Judicial Intervention and Assistance of Court in International Arbitration in Turkey and China

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I. Introduction

Court assistance and court intervention in arbitration proceedings are major problems of international commercial arbitration. Since arbitration has been accepted as an alternative dispute resolution mechanism in international commercial transactions, the limits and powers of arbitrators have always been subject to serious discussions. In the discussions regarding the limits and powers of arbitrators, court assistance and court intervention have always been hot subjects. Especially in states where international arbitration has been codified recently. In such states, in case of doubt, judges tend to use their discretion against arbitration.

In this context, three matters can be distinguished: *i-* the power to decide its own jurisdiction *ii-* interim measures *iii-* the appointment of arbitrators. When we examine Turkey and China, it is clearly noticeable that state courts play an important role in arbitration processes in both countries. This role can be complementary and sometimes interventionist at different stages of the arbitration process. The courts can react either by request from any of the parties or upon the initiative of the arbitral tribunal. But we also see an almost unique system in both of these countries.

The competence-competence doctrine does not exist in Chinese arbitration legislation and practice[1]. Jurisdiction to rule on interim measures is within the competence of Chinese courts. Furthermore, with regards to the appointment of arbitrators, the parties' freedom of choice is limited.

In Turkey, the intervention of courts are dominant but controversially the duty of courts on assistance is arbitration friendly beyond the expectation. The competence-competence doctrine is generally accepted in Turkish

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[1] KUN, F.: Arbitration in China: *Practice, Legal Obstacles and Reforms*, ICC Bulletin, Vol. 19, No. 2-2008, p. 27 (25-40).

arbitration legislation. Regarding the interim measures, Turkish State courts are empowered to decide before or during the arbitral proceeding when a party or arbitrator so requests. The courts will appoint the arbitrator if there is a dispute among the parties regarding such an appointment.

II. Competence-Competence

The doctrine of competence-competence means, the jurisdiction of arbitrators to determine their own jurisdiction.

As a presumption, it is generally accepted that (in accordance with the doctrine of competence-competence) an arbitral tribunal has the power to decide on its own jurisdiction[2]. For example, Article 16 of the UNCITRAL Model Law on International Commercial Arbitration provides that: "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

Despite the general conviction, competence-competence is not a generally accepted doctrine world-wide. Competence-competence doctrine is applicable when the challenges against jurisdiction are made to an arbitral tribunal or institution. There are two systems regarding objections made before the courts[3].

In the first system, if one party brings the case to the courts rather than to an arbitral tribunal and the other party has an arbitration objection, the court will refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. In this system, the courts have the sole jurisdiction and decide the existence and validity of the arbitration agreement in the pre-arbitral stage. Controversially, if the arbitration trial has already commenced, the arbitrators have the sole jurisdiction to rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The first system has been adopted by Germany, Austria, Norway, some Canadian Provinces, Holland and England (if otherwise not decided by the parties).

The second system accepts the arbitrators' power to decide about their own jurisdiction without any condition or exceptions. This system is accepted by arbitration friendly states. In these states, courts refer the parties

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[2] LEAHY, E.R./Bianchi,C.J.; the Changing Face of International Arbitration, Journal of International Arbitration, Vol. 19, No. 4, 2000, p. 20.

[3] ESEN, E.: Uluslararası Tahkime Tabi Bir Uyuşmazlığın Devlet Mahkemelerine Götürülmesi Halinde Tahkim Anlaşmasının Geçerliliğine İlişkin İtirazların İncelenmesi ve Kompetenz-Kompetenz Prensibi, Prof. Dr. Ata Sakmar'a Armağan, Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, 2011, pp. 364-371.

directly to the arbitral tribunal even if the arbitration trial has not commenced. The absolute power of the arbitrators to decide their jurisdiction, including the existence and validity of the arbitration agreement, is accepted by the USA, Switzerland, France, Hong Kong and some Latin American States. As a principle, in these states, the courts control the decision only in set aside actions.

A- Chinese Arbitration Law and Practice

The competence-competence doctrine is not accepted in arbitration legislation and practice in China. The power to decide on jurisdiction lies not with the arbitral tribunals but with the courts and the arbitration institutions.

1) Jurisdiction Objection; Court vs. Arbitration Institution

Article 20 of the Arbitration Law suggests that the jurisdiction of the People's Court takes precedence over that of the arbitration institution when one party asks the People's Court to rule on the validity of their arbitration agreement.

According to the Supreme People's Court Notice of 1998, in case the challenges against jurisdiction are made both to the court and to the institution, the People's Court shall not accept the case if the arbitration institution has already decided the matter. However, if the arbitration institution has not yet made a decision, the People's Court should accept the case and instruct the institution to suspend the arbitration[4].

