The Principle of Separability and Competence – Competence in Turkish Civil Procedure Code No. 6100

Assoc. Prof. Dr. Seda Özmumcu*

I. Introduction

As a general principle, the authority to adjudicate is matter entrusted to state courts by constitutions. However, in private law, parties to a dispute may elect to resolve their dispute by arbitration, provided that the subject matter of the dispute is considered an arbitrable dispute by the related applicable law. Therefore arbitration is deemed to be an exception to state courts' constitutional power to adjudicate disputes. Since private law is based on the supremacy of the will of parties the dispute between parties may ve resolved by arbitrators appointed by them if and when parites execute an arbitration agreement. A person who is appointed by parties to resolve a dispute is called an "arbitrator".[1]

Arbitration is a dispute resolution mechanism through which, a legal dispute which is based on a contractual or non-contractual relationship, is resolved by arbitrators according to the parties' agreement. In other words, through arbitration, a dispute which is normally resolved in a court of law, is resolved by an arbitrator instead.[2]

---

* Associate Professor at Istanbul University Law School, Department of Civil Procedural Law and Execution and Bankruptcy Law.

1 **Hakan Pekcanıtez/Oğuz Atalay/ Muharrem Özekes, Medeni Usul Hukuku, 14. Ed., Ankara, 2013** p.1064.

2 **H.Yavuz Alangoya/ M. Kamil Yıldırım/Nevhis-Deren Yıldırım, Medeni Usul Hukuku Esasları, Ed. 7, İstanbul, 2009,** p. 595.

Provisions which regulate arbitration are generally located in the codes of civil procedure. In particular, the provisions regulating arbitrations which has a seat in Turkey are domestic arbitration provisions. These provisions also are blocking the road to the state courtsIn this context, arbitration is a method of alternative dispute resolution.

There are two types of arbitration, which are compulsory arbitration and voluntary arbitration. However, except for compulsory arbitration, arbitration is usually considered to be a voluntary procedure.[3]

Although there are similarities between arbitration and litigation, there are many points which are different. First, parties to litigation can not choose the judge. In contrast, parties to an arbitration can choose the arbitrator or arbitrators because arbitration procedure gives the parties the right to resort to arbitration and the right to choose arbitrators.[4] Second, in litigation, parties do not have the authority to determine the applicable procedure. To the contrary, in arbitration proceedings, parties may agree on the applicable procedure. Third, in litigation, the rules of substantive law, which will be applied, are predetermined. In contrast, parties to in arbitration, may freely choose the rules of substantive law.[5]

---

[3] **Yavuz Alangoya, Medeni Usul Hukukumuzda Tahkimin Niteliğive Denetlenmesi, İstanbul, 1973,** pp. 2-3; **Necip Bilge/ Ergun Önen, Medeni Yargılama Hukuku Dersleri, Ankara, 1978**, p.743; **M. Serhat Sarısözen, Medeni Usul Hukukunda Hakem Yargılaması, İstanbul, 2005,** s. 18; **Alim Taşkın, Hakem Sözleşmesi, Ankara, 2005,** pp.5-7; **Selçuk Öztek, Ulusal Tahkimde Uygulanacak Yargılama Usulü, II. Uluslararası Özel Hukuk Sempozyumu "Tahkim", 14 Şubat 2009, Konuşmalar - Tartışmalar – Bildiriler, 2009, İstanbul, (pp.339-358)**, p.339; **Mehmet Sarı, Tahkime Elverişlilik, Terazi Hukuk Dergisi, Vol. 32, 2009, (pp.145-174),** p.148; **Abdurrahim Karslı, Medeni Muhakeme Hukuku, Ed. 3, İstanbul, 2012,** p. 905; **Cengiz Serhat Konuralp, Alternatif Uyuşmazlık Çözüm Yolları: Takim, İstanbul, 2011**, p. 136. (Unpublished Phd).

[4] Pekcanıtez/Atalay/ Özekes, p. 1064.

[5] Pekcanıtez/Atalay/ Özekes, p. 1065.

