ENFORCEMENT OF AWARDS (HAKEM KARARLARININ İCRASI)

1) **Tarafların Rızası ile**
2) **Cebri İcra Yolu ile**
   - **MİLLİ HAKEM KARARLARININ İCRASI (HMK m. 410 veya MTK m.3 Mahkemesinde Tasdik)**

Distinguish the enforcement of domestic awards from the enforcement of foreign awards

Domestic awards

- Arbitration Act 1996, s 66
  - o Arbitration Act, s 66 applies irrespective of the seat of the arbitration: see Arbitration Act 1996, s 2(2)(b)
  - o For the procedure, see CPR, r 62.18 – 19
  - **o Note that the power to enforce the award is discretionary**

ENFORCEMENT OF AWARDS (HAKEM KARARLARININ İCRASI)

YABANCI HAKEM KARARLARININ İCRASI

- Yabancı Hakem Kararlarının Tanınması ve Tenfizi (MÖHUK m. 60-63)
- Yabancı Hakem Kararlarının Tanınması ve Tenfizi (New York Konvansiyonu)

Consider UNCITRAL Model Law on International Commercial Arbitration, Arts 35 and 36

Consider Arbitration Act 1996, ss 100 – 104

RECOGNITION AND ENFORCEMENT (TANIMA VE TENFIZ)

Recognition and enforcement

Define recognition and enforcement of the award

When could a party have an interest in the award being recognized but not enforced?

– West Tankers Inc v Allianz SpA (The Front Comor) [2012] 1 Lloyd's Rep 398, CA: Başvuruna bir fayda sağlayacaksa bildiri niteliğinde olan hakem kararı 66. maddeye göre icra edilebilir – see also African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG (The Christian D) [2011] EWHC 2452 (Comm)

RECOGNITION AND ENFORCEMENT (TANIMA VE TENFIZ)

Distinguish enforcement of domestic awards from recognition and enforcement of foreign arbitral awards (the latter generally under the New York Convention)

– AA96, s 66 (but note that this section also applies to awards made in proceedings with seat outside E & W and NI) and ss 100 – 104

– But see UNCITRAL Model Law, Arts 35 and 36: the regime for domestic and foreign awards has been unified

– French Code of Civil Procedure, art 1488 (only ground for refusal of exequatur is the award being contrary to public policy but note that setting aside proceedings and appeal have the effect of a recourse against the exequatur) and arts 1420 (international arbitration) and 1425 (foreign awards) – for international arbitration and foreign awards no appeal and no failure to state reasons as a ground for refusal.

Enforcement of arbitral awards under the New York Convention

New York Konvansiyonuna Göre Yabancı Hakem Kararlarının Tanınması ve Tenfizi

RECOGNITION AND ENFORCEMENT UNDER NYC (NYC'YE GÖRE TANIMA VE TENFIZ)

Yabancı Hakem Kararlarının Tanınması ve İcrası Hakkındaki New York Konvansiyonun Özeti

- **Madde I** Konvansiyonun Uygulama Alanını Tanımlar
- **Madde III** Akit Devletlerine Hakem Kararlarının Tanınması ve İcrası konusundaki temel yükümlülüklerini belirtir.
- **Madde IV** Hakem Kararının tanınma ve tenfizi sırasında ilgili başvuru yapan tarafın sunması gereken belgelerin neler olduğunu ortaya koyar.
- **Madde V** Tanıma ve tenfizin reddine sebep olabilecek niteliktekş durumların ayrıntılı bir listesini düzenler.
- **Madde VI** Tahkim kararının verildiği yer ile icaraya konulduğu yer arasındaki tanıma tenfize yönelik ilişkileri düzenler.
- **Madde VII** Daha eleverişli ulusal ve uluslararası tahkim hükümlerinin uygulama alanı bulmasına tasarruf sağlar ve NYC ile diğer milletlerarası konvansiyonlar arasında bağlantıyı belirtir.

