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RESEARCH ARTICLE / ARAŞTIRMA MAKALESİ

Reconsidering the Issues Regarding Validity of Arbitration Agreements Referring to Non-Existing Arbitral Institutions or Including Uncertain References to Arbitral Institutions and the Turkish Experience

Yetkili Kılınan Tahkim Kurumunun Mevcut veya Belirli Olmadığı Tahkim Anlaşmalarının Geçerliliğinin Yeniden Ele Alınması ve Türkiye'deki Deneyim

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Abstract

Arbitration agreements referring to non-existing arbitral institutions or including undefined references to arbitral institutions are significantly observed in international arbitration practice. Validity of such arbitration agreements becomes debatable due to the pathological intent thereof. If the pathology may be resolved by way of interpretation in the manner that leaves no room for doubt, the ideal solution is resolution of such problems by way of interpretation by means of supporting parties' common intent towards arbitration and of protecting legitimate expectations of parties in compliance with *bona fides* principle. However, if interpretation of an undefined reference in an arbitration agreement leads to uncertainty about competence of certain arbitral institutions, such agreement aimed at institutional arbitration either may be accepted to be turned into an agreement aimed at *ad hoc* arbitration or may be held null-and-void, depending on position of law of seat of arbitration. If seat of arbitration is also undefined or non-existing, arbitration agreement shall be held incapable of being performed and null-and-void. Attitude of Turkish courts seems in conformity with the three approaches to a large extent and may be qualified as satisfactory but determining validity of such arbitration agreements without reference to any law applicable and disregarding the right of *access to justice* should be criticized.

Keywords

Arbitration agreement, pathological arbitration agreement, reference to non-existing arbitral institutions, undefined references to arbitral institutions, institutional arbitration, *ad hoc* arbitration, seat of arbitration, interpretation of arbitration agreement

Öz

Milletlerarası tahkim tatbikatında, mevcut olmayan bir tahkim kurumunun yetkili kılındığı veya yetkilendirilen tahkim kurumunun belli olmadığı tahkim anlaşmalarına sıklıkla rastlanmaktadır. İçerdiği bu sorunlu hükümler, bu tür patolojik tahkim anlaşmalarının geçerliliğini tartışmaya açmaktadır. Tahkim anlaşmasında yapılan hatanın herhangi bir tereddüde yer vermeyecek şekilde yorum yoluyla giderilmesinin mümkün olduğu hallerde, tarafların tahkim iradesini mümkün mertebe ayakta tutacak ve tarafların meşru beklentilerini koruyacak biçimde, iyiniyet ilkesine uygun olarak yorum yapmak suretiyle problemin giderilmesi ideal bir çözümdür. Buna karşılık, tahkim anlaşmasında yer verilen tabirlerin yorumlanması sonucunda birden fazla tahkim kurumunun yetkili sayılabileceği görüldüğü takdirde, tahkim yeri hukukunun müsaade etmesi kaydıyla, ya kurumsal tahkime yönelik olan tahkim anlaşmasının *ad hoc* tahkime yönelik bir

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tahkim anlaşmasına dönüştüğü kabul edilmeli ya da tahkim anlaşmasının geçersiz olduğuna karar verilmelidir. Tahkim anlaşmasında, yetkilendirilen tahkim kurumuna ilişkin patolojiye ek olarak, tahkim yeri de belli değilse, tahkim anlaşması icra kabiliyetinden yoksun ve geçersiz kabul edilmelidir. Türk mahkemelerinin yaklaşımı, bu üç anlayışa büyük ölçüde uygun görünmektedir ve tatmin edici olarak nitelendirilebilir, ancak bu tür tahkim anlaşmalarının geçerliliğinin uygulanacak hukuk belirlenmeksizin tayin edilmesi ve adalete erişim hakkının göz ardı edilmesi eleştirilmesi gereken yönlerdir.

Anahtar Kelimeler
Tahkim anlaşması, patolojik tahkim anlaşması, mevcut olmayan bir tahkim kurumunun yetkili kılınması, yetkili kılınan tahkim kurumunun belirli olmaması, kurumsal tahkim, *ad hoc* tahkim, tahkim yeri, tahkim anlaşmasının yorumu

Reconsidering the Issues Regarding Validity of Arbitration Agreements Referring to Non-Existing Arbitral Institutions or Including Uncertain References to Arbitral Institutions and the Turkish Experience

Introduction

In international arbitration practice, institutional arbitration is preferred, rather than *ad hoc* arbitration, by parties who have the intention to opt for arbitration but do not desire to bring forward and to discuss, during negotiations of a contract, any potential conflicts and resolution mechanisms thereof, whereas arbitral institutions have detailed and foreseeable rules regulating all aspects of arbitral procedure and also technical and administrative organisation to carry out an arbitral proceeding.[1] Parties, having the intention to opt for arbitration, have the opportunity to authorise, in just a few words, an arbitral institution which has a set of rules regulating procedural issues such as number and appointment of arbitrators, duration of arbitration, language of arbitration, collection and assessment of evidence, hearings, experts and costs, instead of drawing up all those issues.