II. The Legal Nature of Arbitration Agreement

Regarding the legal nature of the arbitration agreement, the doctrine suggests different opinions. Under Turkish law, there is no consensus on the legal nature of the arbitration agreement.[6]

One approach adopted by some scholars suggests that, an arbitration agreement is a contract of substantive law. According to this approach, the legal relationship between the parties to a dispute emerges in the field of substantive law. Arbitration is a private law agreement and in accordance with the provisions of that agreement parties express their will.[7]

According to another approach[8] an arbitration agreement is a contract relating to procedural law sinceprocedural aspects such as appointment of arbitrators, gathering and submission of evidence are demonstrated are regulated procedural law and this is constitutes the procedural aspect of the arbitration contract. In this manner, in the opinion of the

---

[6] **Cevdet Yavuz, Türk Hukukunda Tahkim Sözleşmesi ve Tabi Olduğu Hükümler, Ulusal Tahkimde Uygulanacak Yargılama Usulü, II. Uluslararası Özel Hukuk Sempozyumu "Tahkim", 14 Şubat 2009, Konuşmalar - Tartışmalar – Bildiriler, 2009, İstanbul, (pp.133-177),** p.140; **Erol Ertekin/İzzet Karataş, Uygulamada İhtiyari Tahkim ve Yabancı Hakem Kararlarının Tenfizi Tanınması, Ankara, 1997,** p.31; Pekcanıtez/Atalay/Özekes, p.1065.

[7] Alangoya**,** pp.42-46; **Rasih Yeğengil, Tahkim (L'ARBİTRAGE), İstanbul, 1974,** pp. 109-110; **Bilge/Önen,** pp. 745-746; **Turgut Kalpsüz, Hakem Kararlarının Milliyeti, Banka ve Ticaret Hukuku Dergisi, Vol. IX, 1978, (pp.601-633),** pp.603-604; **İzzet Karataş, Uygulamada İhtiyari Tahkim, Turhan Kitabevi, Ankara, 1999,** p.17; **Baki Kuru, Hukuk Muhakemeleri Usulü, Ed. 6, Vol. VI, İstanbul, 2001,** p. 5937-5938; Sarısözen, pp. 7-8; Taşkın, pp.15-16; Ertekin/Ertaş, p.32; Sarı, pp.149-150; Yavuz, p.142; Konuralp, pp. 153-154; **Bilge Umar, Hukuk Muhakemeleri Kanunu Şerhi, Ankara, 2011,** sp.1139; Pekcanıtez/ Atalay/Özekes, pp.1065-1066.

[8] Alangoya, pp. 52, 63-64; **Saim Üstündağ, Yargılama Hukuku, Vol. I-II, Ed. 7, İstanbul, 2000,** pp. 934-935; Yeğengil, pp. 107-108; Sarısözen, pp. 5-7; Taşkın, pp. 16-20; **Turgut Kalpsüz, Hakem Kararlarının Milliyeti, Banka ve Ticaret Hukuku Dergisi, Vol. IX, 1978, (pp.601-633),** pp. 604-605; Ertekin/Karataş, p.32; Kuru, p.5937; **Nevhis Deren- Yıldırım, Tahkim ve Objektif Açıdan Tahkime Elverişlilik, Prof. Dr. Yavuz Alangoya için Armağan, İstanbul, 2007 (pp.47-61),** pp.48-49,60-61; Yavuz, pp. 142-143; Konuralp, p. 154; **Meral Sungurtekin- Özkan, Türk Medeni Yargılama Hukuku, İzmir, 2013**, p.407; Pekcanıtez/Atalay/Özekes, pp.1065-1066.

Court of Appeal's, the arbitration agreement is a contract of procedural law.[9]

Finally, a third approach suggest that ,[10] an arbitration agreement is a product of both procedural law and substantive law and that is why it has a mixed character . The formation of an arbitration agreement by the free will of the parties shows the substantive law element of this contract, while the fact that the implementation of the arbitration agreement leads to some consequences which are entirely related to procedural law, which demonstrates the procedural law element of this contract. According to the mixed contract approach, both approaches which considers an arbitration agreement as procedural or substantive contact are by inadequate in explaining the legal nature of arbitration. Therefore, on the basis that the arbitration agreement encompasses both law elements, it should be considered as a single legal transaction in its entirety.

The effects and consequences of the arbitration agreement in the field of procedural law is evident. For this reason, the nature of abitration agreements is procedural. An arbitration agreement has two important effects. The first of these is the positive impact that allows for a decision by anarbitrator, while the other is the negative effect that limits the parties' right to apply to state courts.

III. Seperability of Arbitration Agreements

An arbitration agreement between the parties is seprable from the main contract. The arbitration agreement, as a rule is a procedural law contract. In contrast, the main contract is a substantive law contract. These two contracts are different from each other. Therefore, the fate of an arbitration agreement is not tied to the fate of main contract. At the same time, the fate of main contract does not depend on the fate of the arbitration agreement. For this reason, the validity of both agreements

[9] Pekcanıtez/ Atalay/ Özekes, p. 1066. HGK. 19.03.2003, 15-142/182 (Manisa BD. 2004/4, pp.94-99).