Scope of the NYC and obligation to enforce (NYC'nin Uygulama Alanı ve Tenfiz Yükümlülüğü)

Art I of the NYC

– awards made in the territory of a State other than the State where recognition and enforcement are sought

– awards not considered domestic in the State where recognition and enforcement are sought

– reservations for commercial matters and reciprocity

• AA 96, s 100

MÖHUK MADDE 60 – (1) Kesinleşmiş ve icra kabiliyeti kazanmış veya taraflar için bağlayıcı olan yabancı hakem kararları tenfiz edilebilir.

Art III of the NYC

– 'Each Contracting State shall recognize as binding and enforce …'

– no substantially more onerous conditions or fees

• AA 96, s 101

MÖHUK MADDE 63 –(1) Yabancı hakem kararlarının tanınması da tenfizine ilişkin hükümlere tâbidir.

Scope of the NYC (NYK'nın Uygulama Alanı)

1. Yabancı Hakem Kararı
2. Tanınması ve Tenfizi istenen devlette milli sayılmayan hakem kararı
3. NYK'ya konabilecek ihtirazi kayıtlar
    1. Karşıklıklılık Kaydı
    2. Ticari Uyuşmazlıklar Kaydı

Obligation to Enforce (NYK'ya göre İcrayı Temin Yükümlülüğü)

NYK Madde III.

Âkit devletlerden her biri hakem kararlarının muteberliğini tanıyacak ve bunların öne sürüldüğü memlekette yürürlükte olan usul kaideleri gereğince aşağıdaki maddelerde yazılı şartlar dairesinde icrasını temin edecektir, bu sözleşmenin şümulü içine giren hakem kararlarının tanınması ve icrası için millî hakem kararlarınınkine nisbetle ne oldukça daha ağır şartlar yüklenecek ne de daha yüksek adlî harçlar alınacaktır.

MÖHUK MADDE 61 (2) Mahkemece hakem kararlarının tenfizinde 55 inci, 56 ncı ve 57 nci madde hükümleri kıyas yoluyla uygulanır.

MÖHUK MADDE 56 – (1) Mahkemece ilâmın kısmen veya tamamen tenfizine veya istemin reddine karar verilebilir. Bu karar yabancı mahkeme ilâmının altına yazılır ve hâkim tarafından mühürlenip imzalanır.

Requirements and Procedure
Tanıma ve Tenfizin Şartları

1. Taraflar arasında yazılı bir tahkim anlaşmasının akdedilmiş olması

NYK Madde II

2. Hakem Kararlarının Taraflar için Bağlayıcı Olması

NYK Madde V 1 (e) Hakem kararının taraflar için henüz mecburî olmadığı veya, bunun, verildiği memleket kanunu yahut tabi olduğu kanun yönünden yetkili bir makam tarafından iptal veya hükmünün icrasının geri bırakılmış bulunduğu.

Requirements and Procedure
Tanıma ve Tenfiz Usulü

Art IV: filing requirements

– duly authenticated original of the award or certified copy

– original of the arbitration agreement referred to in Art II or certified copy

– certified or sworn translations if necessary

Art V: grounds for refusal

– distinguish between Art V(1) and Art V(2)

Art VI: stay of enforcement proceedings if a challenge against the award is pending in the country in which, or under the law of which, the award was made

Art VII: saving for multilateral or bilateral conventions and for more favourable provisions of national law

Requirements and Procedure
Tanıma ve Tenfiz Usulü

1. **Prensip – NYK m. III MÖHUK m.61(2) ve 56**
2. **Yetkili Mahkeme** – MÖHUK m. 60(2) Yabancı hakem kararlarının tenfizi, tarafların yazılı olarak kararlaştırdıkları yer asliye mahkemesinden dilekçeyle istenir. Taraflar arasında böyle bir anlaşma olmadığı takdirde, aleyhine karar verilen tarafın Türkiye'deki yerleşim yeri, yoksa sâkin olduğu, bu da yoksa icraya konu teşkil edebilecek malların bulunduğu yer mahkemesi yetkili sayılır.
3. **Mahkemeye Sunulacak Belgeler NYK m. IV**
    a. Hakem kararının usulüne göre tasdik edilmiş aslını yahut aslına uygunluğu tasdik edilmiş bir suretini
    b. Kararın dayandığı tahkim anlaşmasının (tahkim şartı veya sözleşmesinin) aslını veya usülü dairesinde tasdik edilmiş suretini
4. **Uygulanacak Muhakeme Usulü MÖHUK m.61(2) ve 55 Tebliğ ve itiraz**