However, it is understood from decisions of courts of certain states that, this opportunity regarding institutional arbitration is not always used thoroughly in practice while it has become ordinary to observe arbitration agreements referring to non-existing arbitral institutions[2] or including uncertain references to arbitral institutions[3] which might be caused by haste, clumsiness or ignorance of the drafter.[4] In other words, the reasons might be the insertion of arbitration agreements into a

1 Cemal Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* **[***Drafting International Commercial Agreements and Settlement of Disputes]*(6th edn. Beta 2016) 353

2 In arbitration agreements referring to non-existing arbitral institutions, parties make a description of an arbitral institution by using an exact wording and clear terms but there exists no such arbitral institution all over the world. Arbitration agreements referring to *"International Commercial Arbitration Court of the Chamber of Commerce and Industry of European Community"* or to *"International Arbitration Court of the Hague"* may be cited for example.

3 In arbitration agreements including uncertain references to arbitral institutions, along with the fact that parties have the intention to prefer institutional arbitration, wording and terms used in arbitration agreement are not available to make a certain and clear determination about which arbitral institution is authorised by parties. Arbitration agreements referring to *"International Court of Arbitration in England"* or to *"Arbitration Commission in Switzerland"* may be cited for example.

4 *See* Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell2007) 128

contract at the last minute or focusing of parties on other contract terms such as price, quality or liability or drafting of arbitration agreements by staff who is not aware of its content and nature or clerical or translation errors destroying arbitration agreements or, in exceptional cases, intentional destroying of arbitration agreements by any party who has the intention to make a trouble in the future with regard to contract.[5]

Whatever the reason might be, such arbitration agreements constitute a kind of *pathological arbitration agreements*[6], a very broad concept of international commercial arbitration, which denotes arbitration agreements that contain any defect liable to disrupt the smooth progress of arbitration. However, it should be noted that *pathological arbitration agreements* are not limited to "arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions". Beside such arbitration agreements, an arbitration agreement might become pathological when parties provide for arbitration as an option or authorise both arbitration and state courts at the same time or do not define seat of arbitration or draft arbitration agreement in multiple languages where differences exist between certain versions or provide for definite arbitrators who have already died.[7] In this paper, *pathological arbitration agreements* will not be studied in all aspects but only validity of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions will be examined. And this examination will especially be focused on the decisions of Turkish courts.

Such arbitration agreements might cause various problems in practice. It is argued in the literature that such problems will, at best, give rise to associated litigation, fueling the arguments of the party attempting to avoid arbitration and make the process more time-consuming and more expensive; at worst, prevent arbitration from taking place at all.[8] However, Turkish Supreme Court [Yargıtay] 15th Circuit's decision of 15.10.2015 indicated another possibility far worse than the one mentioned as the worst above: restriction of the right of *access to justice*.

I. Approaches Adopted for Resolution of the Problem

A. In General

Arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions are significantly observed in international

5 *See* Pierre A. Karrer, *Pathological Arbitration Clauses - Malpractice, Diagnosis and Theraphy, in The International Practice of Law – Liber Amicorum for Thomas Bär and Robert Karrer*, 109, 110-11 (Nedim Peter Vogt 1997); Milo Molfa, 'Pathological Arbitration Clauses and the Conflict of Laws' 37 (2007) Hong Kong Law Journal 161, 163

6 *See* Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, 'International Commercial Arbitration', in Emmanuel Gaillard and John Savage (eds) (Kluwer Law International 1999) 262; Benjamin G Davis, 'Pathological Clauses: Eisemann's Still Vital Criteria' 7(4) (1991) Arb. Int'l 365; Frédéric Eisemann, 'La clause d'arbitrage pathologique' in Eugenio Minoli (ed), *Commercial Arbitration Essays in Memoriam* 129 ff (1974); Karrer (n 5)109 ff; Molfa (n 5) 62.