[10] Alangoya, pp. 47-49; Yeğengil, pp. 113-114; Sarısözen, pp.8-9; Taşkın, p. 20; Sarı, p.150; Yavuz, pp. 143-144; Konuralp, pp. 154- 155; Pekcanıtez/ Atalay/ Özekes, p. 1066.

should be examined separately. This principle in the field of arbitration law is called " *the principle of separability* ".[11] [12] This principle means that the arbitration clause as an agreement is independent of the main contract.[13]

However, both the main contract and the arbitration agreement may be invalid. For example, a lack of intent to a contract can affect both the main contract and the arbitration agreement at the same time. Therefore lack of intent to execute the main contract does not necessarily result with invalidity of arbitration agreement.[14]

IV. Competence-Competence in Civil Procedure Law

"The rule of competence-competence is an important and widely accepted feature of modern arbitration law. This rule denotes the power of the arbitral tribunal to determine its own jurisdiction, which includes

---

[11] **Turgut Kalpsüz, Tahkim Anlaşması, Ünal Tekinalp'e Armağan, Vol. II, İstanbul, 2003, (pp.1027-1053),** s. 1041; **Nevhis Deren-Yıldırım, UNCITRAL Model Kanunu ve Milletlerarası Tahkim Kanunu Çerçevesinde Milletlerarası Tahkimin Esaslı Sorunları, İstanbul, 2004,** p.51 n. 192; Alangoya/Yıldırım/ Deren-Yıldırım, p.604; Karslı, pp. 913 – 915 and n.1623; **Altan Fahri Gülerci, Separability of the Arbitration Agreement in International Arbiration, Ankarabarreview, Vol.1, Issue 1, Ankara, 2008, (pp. 108-114),** pp.108-109;**Ayşe Nurşen Yamantürk, Uygulanabilir Tahkim Anlaşmalarının Kurulması,** (http:// www.tahkim net/ makaleler uygulanabilir tahkim anlaşması kurulması (erişim tarihi 26.04.2014). See also Karslı, p.915, n.1624; **Hossein Fazilatfar, Characterizing International Arbitration Agreements as Truly Separable Cluses, 10 (1) Rudgers Conf. Res. L.J., 2012, (pp.1-16),** (http://ssrn.com/abstract = 2397321), p. 2-4.

[12] The doctrin of separability.

[13] Kalpsüz (Tahkim), pp.1041-1045. Deren-Yıldırım, pp. 51-53; **Gino Lörcher, Yeni Alman Tahkim Kanunu (Trans. : İbrahim Özbay/Zekerriya Arı), SÜHFD. Vol.9, No.3-4, Konya, 2001, (pp.29-40),** p. 32; **Jack M. Graves/ Yelena Davyden, " Competence – Competence and Separability American Style ", 2011 (pp. 157-178),** p.157, (http://digitalcommons.tourolaw.edu/scholarlyworks). (erişim tarihi 26.04.2014). See also: **John J. Barcelo' III, Who Decides the Arbitrators' Jurisdiction? Separability and Competence – Competence in Transnational Perspective, Vanderbilt Journal of Transnational Law, Vo.36, 2003, (pp.1115-1136),** p.1116; Pekcanıtez/Atalay/ Özekes, p.1076.

[14] Üstündağ, pp.946-947; Kalpsüz (Tahkim), p.1044.

the jurisdiction to evaluateany objections with respect to the existence or validity of the arbitration agreement. This is a statutory power conferred to arbitrators and it is ultimately subject to court control." [15]

1. Comparison Between The Principle of Separability and Competence-Competence

"The principle of separability and competence-competence are associated with each other. However, they are not the same. The concept of separability means that the validity of the arbitration clause does not depend on the validity of the other parts of the contract in which it is contained." [16] "As long as the arbitration clause itself is validly entered into by the parties and worded sufficiently broad to cover non-contractual disputes, an arbitrator may declare a contract invalid but still retain jurisdiction to decide a dispute as to the consequences of the invalidity." [17] Arbitration agreements are distinct from the main contract; separability rescues many arbitration agreements from failing simply because they are contained in contracts of which the validity is questioned.[18] Competence-competence picks up where separability ends. This principle has two aspects. First, it means that arbitrators are the judges of their own jurisdiction and have the right to rule on their own competence. Therefore, if the validity of the arbitration agreement itself and thus the competence of the arbitrator is impugned, arbitrator does not have to stop proceedings but can continue the arbitration and consider whether he has jurisdiction. Second, anarbitration agreement limits the jurisdiction

---

[15] Fazilatfar, pp. 4-5; **Vaishnavi Chillakuru, The Rule of Competence – Competence : A Comparative Analysis of Indian and English Law, Comtemporary Asia Arbitration Journal, 2013, (pp. 133-151),** p. 135.

