

Mexican Supreme Court denies the principle of Kompetenz-Kompetenz

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In a ruling dated January 11, 2006, and which will constitute a mandatory precedent for all inferior courts, the Mexican Supreme Court set forth that it is for State courts and not for arbitral tribunals to establish the validity or not of the agreement to arbitrate. The point of departure is article 1424 of the Commercial Code that establishes that if a party brings an action before a court in a matter which is the subject of an arbitration agreement the said court has not to refer the parties to arbitration if it finds that the agreement is null and void, inoperative or incapable of being performed. In the commented case, the aforesaid rule posed a very serious problem as claimant did not present before the court the substantial dispute but only argued that the arbitration agreement was void. In other words, whereas article 1424 foresees the hypothesis where a party that ignores the arbitral clause requires a substantial solution from the judge, in this case the court only was solicited to pronounce itself over the voidance of the arbitral agreement. The first instance judge considered that he was empowered to solve the question even if he was not required to rule over the matter of the case. Following the decision, the court could not refer the parties to arbitration as long as the validity of the arbitration agreement was not resolved. However, in our view, the true problem is not to know if article 1424 of the Commercial Code empowers the judge to resolve the question of the validity of the arbitration agreement without ruling over the whole matter, but how to coordinate article 1424 with article 1432 that provides the kompetenz-kompetenz principle.

Two different solutions have been given by the same First Circuit. In the first case, an exclusive competence had been given to the arbitral tribunal, whereas in the second case, another ruling provided the basis for a concurrent jurisdiction finding that State courts have jurisdiction to decide if the arbitration agreement is void or not without depriving the arbitral tribunal from its competence to pursue meanwhile with its proceedings.

The Supreme Court resolved the contradiction establishing the power of State courts to resolve the question. The reasoning is the following one. First of all, the Justices affirm that there has to be a judicial control over arbitration as it is a private proceeding. Secondly, the court underlines that arbitration is only possible if such is the will of the parties. However, if for instance the alleged voidance consists in affirming that there has never been any consent to arbitration, it would be illogical that an arbitral tribunal could decide such an issue. It is only when it is established that the arbitration agreement is valid that State courts can refer the parties to the arbitration proceeding.

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