7 Fouchard, Gaillard and Goldman (n 6) 262-263.

8 *ibid* 263

arbitration practice. Validity of such arbitration agreements becomes debatable due to the pathological intent thereof. Depending upon a comparative law analysis, the approaches adopted for resolution of the problem might be classified under three groups.

The ideal approach is resolution of such problems by way of interpretation in the manner that leaves no room for doubt, by means of supporting parties' common intent towards arbitration and of protecting legitimate expectations of parties in compliance with *bona fides* principle. However, if interpretation of a pathological reference in an arbitration agreement leads to uncertainty and confusion about competence of certain arbitral institutions, such arbitration agreement aimed at institutional arbitration might either be accepted to be turned into an arbitration agreement aimed at *ad hoc* arbitration or be held null-and-void, depending on position of law of seat of arbitration. In addition to the pathology about arbitral institution referred to in arbitration agreement, if seat of arbitration is also uncertain or non-existing, arbitration agreement should be held incapable of being performed and accordingly null-and-void.

B. Holding Such Arbitration Agreements Valid by way of Interpretation

The ideal solution for resolving the problems regarding validity of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions is holding such arbitration agreements valid by way of interpretation, if the pathology might be resolved by way of interpretation in the manner that leaves no room for doubt, without reference to any law applicable.

In significant amount of decisions holding such arbitration agreements valid, courts ruled that parties referring to non-existing arbitral institutions or inserting uncertain references to arbitral institutions had in fact desired to authorise an existing and definite arbitral institution. In these decisions[9], arbitration agreements are held

9 In *Tennessee Imports, Inc. v. Pier Paulo Filippi and Prix Italia S.R.L.*, 745 F. Supp. 1314 (M.D. Tenn. 1990), defendant raised an arbitration objection upon arbitration clause referring to the *"Arbitration Court of the Chamber of Commerce in Venice (Italy)"* in the case brought before U.S. courts by claimant. Claimant argued that arbitration clause is null-and-void since arbitral institution referred to in the arbitration clause is non-existing where defendant in return argued that arbitral institution referred to in the arbitration clause was in fact the *"International Chamber of Commerce Court of International Arbitration"* which was founded on the purpose of settlement of international disputes as in the case and Venice was determined as seat of arbitration. U.S. court, accepted the arbitration clause referring to the "*Arbitration Court of the Chamber of Commerce in Venice, Italy"* as a valid arbitration clause referring to the *"International Chamber of Commerce Court of International Arbitration"* and opting for Venice as the seat of arbitration, by way of interpretation.
French Cour de Cassation [Supreme Court for judicial matters] accepted the arbitration clause referring to the *"Yugoslavian Chamber of Commerce in Belgrade"* as a valid arbitration clause referring to the *"Foreign Trade Arbitration Court at the Economic Chamber of Yugoslavia"* by way of interpretation in *Epoux Convert v. Droga* decision of 14.12.1983: Rev. Arb. 483-84, (1984); *see* Gary Born, *International Commercial Arbitration* (2nd edn, Wolters Kluwer 2014) 779
In a decision of 27.09.2005 of the Hamm Court of Appeals (Ger.) [Oberlandesgericht (OLG) Hamm] (XXXI Y.B.C.A. 685 ff) where claimant initiated arbitration proceeding in 1998 before the *"Chamber of Commerce and Industry of Geneva"* about a dispute arising from a contract providing for settlement of disputes *"in accordance with the laws of conciliation and arbitration of the Geneva Chamber of Commerce"*. Arbitral tribunal held, in the interim award regarding jurisdiction, that incorrect typing of arbitral institution referred to in arbitration clause does not invalidate such arbitration clause, where common intent of parties to authorise the leading arbitral institution in Geneva is express and clear. Hamm Court

valid by way of interpretation and references to non-existing arbitral institutions or uncertain references to arbitral institutions are accepted to be designated to an existing and definite arbitral institution, when there exists no similar arbitral institution in relevant state or city by contract date and/or when incorrect typing of arbitration agreement does not result in any equidistance to two or more different arbitral institutions and does not cause uncertainty and dilemma about the competent arbitral institution.