MÖHUK MADDE 55 – (1) Tenfiz istemine ilişkin dilekçe, duruşma günü ile birlikte karşı tarafa tebliğ edilir. İhtilâfsız kaza kararlarının tanınması ve tenfizi de aynı hükme tâbidir. Hasımsız ihtilâfsız kaza kararlarında tebliğ hükmü uygulanmaz. İstem, basit yargılama usulü hükümlerine göre incelenerek karara bağlanır.

(2) Karşı taraf ancak bu bölüm hükümlerine göre tenfiz şartlarının bulunmadığını veya yabancı mahkeme ilâmının kısmen veya tamamen yerine getirilmiş yahut yerine getirilmesine engel bir sebep ortaya çıkmış olduğunu öne sürerek itiraz edebilir.

Tenfiz Talebinin Kabülüne veya Reddine Karar Verilmesinin Sonucu

NYK Madde VI.

V. Maddenin 1, e, bendinde derpiş edilen yetkili makamdan, hakem kararının iptali veya icrasının geri bırakılması istendiği takdirde, huzurunda hakem kararı öne sürülen makam uygun görürse, bunun icrası hükmünün verilmesini ileriye bırakabilir; ve kezalik, kararın icrasını isteyen tarafın talebi üzerine karşı tarafı uygun teminat verilmesiyle ödevli kılabilir.

Yerine getirme ve temyiz yolu

MÖHUK MADDE 57 – (1) Tenfizine karar verilen yabancı ilâmlar Türk mahkemelerinden verilmiş ilâmlar gibi icra olunur.

(2) Tenfiz isteminin kabul veya reddi hususunda verilen kararların temyizi genel hükümlere tâbidir. Temyiz, yerine getirmeyi durdurur.

Relationship between Arts IV and V
NYK m. IV ve V arasındaki ilişki

Burden on the applicant

Dardana Ltd v Yukos Oil Co [2002] 1 Lloyd's Rep 225, per Mance LJ:

A successful party to a New York Convention award, as defined in s. 100(1) has a prima facie right to recognition and enforcement. At the first stage, a party seeking recognition or enforcement must, under s. 102(1), produce the duly authenticated award or a duly certified copy and the original arbitration agreement or a duly certified copy. The arbitration agreement means an arbitration agreement in writing, as defined in s. 5. Once such documents have been produced, recognition or enforcement may be refused at the second stage only if the other party proves that the situation falls within one of the heads set out in s. 103(2). The issue before us concerns the content of and relationship between the first and second stages. The first stage must involve the production of an award which has actually been made by arbitrators ... It would not, for example, be sufficient to produce an award which had been forged. However, it must be irrelevant at that stage that the award is as a matter of law invalid, on any of the grounds set out in s. 103(2), since otherwise there would have been no point in including s. 103(2). The award so produced must also have been made by arbitrators purporting to act under whatever is the document which is at the same time produced as the arbitration agreement in writing. That, it seems to me, is probably sufficient to satisfy the requirement deriving from the combination of s. 100(1) and s. 102(1) to produce "an award made, in pursuance of an arbitration agreement, . . .". The words "in pursuance of an arbitration agreement" could in other contexts require the actual existence of an arbitration agreement. But they can also mean "purporting to be made under". Construed in the latter sense the overlap and inconsistency to which I have referred are avoided. Any challenge to the existence or validity of any arbitration agreement on the terms of the document on which the arbitrators have acted falls to be pursued simply and solely under s. 103(2)(b)

Relationship between Arts IV and V
NYK m. IV ve V arasındaki ilişki

Agreement to be 'in writing.'

