the law chosen by the parties (tarafların bu anlaşmaya uygulanmasını kararlaştırdıkları hukuka)**, or **(2) to the law governing the subject-matter of the dispute (esas sözleşmeye uygulanacak hukuka), in particular the main contract**, or **(3) to Swiss law (İsviçre hukukuna).**

3 The arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen. (Bir tahkim anlaşmasına karşı asıl sözleşmenin batıl olduğu veya tahkim anlaşmasının henüz zuhur etmemiş bir nizaa taalluk ettiği def'i ileri sürülemez.)

Definition and general requirements (Tanımı ve genel şartları)

Milletlerarası Tahkim Kanunu Madde 4 – Tahkim anlaşması, tarafların, sözleşmeden kaynaklansın veya kaynaklanmasın aralarında mevcut (Belli) **bir hukukî ilişkiden doğmuş veya doğabilecek uyuşmazlıkların tümünün veya bazılarının tahkim yoluyla çözülmesi konusunda yaptıkları anlaşmadır. Tahkim anlaşması, asıl sözleşmeye konan tahkim şartı veya ayrı bir sözleşme ile yapılabilir.** (Haksız fiilden veya Kanundan Kaynaklanan Hukuki İlişkiler) (HMKm.412)

Tahkim anlaşması yazılı şekilde yapılır. Yazılı şekil şartının yerine getirilmiş sayılması için, tahkim anlaşmasının taraflarca imzalanmış yazılı bir belgeye veya taraflar arasında teati edilen mektup, telgraf, teleks, faks gibi bir iletişim aracına veya elektronik ortama geçirilmiş olması ya da dava dilekçesinde yazılı bir tahkim anlaşmasının varlığının iddia edilmesine davalının verdiği cevap dilekçesinde itiraz edilmemiş olması gerekir. Asıl sözleşmenin bir parçası hâline getirilmek amacıyla tahkim şartı içeren bir belgeye yollama yapılması hâlinde de geçerli bir tahkim anlaşması yapılmış sayılır. (Atıf yoluyla Tahkimin Kararlaştırılması)

Tahkim anlaşması, tarafların tahkim anlaşmasına uygulanmak üzere seçtiği hukuka veya böyle bir hukuk seçimi yoksa Türk hukukuna uygun olduğu takdirde geçerlidir.

Tahkim anlaşmasına karşı, asıl sözleşmenin geçerli olmadığı veya tahkim anlaşmasının henüz doğmamış olan bir uyuşmazlığa ilişkin olduğu itirazında bulunulamaz.

MTK m. 5 (2) Mahkemede Tahkim İtirazı: Yargılama sırasında tarafların tahkim yoluna başvurma konusunda anlaşmaları halinde, dava dosyası mahkemece ilgili hakem veya hakem kuruluna gönderilir.

Definition and general requirements (Tanımı ve genel şartları)

Arbitration Act 1996, s 6

Definition of arbitration agreement

(1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).

(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

French Code of Civil Procedure, Article 1442

An arbitration agreement may be in the form of an arbitration clause or a submission agreement.

An arbitration clause is an agreement by which the parties to one or more contracts undertake to submit to arbitration disputes which may arise in relation to such contract(s).

A submission agreement is an agreement by which the parties to a dispute submit such dispute to arbitration.

Swedish Arbitration Act 1999

Disputes concerning matters in respect of which the parties may reach a settlement may, by agreement, be referred to one or several arbitrators for resolution. Such an agreement may relate to future disputes pertaining to a legal relationship specified in the agreement. The dispute may concern the existence of a particular fact. In addition to interpreting agreements, the filling of gaps in contracts can also be referred to arbitrators. Arbitrators may rule on the civil law effects of competition law as between the parties.

SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ)

CONCEPT AND FUNCTION (KAVRAMI VE İŞLEVİ)

Competence of arbitral tribunal to rule on its jurisdiction

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

- What is the concept/definition of separability?
- What is the function of the doctrine?

SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ)

- **Hakemin Yetkisine İtiraz**

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.

SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ)

Y. 4. HD.nin 25.03.1971t. ve E.71/2152 ve K.71/2829

Y.13. HD.nin 25.05.1976 t. ve E.76/7803 ve K.76/4297

6 Şubat 1956 Neuchatel Kantonu Temyiz Mahkemesi Kararı:

*"Tahkim şartı, dercedildiği akdin mukadderatına tabi bulunması gerekmeyen müstakil bir akit mahiyetindedir (**Guldener**, §24 VIII 2, sh. 177 ve § 72 II 1, dip notu 27, ATF.59, I; 178, 223). Dercedildiği akdin ortadan kalkmasından sonra bile bu akitten doğan alacaklara ilişkin uyuşmazlıklar veya bizzat tahkim şartında açıkça öngörülmüş müstakbel uyuşmazlıklar için tahkim şartı geçerli kalmakta devam eder (**Leuch**, m. 382, No:1; **von Tuhr**, sh. 9 ve 562; Neuchâtel Temyiz Mahkemesinin RCCC, C. VI, sh. 185 ve RSJ. C. XXI, sh.140 da neşredilen kararı)"*[86]

SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ))

Swiss Private International Law Act Article 178 (3) Separability

3 The arbitration agreement cannot be contested on the grounds that the main contract is not valid or that the arbitration agreement concerns a dispute which had not as yet arisen.

(Bir tahkim anlaşmasına karşı asıl sözleşmenin batıl olduğu veya tahkim anlaşmasının henüz zuhur etmemiş bir nizaa taalluk ettiği def'i ileri sürülemez.)

SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ)

US LAW (ABD HUKUKU)

Prima Paint Corp v Flood & Conklin Manufacturing Co 388 US 395 (1967)

– Prima Paint purchased F & C paint business and made a consultancy agreement with F & C for the following six years whereby F & C would help Prima Paint develop the business

– ***arbitration clause:*** 'Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in the City of New York, in accordance with the rules then obtaining of the American Arbitration Association'

– very soon after entering into the agreement, F & C filed for bankruptcy. Prima Paint issued court proceedings seeking rescission of the contract on the ground that F & C had fraudulently induced Prima Paint to enter into the consultancy agreement

– F & C applied for a stay of the proceedings brought by Prima Paint. Prima Paint argued that it was for the courts not for the arbitrators to decide whether the contract had to be rescinded because the rescission of the contract entailed the rescission of the arbitration agreement

SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ)

US LAW (ABD HUKUKU)

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Fortas J said: With respect to cases brought in federal court involving maritime contracts or those evidencing transactions in 'commerce,' we think that Congress has provided an explicit answer. That answer is to be found in s 4 of the Act, which provides a remedy to a party seeking to compel compliance with an arbitration agreement. 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.'* Accordingly, if the claim is fraud in the inducement of the arbitration clause itself-an issue which goes to the *'making'* of the agreement to arbitrate-the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally'.

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SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ)

US LAW (ABD HUKUKU)

Buckeye Check Cashing Inc v Cardegna 546 U S 440 (USS Ct 2006)

– dispute between borrowers and lender over whether loans were illegal. Loan agreement contained an arbitration clause. Respondents brought a putative class action in Florida state court, alleging that Buckeye charged usurious interest rates and that the Agreement violated various Florida lending and consumer-protection laws, rendering it criminal on its face. Buckeye moved to compel arbitration. The trial court denied the motion***, holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and void ab initio***

– **Scalia J relied on** s 2 of the FAA rather than on s 4, holding that s 2 embodies the national policy favouring arbitration and places arbitration agreements on equal footing with all other contracts. Section two reads*: 'A written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such contract ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'*

– three principles: 'First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts … Applying them to this case, we conclude that because ***respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court'.***

SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ)

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 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.

SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ)

ARBITRATION PRACTICE (UYGULAMADA)

Arbitration Rules: ICC Rules, Art 6(9); LCIA Rules, Art 23; AAA Rules, Art 15, SIAC Rules, Art 25.2, etc.