[16] **Jack Lee Tsen Ta, Separability, Comepetence-Competence and The Arbitrator's Jurisdiction in Singapore, S.Ac.L.J. 1995, (pp.421-437),** p.421. See also Deren-Yıldırım (Milletlerarası Tahkim), p. 51, 71.

[17] **Marcus S Jacobs, "The Separability of the Arbitration Clause: Has the Principle Been Finally Accepted in Australia?" ALJ , Vol. 68, 1994** p. 629; Tsen Ta, p. 421.

[18] Tsen Ta, p. 421.

of state courts. If the prima facie existence of the arbitration agreement is objected to, a court must refer the dispute to arbitration.[19]

2. The Dual Effect of Competence-Competence in Civil Procedure Law

"There are two effects of the principle of *Competence-Competence,* one positive and one negative. The *positive effect* is to permit arbitral tribunals to rule on their own jurisdiction to hear the dispute. By ruling on the jurisdiction of the tribunal, this *positive effect* sets out a framework of concurrent jurisdiction of courts and arbitral tribunals. The *negative effect* on the other hand is more controversial and rests on the notion that the arbitral tribunal should have a chronological priority to rule on its jurisdiction before the courts do".[20] "The *negative effect* thereby restricts the function of the courts in order to provide the tribunal with the first opportunity to determine its own jurisdiction and the validity of the arbitration agreement. In this manner, the *negative effect* bars a court from reviewing the merits of the dispute when deciding on the existence or validity of the arbitration agreement prior to the arbitral tribunal." [21] According to the *negative effect,* a state court may review the jurisdiction of a tribunal only at the enforcement stage. Such prioritisation of tribunals over state courts concerning the review of validity is an essential feature of the *negative effect.*[22] In this regards, the basis of the principle of competence–competence is the intention of the parties to grant the arbitrators authority to determine every issue related to their dispute, including

---

[19] Tsen Ta, p. 420- 421.

[20] **Emmanuel Gaillard/ Yas Banifatemi, Negative Effect of Competence – Competence : The Rule of Priority of Arbitrators, 2002, (pp.257-273), (17 (1) Mealy's International Arbitration Report 27),** pp.258-259; **Ozlem Susler, The English Approach to Competence-Competence Pepperdine Dispute Resolution Law Journal, 2013, Vol. 13, (pp. 427-452)**, p. 427. **Amokura Kawharu, Arbitral Jurisdiction, New Zealand Universities Law Review, Vol. 23, 2008, (pp. 238- 262),** pp. 238-239, 243-244.

[21] Gaillard/Banifatemi, pp.259-260; Susler, p. 427; Kawharu, pp. 238-239, 243-244.

[22] Alangoya, p. 70; Kawharu, pp. 243- 244; Susler, p. 428.

questions of jurisdiction.[23] Starting from this point, in order to give full efficacy to the *negative effect,* priority must be given to the arbitral tribunal if the same subject matter is pending in court.[24] However, the court should refrain from intervening until the tribunal issues a jurisdictional ruling. The negative effect of the principle of competence–competence does not provide an absolute priority, but a priority for the tribunal to rule on jurisdiction prior to the court. [25]

3. Civil Procedure Code numbered 1086 and Competence -Competence

In Turkish law, the new Code of Civil Procedure numbered 6100 which came into force on 01 October 2011 contains provisions related to domestic arbitration between Articles 407 and 444.

According to the article 519 of the former Turkish Code of Civil Procedure; arbitrators who resolve a dispute between the parties, have not been given the authority to decide on their jurisdiction.[26]

According to one doctrinal approach[27], the authority to adjudicate a dispute is granted to state courts and therefore this power cannot be altered by freedom of contract. Arbitrators are cannot be given to render a final decision on a dispute since, this would be contrary to public policy.[28] The legislature, taking into account the specific purposes of arbitration, allows arbitrators to finally resolve disputes. In this way, the legal protection duty of the courts has been considered as an exception. Therefore the provision of the law, while recognizing this exception, provides some important limitations. However, parties are only free to

---

[23] Kawharu, pp. 243- 244; Susler, p. 428.