Dardana Ltd v Yukos Oil Co [2002] 1 Lloyd's Rep 225, per Mance LJ:

One cannot produce an agreement made otherwise than in writing. However, one can produce terms in writing, containing an arbitration clause, by reference to which agreement was (allegedly) reached, and one can produce a record of an arbitration agreement made in writing with (allegedly) the authority of the parties to it. That, it seems to me, is all that is probably therefore required at the first stage. That conclusion supports, rather than undermines the further conclusion that, at the first stage, all that is required by way of an arbitration agreement is apparently valid documentation, containing an arbitration clause, by reference to which the arbitrators have accepted that the parties had agreed on arbitration or in which the arbitrators have accepted that an agreement to arbitrate was recorded with the parties' authority. On that basis, it is at the second stage, under s. 103(2), that the other party has to prove that no such agreement was ever made or validly made.

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

1. **Mahkemenin Resen Nazara Alacağı Red Sebepleri**
   a. Uyuşmazlık Konusunun Tanıma ve Tenfiz İsteğinin Öne Sürüldüğü Memleket Kanuna Göre Hakemlik Yolu ile Halle Elverişli Olmaması
   b. Hakem Kararının Tanınması ve İcrasının Talep Edildiği Memleketin Kamu Düzrni Kaidelerine Aykırı Olması
2. **Aleyhine Tenfiz Talebinde Bulunulan Tarafça Mevcudiyetleri İddia ve İspat Edilecek Red Sepebleri**
   a. Takim anlaşması taraflarının ehliyesizliği veya tahkim anlaşmasının hükümsüzlüğü
   b. Aleyhine tenfiz istenilen tahkimdem haberdar edilmemiş olması veya iddia veya müdafaa vasıtalarını ikame etmek imkanından mahrum bırakılması
   c. Hakem kararının tahkim anlaşmasına konu teşkil eden uyuşmazlığa ilşkin olmaması veya tahkim anlaşmasının kapsamını aşan hükümler ieçermesi
   d. Hakem kurulunun teşekkülünün veya tahkim usulünün tarafların anlaşmasına veya anlaşma olmayan hallerde hakemliğin cereyan ettiği yer kanunu hükümlerine aykırı olması
   e. Hakem kararının taraflar için bağlayıcı olmaması veya yetkili bir makam tarafından iptal edilmiş yahut icrasının ger bırakılmış bulunması

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Incapacity

- A party to the arbitration agreement was, under the law applicable to it, under some incapacity
- Reference to the conflict of laws of the state where enforcement is sought
- Centroamericanos, AS v Refinadora Costarricense de Petroleos, SA 1989 US Dist LEXIS 5429 (SDNY 1989)
  - The contract was a contract of affreightment for carriage of crude oil governed by the law of New York. A dispute arose and Recope participated in the arbitration objecting to the tribunal's jurisdiction on the ground that, as a state-owned Puerto-Rican entity, Recope did not have the capacity to enter into an arbitration agreement unless authorised by the legislature. The arbitrators affirmed their jurisdiction on the ground that New York law governed the matter and that Recope had waived any immunity it might have had by entering into the arbitration agreement
  - The district judge confirmed the award holding that none of the grounds under Art V NYC had been established. The finding of the arbitrators would be disturbed only if in manifest disregard of the law, which did not arise in the case
  - Note deference to the tribunal on a jurisdictional issue

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Validity

- Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan [2010] 3 WLR 1472, UKSC – ICC arbitration with seat in Paris between a Saudi company and the Government of Pakistan

  – arbitration agreement expressed to be made and signed on behalf of Dallah and Awami Hajj Trust (the trust)

  – the trust was set up by the Government of Pakistan but ceased to exist because the Government let the secondary legislation whereby the trust had been established lapse

  – the Government did not take part in the arbitration and maintained its objection to the jurisdiction throughout

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Validity

- The law governing the arbitration agreement was French law as the law of the country were the award was made
- The test in French law is the 'common intention' of the parties (including the party who is alleged to be bound by the arbitration agreement), whether express or implied, to be ascertained based on all relevant circumstances, including the negotiation, performance, and termination of the contract

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Validity

Lord Mance JSC – full judicial determination

– irrelevant that the party did not challenged the award in France – this raises no issue estoppel

– tribunal's own view 'has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all'

– note para 24: it is possible for the parties to submit to arbitration the very issue of arbitrability but this 'involves specific agreement' - what does this mean? If the parties did not agree to arbitration, then no agreement is conceivable but if they did, could they then limit the review of the court under s 67? Also, could there be a separate valid arbitration agreement A on the validity of another arbitration agreement B? Would then the issue of jurisdiction in relation to agreement B become a issue of substance in the arbitration based on agreement A?