Award in Case No 109/1980 of 9 July 1984 SNE (Moscow) v Joc Oil, Ltd (1993) XVIII YB Comm Arb 92 (1993)

– sale of oil by SNE (company incorporated under the law of the former USSR) to JOC, a company incorporated in Bermuda. JOC took delivery of the oil but did not make any payment. SNE commenced arbitration but JOC argued that the contract was not executed by two representatives of SNE as required under USSR law and was, therefore, void. And so was the arbitration agreement

– the Rules of the relevant Soviet arbitration institution did not require arbitration agreements to be subject to the same formalities as contract with foreign parties. Arbitration agreement has different content from the main agreement and its invalidity different effects from the invalidity of the main contract. Note reliance on UNCITRAL Rules and literature. *Tribunal did find the contract, but not the arbitration clause, invalid.*

SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ)

English law (İngiliz Hukuku)

- ***AA96, s 7 Separability of arbitration agreement***

Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

Fiona Trust & Holding Corpn v Yuri Privalov [2007] UKHL 40, [2008] 1 Lloyd's Rep 254

– ship owners sought a declaration that charter parties had been rescinded on the ground that they had been entered into as a result of bribery. Charterers applied for a stay of the proceedings. The argument for the ship owners was that the arbitration agreements had been rescinded and were in any event liable to be rescinded

– a stay was granted as the ship owners' argument was precisely the type of argument that s 7 prevented. The pleaded ground of invalidity related to the main contract not to the arbitration agreement as such

SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ)

Application of Fiona Trust

El Nasharty v J Sainsbury Plc [2007] EWHC 2618 (Comm), [2008] 1 Lloyd's Rep 360

- N issued court proceedings for a declaration and damages alleging that he had entered into a share sale agreement with S as a result of duress and the agreement had been avoided. S applied for a stay under s 9 AA96
- Tomlinson J held that the allegation of duress went to the main agreement not to the arbitration clause and that, precisely for the same reason, the claimant had validly waived its right to a court under Art 6 of the European Human Rights Convention ("ECHR")

Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd [2013] EWHC 1063 (Comm)

- guarantees given by Chinese company were allegedly illegal because they lacked the required state authorization
- His Honour Judge Mackie QC held that the arbitration agreement was nevertheless enforceable as a separate contract as there was nothing that impeached the arbitration agreement itself as opposed to the guarantees

SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ)

Are there exceptions to the doctrine of separability? Should there be?

Lord Hoffmann's examples in Fiona Trust, paras 17 and 18:

> For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a 'distinct agreement', was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.
>
> On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

SEPARABILITY OF ARBITRATION CLAUSE (TAHKİM ANLAŞMASININ İSTİKLALİ)

Are there exceptions to the doctrine of separability? Should there be?

Soleimany v Soleimany [1998] 3 WLR 811, CA, per Waller LJ:

But, the fact that in a contract alleged to be illegal the arbitration clause may not itself be infected by the illegality, does not mean that it is always so, and does not mean that an arbitration agreement that is separate may not be void for illegality. **There may be illegal or immoral dealings which are, from an English law perspective, incapable of being arbitrated because an agreement to arbitrate them would itself be illegal or contrary to public policy under English law. The English court would not recognise an agreement between the highwaymen to arbitrate their differences any more than it would recognise the original agreement to split the proceeds … At one stage it seemed to us that Mr. Serota was conceding that what the plaintiff and the defendant sought to have arbitrated was how to split the proceeds of a joint venture that had as its object the commission of offences in Iran. If that were so, we would incline to the view that the arbitration clause was invalid, so that there was no award to enforce.** But, on reflection, and having analysed the way the matter was put before the arbitrator, it seems to us that it is not fair to characterise the matter in that way. Disputes between the plaintiff and the defendant arising out of a claim by the plaintiff for an account of the proceeds of sale, was what was referred to the arbitrator. It was during the arbitration that the arbitrator took the view that he was dealing with a joint venture with the objects we have already indicated. Accordingly it seems to us that the original arbitration agreement was a valid agreement, and that it was within the jurisdiction of the arbitrator to consider questions of illegality in so far as they might affect the rights of the parties

Law applicable to the arbitration agreement (Tahkim Anlaşmasına Uygulanacak Hukuk)

Conflict of laws (Hukuk Uyuşmazlıkları)

- Distinguish courts and arbitrators
  - – courts: conflict of laws of the State
  - – arbitrators: conflict of laws of the seat or international principles, e.g. drawn from NYC and UNCITRAL Model Law
- General approach
  - – express or implied choice: UNCITRAL Model Law, Art 34(2)(a)(i) and New York Convention, Art V(1)(a)
    - law chosen by the parties
    - failing the agreement of the parties, law of the country where the award was made (which generally means country where the seat is established)

Tahkim anlaşmasını akdeden tarafların haklarında tatbiki gereken kanuna göre ehliyetsiz olduğu, yahut da zikri geçen anlaşmanın taraflarca tabi kılındığı kanuna ve eğer bu babta sarahat mevcut değilse hakem kararının verildiği yer kanununa göre hükümsüz bulunduğu.