On the other hand if arbitration institution has accepted the application and rendered a decision on the validity of an arbitration agreement, no applications can be made to the People's Court for a ruling on the validity of the arbitration agreement or for the institution's decision to be set aside. The court's involvement is not by way of judicial review after the arbitral tribunal has made its decision, but through direct intervention when the challenge is made, provided that no decision has yet been made by the arbitration institution[5].

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[4] Article 14 of the Arbitration Law provides that arbitration institutions shall be "independent of administrative organs and there shall be no relationship of subordination between arbitration institutions and administrative organs. There shall also be no relationship of subordination between arbitration institutions."
Article 19 of the Arbitration Law provides that "the arbitration agreement exists independently, and its validity is not affected by the revision, avoidance, termination or invalidity of the main contract."

[5] TAO, J.: *Arbitration Law and Practice in China*, 2. Edt., Kluwer Law International, p. 73.

This approach has caused concern in jurisprudence, in so far as it may lead to the removal of the competence-competence principle in Chinese arbitration law and practice[6].

B) Jurisdiction Objection: Arbitration Institution vs. Arbitral Tribunal

A related issue that deserves attention is the power of arbitration institutions to rule on arbitral jurisdiction.

Arbitration institutions are generally regarded as having different functions in this regard. For example under the current Rules, where a party raises a jurisdictional challenge, the ICC Court of International Arbitration only makes a *prima facie* decision on the challenge in that respect and leave the final decision to the arbitral tribunal whether the arbitration agreement is valid and whether the objection against the arbitral jurisdiction is justified.

In China, until 1 March 2012, only the arbitration institution is authorized to rule on jurisdiction. However, in this period, CIETAC will issue a preliminary ruling on jurisdiction based on a *prima facie* assessment. But if the tribunal and the institution have been inconsistent with the jurisdictional objection, then the arbitrator may have no choice but to abide by the decision. This regulation opened the door to delaying tactics and impaired the efficiency of the arbitration in the past and hardly criticized by practitioners[7].

The new arbitration rules provide that CIETAC can delegate its power over jurisdiction to the arbitral tribunal, although it remains unclear as to when and in what circumstances, CIETAC will do so.

TURKEY

The competence-competence doctrine is generally accepted in Turkish arbitration legislation.

Under Article 7(h) of the Turkish IAL (International Arbitration Law), arbitrators may rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The doctrine of competence-competence is largely based on Article 7.

However, Article 5 stipulates a different approach to the issue. According to this provision, the reply to a jurisdiction objection and the disputes concerning the validity of an arbitration agreement are subject to the provi-

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6 KUN, p. 28.
7 *ibid,* p. 28.

sions of Civil Procedure Code concerning initial objections. If such objections are accepted, the court dismisses the action on procedural grounds.

Turkish jurisprudence provides the following commentary:

If the case is brought to a court in a pre-arbitration stage, the judge will have the jurisdiction over whether the dispute can be submitted to arbitration and whether the arbitration agreement is valid[8].

If the case is brought to the court during an arbitration process, then the judge lacks jurisdiction for review in accordance with Art. 7 of IAL. Despite its jurisdiction, the court must content itself with a prima facie examination[9].

In my opinion, when we consider the special provision of Art. 5, we see that it is a procedural rule and it deters judges from ruling on the jurisdiction and validity of the arbitration agreement. The rule clearly varies from Art. 8 of UNCITRAL Model Law. The legislature made this unique structure with the purpose of creating an arbitration friendly environment.

The Turkish Supreme Court has opinion that the validity of arbitration agreements contested in a pre-arbitration stage, challenges against the validity of arbitration agreement should be brought before the arbitrators first. In a case where a party contested an arbitration agreement that had been made under the IAL in court, the court of first instance ruled the arbitration clause to be invalid. The Supreme Court of reversed the decision, holding that[10]:

"*In a matter falling within the scope of international arbitration, the power to decide on whether the dispute can be submitted to arbitration or not and whether the arbitration agreement is valid or not is left to the arbitrators. This objection should be raised in the first statement of defence, at the latest, in the arbitral proceedings. This objection will be examined primarily by the arbitrators and, provided the arbitrators decide that they have jurisdiction, the judgment will proceed. Where the dispute is decided on the merits and an action for set aside is filed, this question will be considered by the court as a reason for set aside. If the arbitrators determine they do not have jurisdiction, they will dismiss the claim on the grounds of lack of jurisdiction. Under these circumstances, it is clear that in the pending dispute, at this stage the court lacks of jurisdiction for review in accordance with Article 519 of the Code of Civil Procedure*."

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8 AKINCI, Z.: *Milletlerarası Tahkim*, Ankara 2007, 2. Bası, p. 98.
9 ESEN, s. 377.
10 Supreme Court 15. Law Circuit, Decision No. 2007/4389, 27.6.2007 (www.kazanci.com).