[24] Susler, p. 428.

[25] Susler, p. 428.

[26] Alangoya, pp. 150-151; Üstündağ, p.948; **Alim Taşkın, Hakem Mahkemesinin Kendi Yetkisi Hakkında Hüküm Verme Yetkisi, AÜHFD, Vol. 46, No.1-4, Ankara, 1997, (pp.169-183),** p. 171; Kalpsüz (Tahkim) p. 1051; Konuralp, p. 167.

[27] Alangoya, pp. 150-151.

[28] Alangoya, p.151.

submit their disputes to arbitration as long as these disputes are among the matters the fate of which are under their disposal Thus, the state law reveals under what conditions jurisdiction of its courts adjudicating can be limited. Also it is not possible to grant arbitrators the authority to decide on on their own jurisdiction if such determination would result with creating a binding effect state courts. As it is mentioned above, such authority is contrary to public policy.[29]

On the other hand, as judges make decisions on their own jurisdiction, an arbitral tribunal shall also determine the boundary between its authority and that of the state court. In fact, if an arbitral tribunal is not authorized to decide on its jurisdiction, the absolute nature of state court's jurisdiction will be preserved.

UNCITRAL (the United Nations Commission on International Trade Law) adopted UNCITRAL Modal Law on Arbitration in 1985 and in 2006 released a revised version. The Modal Law, in its Article 16, sets forth the Competence-Competence principle:

(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.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

[29] Alangoya, p. 151.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specifi ed in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

In Turkish Law, International Arbitration Law, was adopted on 21 June 2001 by Law No. 4686.[30] Concerning International Arbitration Law in Turkey, the UNCITRAL Model Act has been taken as an example in terms of implementation of the International Arbitration Act.

According to one approach, arbitration held in accordance with the provisions of the Code of Civil Procedure Law No. 1086, was significantly narrowed by the enactment of Law No. 4686. According to Article 7/H of Law No. 4686, "*An arbitrator or the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. In this decision, the arbitration clause contained in a contract, shall be evaluated independently of any other provision.*

The ability of an arbitrator or of the arbitral tribunal to decide on the nullity of the main contract, does not result in a nullity of the arbitration contract itself."

4. The Competence -Competence Principle in Civil Procedure Code numbered 6100

During the period of application of the Code of Civil Procedure No: 1086, serious and significant differences between international arbitration and domestic arbitration provisions were present. However, Code of Civil Procedure No. 6100 contains provisions based on International

[30] Official Gazette No. 24453. For more information see: **Cemal Şanlı, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları, İstanbul, 2013,** pp.260; **Ergin Nomer/Nuray Ekşi / Günseli Öztekin – Gelgel, Milletlerarası Tahkim Hukuku, Cilt I, Mart 2013,** pp. 33.

Arbitration Act No:4686, and International Arbitration Act No:4686 is based on the UNCITRAL Model Law. Under Turkish Law, International Arbitration Law is based the UNCITRAL Model Law. Thus, the difference between the two codes relating to arbitration is resolved.[31]

Under the new Turkish Code of Civil Procedure, the jurisdiction of the arbitrator to decide on their own jurisdiction, is provided in Article 422. Unlike the former Code of Civil Procedure, the new code allows an arbitrator to decide on its own jurisdiction, as provided in Article 422.

Article 422 of the new Procedure Law allows an arbitrator to decide on its own jurisdiction. In the new Procedure Code, in accordance with paragraph 1 of Article 422 the arbitral tribunal, may also decide whether a valid arbitration agreement exists. Thus, in the Code of Civil Procedure, the courts authority to decide on this matter is limited. Therefore an arbitration clause contained in a contractshall be evaluated independently of any other provision. Even if an arbitral tribunal decides that the original contract is null and void, the validity of the arbitration agreement would not automatically be also deemed to null and void.[32]

The Defendant can make an objection to the jurisdiction of t the arbitral tribunal in the reply submission at the latest. If this objection can not be made in the reply petition and arbitral tribunal concludes that the delay is justified, the objections not raised in timely manner may be accepted by the arbitral tribunal.(Art 422/4). Parties might have personally chosen the arbitrators or might have been involved in the selection of arbitrators prior to making an objection. Even in this case, the jurisdiction of the arbitrator or the arbitral tribunal can be objected to (Art 422/2). If the arbitral tribunal has exceeds its authority during the process of arbitration, an objection must be made immediately (Art 422 / 3). If this objection cannot be made in timely manner and if the arbitral tribunal concludes that the delay is justified the tribunal may accept the objection. (Art 422 / 4).