Law applicable to the arbitration agreement (Tahkim Anlaşmasına Uygulanacak Hukuk)

International principles (Uluslararası İlkeler)

- Exclusion of parochial policy interests (Dar Görüşlü Politik Çıkarların Hariç Tutulması İlkesi)
  - *Ledee v Ceramiche Ragno 684 F2d 184 (1st Cir 1982)*

    – distributorship agreement between Italian company and Puerto Rican distributors for the exclusive distribution of ceramic tiles in the Antilles. Arbitration clause for arbiter to be appointed by the President of the court of Modena (Italy)

    – distributors sued in Puerto Rican courts and argued that the Puerto Rico Dealers Act prohibited arbitration clauses for arbitration outside Puerto Rico or under a foreign law. Purpose was to protect dealers and distributors

    – Court referred parties to arbitration under Art II of NYC (FAA, Ch II): 'Null and void, inoperative or incapable of being performed' does not include parochial interests but only those situations such as fraud, mistake, duress, and waiver 'that can be applied neutrally on an international scale.
  - NYC 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.

Law applicable to the arbitration agreement (Tahkim Anlaşmasına Uygulanacak Hukuk)

International principles (Uluslararası İlkeler)

- Autonomous principles ('régles matèrielles') of international commercial arbitration (Milletlerarası Ticari Tahkimin Özerkliği İlkesi):
  - French approach in Judgment of 20 December 1993, Court de Cassation, Municipalité de Khoms El Mergeb v Société Dalico (1994) Revue de l'arbitrage 116

    – Dalico to conduct sewage disposal work in Libya. Contract referred to standard conditions which included a Libyan jurisdiction clause but the tender documents contained an ICC arbitration clause which was stated to prevail over the jurisdiction clause in the standard conditions. A dispute arose and Dalico started arbitration

    – the respondent municipal council objected to jurisdiction arguing that the ICC clause was invalid as a matter of Libyan law

    – the Tribunal rejected the objection. The Cour de Cassation refused to set aside award because, in international commercial arbitration, the assessment of the validity of the arbitration agreement was to be based only on the common intention of the parties independent of any given legal system or national provisions subject to French mandatory provisions and international public policy. Libyan law was, therefore, irrelevant

Law applicable to the arbitration agreement (Tahkim Anlaşmasına Uygulanacak Hukuk)

English law / İngiltere Hukuku

• Rome Convention of 1980 on the law applicable to contractual obligations ('Rome Convention'), implemented by the Contracts (Applicable Law) Act 1990 excluded 'arbitration agreements and agreements on the choice of court' → see now ***Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L117/6, Art 1(2)(e)***

• Common law applies: (a) express choice; (b) implied choice (c) closest connection

• If the validity of the arbitration agreement is disputed, the proper law is the law which would have applied assuming the validity of the agreement:Marc Rich & Co AG v Società Italiana Impianti PA (The Atlantic Emperor) [1989] 1 Lloyd's Rep 54

Law applicable to the arbitration agreement (Tahkim Anlaşmasına Uygulanacak Hukuk)

English law / İngiltere Hukuku

- Express choice to be given effect unless meaningless or against public policy

  – almost never do parties choose the law applicable to the arbitration agreement. Very often they choose the law applicable to the main contract. Is this an express choice of the law applicable to the arbitration agreement?

- Implied choice

  – choice of seat if there is no express choice of the law applicable to the underlying contract and the choice of seat is not delegated: Deutsche Schachtbau-und Tiefbohrgesellschaft MBH v Ras Al Khaimah National Oil Corporation [1987] 2 Lloyd's Rep 246

  – choice of law of the main contract and no choice of seat

  – what if parties choose the law of the main contract (country A) and the seat (country B)?