– the conduct of the Government during the negotiation of the contract and thereafter, in particular after the demise of the trust, did not reveal an intention to be bound by the arbitration agreement between Dallah and the trust

– not right to exercise the discretion to enforce when there is no valid arbitration agreement absent a new agreement or estoppel ('may' in s 103((2) of the AA96 and Art V(1) of the NYC)

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Validity

Lord Collins JSC – para 84: distinguish between Kompetenz-Kompetenz and the power and standard of review by a court but note that Kompetenz-Kompetenz is described as 'a general principle of law'

– but what is the standard of review?

– review on the merits: paras 100 - 104

– unless ruling by the court at the seat gives rise to issue estoppel (obiter)

– see para 99 for Dallah's arguments as to why the court's review should be more limited

– when the NYC refers to the law of the country where the award was made as the law applicable to the arbitration agreement, the reference was to the substantive law of that country not to its conflict of laws rules

– Art V of the NYC provides for a discretion to enforce notwithstanding a ground for refusal has been established but the discretion must be exercised consistently with the principles underpinning the Convention

– see the application of these principles to the facts at paras 132 – 147

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Procedural challenges

- No proper notice of the proceedings or inability to present own case
- Arbitrators acted beyond their jurisdiction
- Composition of the tribunal or procedure not in accordance with the agreement of the parties or, in the absence of such an agreement, with the law of the country where the arbitration took place

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Inability to present case

- Minmetals Germany Gmbh v Ferco Steel Ltd [1999] 1 All ER (Comm) 315
  - – Ferco argued that it had not been able to present its case in a CIETAC arbitration
  - – the award would be enforced
  - – if party has an opportunity to present its case but does not do so, there is no ground for refusing to enforce an award
  - – deference should be given to the supervisory court's decision that there had been no procedural irregularity

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Arbitration not in accordance with agreed procedure

• China Agribusiness Development Corporation v Balli Trading [1998] 2 Lloyd's Rep 76

– agreement to arbitrate under the provisional rules of the Foreign Trade Arbitration Commission (FTAC)

– the FTAC ceased to exist and the arbitration was conducted under the rules of CIETAC

– the award would be enforced

– the agreement was an agreement to arbitrate in the PRC under the rules of the arbitration institution in force for the time being

– the degree of prejudice to the party opposing enforcement was material to the exercise of the court's discretion to enforce the award even if a ground for refusal is established. The award would be enforced because the prejudice to the applicant was insubstantial

– the argument had been raised by the party at a very late stage thus depriving the claimant of the opportunity to consider what alternative course might be taken. The court would be slow to deny enforcement when an argument has been 'dreamed up at the door of the cour

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Award not yet binding, suspended or set aside

- Dowans Holdings SA v Tanzania Electric Supply Co Ltd [2011] EWHC 1957 (Comm)

  – whether an award is binding under the New York Convention does not depend on the law of the seat

- Award set aside in country of origin may be enforced

  – Chromally Gas Turbine Corp v Arab Republic of Egypt 939 F Supp 907 (DDC 1996) but see Baker Marine (Nigeria) Ltd v Chevron (Nigeria) Ltd 191 F 3d 194 (2nd Cir 1999)

  – Court de cassation, 23 March 1994, Hilmarton v Omnium de Traitment et de Valorisation (1995) XX YB Comm Arb 663 and Court de Cassation, 10 June 1997, Hilmarton v Omnium de Traitment et de Valorisation (1997) XXII YB Comm Arb 696

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Whose public policy?