Considering the Supreme Court's decision and Turkey's desire to go beyond the Model Law in supporting arbitration, courts shall, at the preliminary request of a party, refer the parties to arbitration. This may occur even before the commencement of arbitration if the parties have a written agreement within the meaning of ART. 4 . Turkish courts can review the jurisdiction and the validity challenges only in set aside actions after the arbitral decision.

III. Interim Measures

A- China

There are two main kinds of interim measures of protection under Chinese law: (1) those for the preservation of property (Article 28) and (2) those for the preservation of evidence (Article 46). The purpose of the first kind of measures generally relates to the ultimate execution and satisfaction of the final award on the merits of the case yet to be made.

Interim measures prescribed in Chapter IV.A of the UNCITRAL Model Law (2006 amendment) do not find their counterparts in current Chinese law. According to the current law and practice in China, the arbitral tribunal has no power to grant interim measures.

Pursuant to Art. 28 and 46 of the Arbitration Law, arbitral tribunals in China have no jurisdiction to order interim measures of protection. If a party applies for such measures to be taken, the arbitration institution shall submit the application to the court in accordance with the relevant provisions of the Civil Procedure Law[11].

The competent court for handling an application for the preservation of property in a domestic arbitration case will be the basic People's Court in whose jurisdiction the domicile of the party against whom such measure is petitioned is located or the property concerned is located. In a foreign-related arbitration case, the competent court is the relevant intermediate people's court instead of the basic people's court[12].

B- Turkey

As with the Model Law, parties in Turkey can apply either to an arbitral tribunal or a court for interim measures of protection.

Despite the limitations on arbitrability in art. 2, no restrictions are placed on the interim measures that can be granted by a tribunal. The two

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[11] LU, S.: *The People's Republic Of China* (National Report), Yearbook of ICCA, 2008, p. 6.
[12] *ibid.* p. 32 et al.

main restrictions on the arbitration of interim measures are the subject-matter of the interim measure and interim measures against the third parties.

At first sight, the provisions for interim measures adopted in Turkish International Arbitration Law seem to create an effective arbitral system.

However, the provision of the second paragraph of Art. 6 totally razes this impression. Under this provision, if a party does not comply with the decision, the arbitral tribunal has no power to grant interim measures or attachments which require enforcement by execution offices or other official authorities. Therefore, the counterparty must request the assistance of a competent court for the execution of the interim measure or attachment. However, despite the wording of Art. 6, arbitrators have no jurisdiction to decide any attachments.

IV. Appointment of Arbitrators

A- China

In China, the parties' freedom of choice is limited when it comes to choosing arbitrators. Article 13 of the Arbitration Law requires each arbitration institution to draw up a panel of arbitrators by profession. This requirement is generally seen as creating a compulsory panel system in China.

At the present time, there are more than 185 arbitration institutions in China, each of which maintains its own list of arbitrators. Only those arbitrators whose names appear on the list of a given institution are eligible to be appointed as arbitrators by that institution[13].

According to the arbitration law, where the parties concerned fail to decide upon the composition of the arbitration tribunal or fail to choose the arbitrator within the time limit prescribed by the arbitration rules, the chairperson of the arbitration commission shall make the decision.

Under CIETAC arbitration rules, arbitrators appointed to act in CIETAC arbitrations–wherever they take place in China–must be selected from the CITEAC list unless the parties agree otherwise, in which case the appointment must be approved by the chairman of CIETAC.

[13] KUN, p. 39.

B- Turkey

Essentially, the parties are free to agree on an appointing procedure, but if none is determined, a proceeding shall have either one or three arbitrators. If appointments are not made in such time, a court will make the appointment unless the parties have agreed upon another procedure for such appointment.

In Turkish law the matter of appointment is closely connected with public policy. In this respect, the equality of parties in the appointment process is an essential concern of Turkish courts in set aside and execution cases.

Conclusion

With the absence of competence-competence doctrine, lack of jurisdiction of arbitrators to order the interim measures and limited freedom on choosing of arbitrators, China seems to be an unfriendly environment for commercial arbitrations. Despite the extensive interventionist approaches of Chinese courts in commencing arbitrations, Chinese Arbitration Law stipulates a very limited set aside reasons in art. 58, when compared to Turkish law. With this approach, China offers the parties more predictability on fate of their arbitration decision.

On the other hand the Turkish IAL (with less judicial intervention and more assistance of courts) seems to promise a convenient arbitration system to the practitioners. However the state courts of Turkey don't seize the same approach with the legislator and display a different attitude in the set aside proceedings. There is a great tendency of Turkish courts to interpret the set aside reasons set forth by art. 15 of Turkish IAL.

Today China tries to create a more liberal arbitration environment with the new CIATAC rules and preparatory of a new arbitration law. However the experience of Turkey shows that, regardless of the legislation, the courts shall have the last word.