Law applicable to the arbitration agreement (Tahkim Anlaşmasına Uygulanacak Hukuk)

English law / İngiltere Hukuku

- Some authorities under AA96 suggested that when there is a choice of seat and a choice of the law applicable to the main contract, the law applicable to the arbitration agreement is the law of the seat: XL Ins v Owners Corning Corp[2000] 2 Lloyd's Rep 500 and C v D [2008] 1 Lloyd's Rep 239, CA, obiter
- See now Sul América Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] 1 Lloyd's Rep 671, CA

Law applicable to the arbitration agreement (Tahkim Anlaşmasına Uygulanacak Hukuk)

Sul América Cia Nacional de Seguros SA v Enesa Engenharia SA

- Insurance policy governed by Brazilian law contained a London arbitration clause
- Moore-Bick LJ
  - there is a presumption that the arbitration agreement is governed by the law chosen to govern the main contract but the presumption may be displaced by other factors
  - Brazilian law would have made the arbitration clause enforceable only with the insured's consent. This was not what appeared to be the clear intention of the parties. As a consequence, the presumption was displaced
  - English law had the closest connection with the arbitration agreement

Law applicable to the arbitration agreement (Tahkim Anlaşmasına Uygulanacak Hukuk)

Sul América Cia Nacional de Seguros SA v Enesa Engenharia SA

In the absence of an express choice of law to govern the arbitration agreement, the English Courts will undertake a three-stage enquiry to determine what the proper law is. In this case, a reference in the arbitration clause to the place of arbitration as London, England was sufficient to override (i) an express choice of Brazilian law as the governing law of the main underlying contracts; and

(ii) an exclusive jurisdiction clause providing that any disputes arising out of, or in connection with the main contracts was to be resolved in the Brazilian courts.

Law applicable to the arbitration agreement (Tahkim Anlaşmasına Uygulanacak Hukuk)

APPLICATION OF: Sul América

Arsanovia Ltd v Cruz City 1 Mauritius Holdings [2012] EWHC 3702 (Comm)

• Contract expressed to be governed by Indian law contained an LCIA arbitration clause with seat in London

• Andrew Smith J held that arbitration agreement was governed by Indian law, relying on Moore-Bick LJ's judgment in Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA [2012] EWCA Civ 638

• Interesting to note that the judge commented, obiter, that choice of law may have been expressed and not implied

• *But what matters are governed by the applicable law?*

Arbitration clauses are often one of the last clauses to be considered, even in closely negotiated contracts and occasionally insufficient attention is paid to the fact that arbitration clauses are not simply a dispute resolution mechanism but jurisdictional clauses in their own right. Since arbitration clauses are separate agreements from the main contracts, it may be prudent for parties to expressly state what the governing law of the arbitration agreement is.

TAHKİM İRADESİNİN AÇIK VE KESİN OLMADIĞI İDDİASI (Uyuşmazlığın Genel Mahkemelerde Çözülmesi Gerektiğinin İddia Edildiği - Sözleşmedeki Tahkim Şartlarının Geçerli Olup Olmadığına Karar Verme Yetkisinin Görevli ve Yetkili Hakem Kuruluna Ait Olduğunun Gözetileceği)T.C. YARGITAY 15. HUKUK DAİRESİ E. 2014/3330 K. 2014/4607 T. 1.7.2014

Taraflar arasındaki sözleşmelerin

- 32.2 maddesinde "Taraflar bu sözleşmeden doğabilecek her türlü ihtilafın 4686 sayılı Milletlerarası Tahkim Kanunu hükümleri uyarınca tahkim yoluyla çözüleceğini kabul ederler",
- 32.3 maddesinde "Hakem heyeti 3 (üç) hakemden oluşacaktır",
- 32.4 maddesinde "Taraflar 4686 sayılı Milletlerarası Tahkim Kanunu madde 15/A hükmü kapsamında iptâl davası açma hakkından tamamen, koşulsuz ve gayri kabili rücu şekilde feragat ederler",
- 32.5 maddesinde "Tahkim yeri Bursa-Türkiye olacaktır. Tahkimde kullanılan lisan Türkçe olacaktır",
- 32.7 maddesinde "Bu sözleşme Türkiye Cumhuriyeti kanunlarına tâbi olacak ve bu kanunlara göre yorumlanacak ve uygulanacaktır. İhtilaf durumunda Bursa Mahkemeleri ve İcra Daireleri yetkilidir" düzenlemelerine yer verilmiştir.