---

[31] Pekcanıtez/Atalay/Özekes, p.1065.

[32] Konuralp, p.168.

An arbitration tribunal will examine and decide on the jurisdiction objection in the form of a preliminary question. If the arbitral tribunal decides that it has a jurisdiction, the tribunal will continue the arbitral proceedings and render an award. (Art 422 /5). If The arbitral tribunal decides that it are not authorized, the tribunal will reject the claim on the basis of lack of jurisdiction. If the defendant, upon finalization of this decision within two weeks brings a lawsuit in court, this proceeding is considered as a continuation of the first case before the arbitration tribunal. If the plaintiff, upon finalization of the rejection of claim does not bring a lawsuit in court within two weeks the case filed in front of the arbitrator shall be considered as void.[33]

V. Legal Regulations in the Field of Comparative Law

Most the legal systems have adopted competence-competence principle..[34] For example German Civil Procedure Law adopted the competence-competence principle in its Article 1040:

§ 1040 The Power of the Tribunal to Rule on its own Jurisdiction,

(1) The arbitral tribunal may rule on its own jurisdiction and in this connection on 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.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers that the party has justified the delay.

[33] Konuralp, p.169.

[34] **Leyla Keser Berber, Hakem Mahkemesinin Yetkisi Hakkında Karar Verme Yetkisi (Kompetenz – Kompetenz), Prof. Dr. İrfan Baştuğ Armağanı, Ankara, 2001, (p.123-138),** pp.126-127; Konuralp, p.167.

(3) If the arbitral tribunal considers that it has jurisdiction, it rules on a plea referred to in subsection 2 of this section in general by means of a preliminary ruling. In this case, any party may request, within one month after having received written notice of that ruling, the court to decide the matter. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

As can be seen from this provision of the Act, the arbitral tribunal has the power to decide on its own jurisdiction. The issue of whether an arbitral tribunal has this authority or not will be determined by the arbitrators. Objections to the arbitrators' jurisdiction should be raised before the defense submission. If objections made after this stage are reasonably justified the arbitral tribunal may allow them. If the arbitral tribunal decides that it has jurisdiction, it will render and interim award on the matter.[35]

In the field of comparative law the power of arbitrators to decide on their own jurisdiction, is also regulated by the Swiss Federal Code of Civil Procedure. Article 359 in the Swiss Federal Law on Civil Procedure is as follows:

"(1) If the validity of the arbitration agreement, its content, its scope or the proper constitution of the arbitral tribunal is challenged before the arbitral tribunal, the tribunal shall decide on its own jurisdiction by way of an interim decision or in the final award on the merits.

(2) An objection to the arbitral tribunal on the grounds of lack of jurisdiction must be raised prior to any defence on the merits."

As can be seen from the above provision, in Swiss law, similar to other legal systems, arbitrators power to decide on their own jurisdiction is adopted.

In Swiss Civil Procedure, in accordance with the principle of separability, the validity of the arbitration agreement cannot be disputed merely on the ground that the main contract (containing the arbitration provi-

[35] Barcelo, p. 1131; Taşkın (Hüküm Verme Yetkisi), pp.175-176; Özbay, pp. 1061-1063; Berber, p. 127; Konuralp, pp.167-168.

sion) is invalid (Art 357/2). "The arbitral tribunal shall also have jurisdiction to decide in an interim or final award on the validity, regarding the scope of the arbitration agreement, or on any other objection aimed at challenging the jurisdiction of the arbitral tribunal. The plea that the arbitral tribunal lacks jurisdiction must in any case be raised prior to any pleadings on the merits." [36]

VI. Conclusion

The concept of separability means that the validity of the arbitration clause does not depend on the validity of the maincontract in which it is contained.

The former Code of Civil Procedure, did not recognize the power of an arbitrator to decide on their own jurisdiction. In contrast, the International Arbitration Act No. 4686, provides that arbitrators have the power to decide on their own jurisdiction. In compliance with the Internation Arbitration Law and UNCITRAL Model Law, the new Code of Civil Procedure , recognizes the power of an arbitrator to decide on its jurisdiction.

Therefore, under Turkish law, harmony and unity has been established by allowing arbitrators, in both international arbitration and domestic arbitration, to decide on their own jurisdiction.

[36] **Manuel Arroyo, Arbitration in Switzerland, Kluwer International Law, 2013, (pp.17-23),** s.20.