- NYC, Art V(2)(b): 'public policy of that state'
- UNCITRAL Model Law, Art 36(1)(b): 'public policy of this state'
- AA96, s 103(3): 'public policy'
- French NCCP, arts 1520 (international commercial arbitration) and 1514 + 1525 (foreign awards): 'international public policy'

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Public policy and mandatory rules

- Adviso NV v Korea Overseas Construction Corp (Korean S Ct, 1996)
  - – enforcement in South Korea of an award rendered in Switzerland opposed on the grounds that
    - limitation period was much longer than under Korean law
    - the tribunal wrongly ruled that the claimant had not assigned its contract and this was a violation of the principle of estoppel under Korean law
    - the claimant blackmailed and exercised undue influence on the defendant
  - – held that public policy is not the same as Korean mandatory rules and only if the concrete outcome of recognizing the award is contrary to 'the good morality and other social order of Korean would recognition be denied on grounds of public policy

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Public policy and national policy

- Parsons & Whittemore Overseas Co v Société Générale de l'Industrie du Papier 508 F2d 969 (2d Cir 1974)

  – Overseas claimed that it could not perform the contract given the hostilities between Egypt and the US

  – the Court held that the NYC should be construed in light of its pro-enforcement bias and, therefore, the public policy exception should be construed narrowly. Enforcement would be denied only when it would violate 'the forum state's most basic notions of morality and justice'

  – public policy is not the same as national policy

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Public policy and the merits of the case

• Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Das Gas Bumi Negara 364 F 3d 274 (5° Cir 2004)

– contract relating to the production and supply of energy between KBC and Pertamina was indefinitely suspended by the Indonesian Government

– arbitral tribunal in Switzerland found in favour of KBC

– Pertamina resisted enforcement in the US on the ground of public policy because: (1) the award effectively sanctioned an abuse of rights; (2) the award penalised obedience to a governmental decree; (3) KBC had not disclosed a political risk insurance policy

– held that the award would be enforced as it did no contravene the 'most basic notions of morality and justice'

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Westacre InvestmentsInc v Jugoimport SPDR Holding Co Ltd [1999] 3 WLR 811, CA

- J, a Yugoslavian state owned company, appealed against an order enforcing a Swiss arbitration award in respect of a contract for the sale of weapons to Kuwait. The contract was governed by Swiss law. Westacre had acted as a consultant for the procurement of the contract. J had contended before both the Swiss Federal Court and the arbitrators that the contract was illegal and unenforceable because of the alleged bribery of Kuwaiti officials
- before the arbitrators, the issue was that the contract was against 'international public policy' or 'bonos mores' because Westacre paid bribes. The tribunal rejected this contention. The award was appealed before the Swiss courts on the grounds that the contract was a vehicle to pay bribes to members of the Kuwaiti government. The Swiss court held that the facts as found by the arbitrators could not be reopened. The case before the English courts was that enforcement should be refused on grounds of public policy because the contract was a vehicle to pay bribes and because the evidence before the arbitrators was perjured and false

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Westacre InvestmentsInc v Jugoimport SPDR Holding Co Ltd [1999] 3 WLR 811, CA

- Waller LJ said that as regards contracts (1) there are some rules of public policy which if infringed will lead to non-enforcement by the English Court whatever their proper law and wherever their place of performance (eg drug trafficking, pedophilia, prostitution) but others are based on considerations which are purely domestic; (2) contracts for the purchase of influence are not of the former category; thus (3) contracts for the purchase of personal influence if to be performed in England would not be enforced as contrary to English domestic public policy; and (4) where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country also that the English Court would not enforce it
- as regards awards, the English court would take cognizance of the fact that the arbitral tribunal did not consider that the underlying contract violated any rule of public policy where the court would deny enforcement whatever the place of performance or the proper law. When it was so, if the contract was not in breach of public policy in the place of performance or under the proper law, the English court would not intervene even if the contract would be contrary to English public policy
- an English court would generally take the facts as established in the award and would take cognizance of the ruling of the arbitrators
- the court could reopen the facts after a preliminary inquiry: the integrity of the system must prevail over finality

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Westacre InvestmentsInc v Jugoimport SPDR Holding Co Ltd [1999] 3 WLR 811, CA

Mantell LJ, Sir David Hirst agreeing, said:

The allegation [of bribery] was made, entertained and rejected. Had it not been rejected the claim would have failed, Swiss and English public policy being indistinguishable in this respect. Authority apart, in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the award.' He went on to say that any preliminary inquiry would lead to the same conclusion because 1) there was evidence before the tribunal that this was a straightforward commercial contract; 2) the arbitrators specifically found that the underlying contract was not illegal; 3) there was nothing to suggest incompetence on the part of the arbitrators and there was no reason to suspect bad faith or collusion in the obtaining of the award; 4) the seriousness of the alleged illegality was not a factor to be considered at the stage of deciding whether or not to mount a full scale inquiry

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Soleimany v Soleimany [1998] 3 WLR 811, CA

- Contract for smuggling carpets out of Iran
- Arbitral tribunal found that the contract wasmillegal but awarded damages for its breach as permitted by the proper law
- CA denied enforcement
  - how can Soleimany be distinguished from Westacre?

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Omnium de Traitment et de Valorisation v Hilmarton [1999] 2 Lloyd's Rep 222

- OTV appointed Hilmarton to be the consultant in relation to a project involving the design and completion of the various stages of the drainage project for the town of Algiers. OTV only paid Hilmarton half the agreed fees. The contract was governed by Swiss law and provided for ICC arbitration. Hilmarton brought arbitral proceedings. The arbitrator held that the work performed by Hilmarton with OTV's agreement consisted of approaching public servants and Algerian government officials to obtain the public contract. Such activity 'wittingly' breached an Algerian statute which prohibited the intervention of a middleman in connection with any public contract or agreement within the ambit of foreign trade. This activity did not however involve any bribery or other similar corrupt activity and as a matter of Swiss law the agreement, albeit that it breached Algerian law, was not unlawful
- Timothy Walker J held that in the absence of a finding of corruption or bribery, the award would be enforced and whether or not English law would have arrived at a different conclusion was irrelevant
- *On the Soleimany point, Timothy Walker J said*

  In that case it was apparent from the face of the award that the arbitrator was dealing with an illicit enterprise for smuggling carpets out of Iran. It was quite simply a smuggling contract. The case thus clearly fell into the category of cases where as a matter of public policy no award would be enforced by an English Court, and the whole of the judgment of the Court of Appeal has to be read in that context. The element of corruption or illicit practice was present whic

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Stays under Art VI NYC

- Dowans Holdings SA v Tanzania Electric Supply Co Ltd [2011] EWHC 1957 (Comm)

  – whether the English courts would stay enforcement pending a challenge of the award before a competent authority in the country of which, or under the law of which, the award was made depends on whether the challenge has a real prospect of success

  – whether a stay would be conditional upon security being given by the party resisting enforcement depends on: a) the probability that the challenge would succeed; b) potential delay in pursuing the challenge; c) the likely duration of the proceedings; d) the risk of enforcement being made more difficult if enforcement was delayed

Grounds for refusal (Tenfiz Engelleri) NYC Article V / NYK Madde V

Key issues

- Light burden on applicant
- Burden of proof lies on party opposing enforcement
- Different approach depending on whether the issue is one of jurisdiction or relates to other matters
- Narrow approach to public policy

İkili veya Çok Taraflı Sözleşmelerin Hükümlerinin Mahfuz Olması

NYK Madde VII

1. İşbu sözleşme hükümleri, âkit devletler arasında akdedilmiş hakem kararlarının tanınması veya icrasına dair, iki yahut çok taraflı sözleşmelerin muteberliğine halel getirmez ye ilgili taraflardan hiçbirini, bir hakem kararından, bunun dermeyan edildiği memleketin kanun ve sözleşmeleri hükümleri dairesinde faydalanmak imkânından mahrum kılmaz.

2. Hakemlik şartlarına dair 1923 tarihli Cenevre protokolü ile yabana hakem kararlarının icrasına dair 1927 tarihli Cenevre Sözleşmesi, âkit devletler işbu sözleşme gereğince birbirine karşı bağlandıkları andan itibaren ve bağlılıkları nispetinde, yürürlüklerini kaybederler.