Construction of arbitration agreement (Tahkim Anlaşmasının Kurulması)

Civil law and common law approaches

Svenska Petroleum Exploration AB v Lithuania [2006] EWCA Civ 1529, [2007] QB 886, [2007] 2 WLR 876, [2007] 1 All ER Comm) 909, [2007] 1 Lloyd's Rep 193

– contract to be construed in 'good faith'

– ascertainment of subjective intention

– pre-contractual negotiations admissible

Investors Compensation Scheme LTD v West Bromwich Building Society [1998] 1 WLR 896

– meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract

– pre-contractual negotiations inadmissible

Construction of arbitration agreement (Tahkim Anlaşmasının Kurulması)

Forms of words (Kelimelerin Şekli)

Fiona Trust & Holding Corpn v Yuri Privalov [2007] UKHL 40, [2008] 1 Lloyd's Rep 254

– presumption is that arbitration clause covers all disputes relating to the contract regardless of forms of words used

Contrast Mediterranean Enterprise Inc v Ssagyong 708 F 2d 14458 (9th Cir 1983)

– JV between Californian company and Korean company for construction works in Saudi Arabia

– MEI sued Ssagyong for breach of contract, breach of fiduciary duty, quantum meruit and conversion (tort)

– arbitration clause: disputes arising 'hereunder'

– Court held arbitration clause covered only disputes relating to interpretation and performance of the contract

• Claim of quantum meruit (services have been rendered but there is no valid agreement) and claim in the tort of conversion did not fall within the scope of the arbitration clause

Drafting solution

Construction of arbitration agreement (Tahkim Anlaşmasının Kurulması)

Consider the following standard arbitration clauses:

- MTO Tahkim Şartı

Bu sözleşmeden doğan ya da bu sözleşme ile ilgili olarak doğacak tüm ihtilaflar Milletlerarası Ticaret Odası Tahkim Kuralları uyarınca, bu kurallara göre atanan bir veya birden fazla hakem tarafından çözümlenir.

- SCIA Standart Tahkim Şartı

Sözleşmenin geçerliliği, hükümsüzlüğü, ihlali veya sözleşmenin feshi halleri de dahil olmak üzere işbu sözleşmeden kaynaklanan veya sözleşme ile bağlantılı her türlü uyuşmazlık, ihtilaf veya talep, işbu Kurallar uyarınca Tahkim Bildirimi'nin sunulduğu tarihte yürürlükte olan İsviçre Odaları Tahkim Kurumu'nun İsviçre Uluslararası Tahkim Kuralları'na uygun olarak tahkim yoluyla çözülecektir.

Hakemlerin sayısı … ("bir", "üç", "bir veya üç") olacaktır;

Tahkim yeri … olacaktır. (Taraflar başka bir ülkedeki bir şehir üzerinde anlaşmış olmadıkları takdirde İsviçre'de bir şehrin ismi);

Tahkim yargılamasının yapılacağı dil … olacaktır. (tercih edilen dili yazınız).

- AAA international arbitration clause
- UNCITRAL model arbitration clause

Construction of arbitration agreement (Tahkim Anlaşmasının Kurulması)

UNCITRAL Model arbitration clause for contracts

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note — Parties should consider adding:

(a) The appointing authority shall be ... (name of institution or person);

(b) The number of arbitrators shall be ... (one or three);

(c) The place of arbitration shall be ... (town and country);

(d) The languageto be used in the arbitral proceedings shall be ...

Construction of arbitration agreement (Tahkim Anlaşmasının Kurulması)

Incorporation in contract strings (Sözleşme Dizelerinin Birleşmesi) Tahkim şartını sözleşmeye konulan genel kapsamlı kelimelerle mi yoksa net ve açık kelimelerle mi koymak gerekir.

Progressive Casualty Insurance Co v CA Reaseguradora Nacional de Venezuela 991 F 2d 42 (2nd Cir 1993)

–Reasürans, sigorta şirketlerinin üstlerindeki riskleri tekrar sigortalatarak kendilerini güvence altına almasıdır. Örnek olayda reasürör ve reasürör arasında sigorta sözleşmesinin kapsamı konusunda uyuşmazlık çıkar. Retresosyen Anlaşması ihtiyari reasürans sözleşmesine tabiidir. Reasürans anlaşmasında bulunan Tahkim Şartı «sözleşme taraflarına» atıf yapıyor.

– Mahkeme heyeti genel kapsamlı kelimelerle tarafların tahkime davet edilmesinin NYC kapsamında Tahkim Klozu olarak değerlendirileceğine hüküm veriyor. NYC'nin tahkim anlaşmalarını yeterince geniş değerlendirdiğini gözlemliyor.

But see English law:

– Konşimento Tahkimi Davaları: Thomas v Portsea [1912] AC 1; TB&S Batchelor & Co Ltd v Owners of the SS Merak (The Merak) [1964] 2 Lloyd's Rep 527; The Rena K [1979] 1 All ER 397, CA; Cargo on Board MV 'Delos' v Delos Shipping [2001] 1 All ER 763

YARGITAY 11. HUKUK DAİRESİ E. 2012/5132 K. 2012/7052 T. 2.5.2012 Taşıyan İle Gönderilen Arasındaki Uyuşmazlıkta Konşimentonun Esas Tutulacağına, Konşimento İle Birlikte Kullanılacak Çarterparti Hükümlerinin Davacı İçin Bağlayıcı Hale Geldiğine İlişkin Yargıtay Kararı

Taşıyan ile gönderilen arasındaki hukuki ihtilaflarda konşimentonun esas tutulacağı hükme bağlandığı, davacıya gönderilen ve konşimentoya göre teslim alınan malların millileştirilmesinin yapıldığı, bu durumda davacı tarafça konşimentonun kullanıldığı açık olup konşimento ile birlikte kullanılacak çarterparti hükümlerinin de artık davacı için bağlayıcı hale geldiği, bu çarterpartide mevcut tahkim klozuna göre taraflar arasındaki uyuşmazlığın Londra'da oluşturulacak hakem heyetince çözümlenmesi gerekir.

– reasürans ve retrosesyona ilişkin tahkim davaları: Excess Insurance and Home Overseas Insurance v CJ Mander [1997] 2 Lloyd's Rep 119; AIG Europe (UK) Ltd v The Ethniki [2000] 2 All ER 566, CA

– Aughton v Kent [1991] 57 BLR 1(CA): Ralph Gibson LJ'ın kararında genel kapsamlı kelimelerle tarafları tahkime dahil etmeye yeterli olacağını belirtir. Sir John Megaw held that the rule in Thomas v Portsea applied (Genel kelimelerle Spesifik Kelimeler arasında ayrım yapmak gerekir)

– Tek sözleşme davalarında genel kapsamlı kelimelerin kullanılması tahkime gidilmesi için yeterlidir: Habas Sinai Ve Tibbi Gazlar Isthisal Endustri AS v Sometal SAL [2010] EWHC 29 (Comm), [2010] 1 All ER (Comm) 1143 – Taaraflar aralarında aktetikleri daha önceki sözleşme koşulları ile tahkime gitmeyi mi istiyorlar yoksa farklı taraflar arasında bir sözleşme mi oluşturmak istiyorlar.

Construction of arbitration agreement (Tahkim Anlaşmasının Kurulması)

'May' be referred to arbitration (Tahkime Gidilebilir)

Lobb Partnership Ltd v Aintree Racecourse Co Ltd [2000] BLR 65

– taraflar aksini kararlaştırmadığı sürece «olabilir» «may» fiili tarafların bağlayıcı ve kesin bir tahkime gitmeye niyetleri olduğu şeklinde yorumlanır.

WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka [2002] 3 Sing LR 603

– Sri Lanka kriket milli takımının hazırlık maçlarının yayın haklarından kaynaklanacak uyuşmazlıklar hakkına İngiliz Hukuku seçilir.

– Davacı Singapur'da SIAC Tahkimine gider. Davalı ise Sri Lanka'da devlet yargılamasına girişir. Davacılar Singapur Mahkemelerinde Sri-Lanka YARGILMASININ sona erdirilmesi için tedbir talebinde bulunur.

– Tahkim anlaşması: 'either party **may** elect to submit dispute to arbitration' 'taraflardan herhangi biri uyuşmazlığı tahkime sunmayı tercih **edebili**r'

– Mahkeme bağlayıcı bir tahkim anlaşmasının olduğunu kabul eder. Ayrıca yeni Singapur Tahkim Kanunu ve UNCITRAL Model Kanunu örnek olamalarındaki politik tercihlere vurgu yapar.