On the other hand, if reference to arbitral institution is equidistant to two or more different arbitral institutions and has the nature to cause uncertainty and dilemma about the competent arbitral institution, directing parties to one of these arbitral institutions by way of interpretation shall connote to designation of competent arbitral institution by state courts upon a presumptional intent of parties and shall result in a legal conclusion exceeding genuine intent of parties. It seems impossible to satisfactorily explain why state court did not find the other arbitral institution competent when it finds an arbitral institution competent.[10] Besides, any decision of

of Appeals, where claimant asked for enforcement of final award, rejected objections of defendant based on invalidity of arbitration clause on the grounds that the only arbitral institution by the contract date was the *"Chamber of Commerce and Industry of Geneva"* and that arbitration objection was *mala fide* since defendant had admitted jurisdiction of arbitral tribunal by joining to constitution thereof and to arbitral proceeding without raising any objection upon invalidity of arbitration clause and by cooperating with arbitral tribunal during pre-arbitral conciliation process.
In a decision of 15.10.1999 of the Berlin Court of Appeals (Ger.) [Oberlandesgericht (OLG) Berlin] (XXVI Y.B.C.A. 328), parties provided for arbitration at *"German Central Chamber of Commerce",* but claimant initiated arbitration at the *"Deutsches Institut für Schiedsgerichtsbarkeit"* on the ground that arbitral institution referred to in the arbitration clause was non-existing. Upon objection of defendant on jurisdiction, arbitral tribunal rendered an interim award denying the objection and defendant resorted to Berlin Court of Appeals for annulment of the interim award. The Court held that the arbitration clause was valid on the ground that it is possible to specify an arbitral institution by way of interpretation where parties had referred to a non-existing arbitral institution. According to the Court, considering the fact that parties had agreed upon German law as the applicable law to contractual obligations and upon settlement of disputes under the auspices of an arbitral institution located in Germany, parties had in fact intended to authorise the *"Deutsches Institut für Schiedsgerichtsbarkeit"* while referring to *"German Central Chamber of Commerce"* in the arbitration clause.
In an arbitration proceeding conducted under the auspices of Zurich Chamber of Commerce (Switz.) (ZHK 249/1994), arbitration clause providing settlement of disputes by *"arbitration court in Zurich"* and *"in accordance with the rules of this court"* held valid on the ground that parties had obviously opted for arbitration under an arbitral institution located in Zurich which have arbitral rules in force, whereas there exists no arbitral institution having such characteristics other than arbitration court of the Zurich Chamber of Commerce. *See* Karrer (n. 5) 1 ff

10 In *Kwasny Company v. Acrylicon International Ltd.*, 2010 WL 2474788 (E.D. Mich.), parties provided for settlement of disputes by arbitration in accordance with the Rules of the Conciliation and Arbitration of the ICC and the appointing and administrating body will be the *"English Centre for International Commercial Arbitration".* But if an appointment is not made within the time periods set forth, such appointment shall be made in accordance with the rules of the Conciliation and Arbitration of the ICC. Furthermore, parties had agreed upon that arbitral proceeding shall be conducted in the State of Michigan if it is initiated by defendant, and in London if it is initiated by claimant. Defendant alleged that since *"English Centre for International Commercial Arbitration"*, identified by parties as "appointing and administrating body", evidently does not exist, parties failed to reach a meeting of the minds on a material aspect of the arbitration clause and that the arbitration clause therefore is null-and-void and unenforceable. The Court concluded that the reference to a non-existing arbitral institution is severable from, and does not render unenforceable, the parties' broad and overarching agreement to arbitrate, on the grounds that a mutual mistake voids a contractual provision only if mistake is material however defendant has failed to identify any basis for court to conclude that parties' mistaken reference to a non-existening arbitral institution should be viewed as integral to, and not severable from, parties' expressly stated intent to arbitrate; that arbitration clause itself mitigates, to a significant extent, the parties' mistaken reference to a non-existing administrative entity, by virtue of the parties' stipulation to arbitrate in accordance with the ICC Rules of Arbitration; that such rules expressly identify the International Court of Arbitration as the arbitration body attached to the ICC responsible for administering the rules; that parties' conduct and e-mail correspondence after their dispute arose do not suggest that their mistaken belief in the existence of *"English Centre for International Commercial Arbitration"* was material to their willingness to arbitrate disputes. However, determination of arbitration court of the ICC as the competent arbitral institution just upon choice of ICC rules by the parties, by disregarding the fact that the parties -who provided for settlement of disputes by

arbitration in accordance with the ICC rules but agreed upon *"English Centre for International Commercial Arbitration"* as the appointing and administrating body- were well aware of arbitration court of the ICC but they did not choose it as appointing and administrating body knowingly and willfully, is expressly contrary to the clear intent of the parties. In this respect, directing the parties to an *ad hoc* arbitration seated in the U.S.A. according to ICC rules by turning this arbitration clause aimed at institutional arbitration to an arbitration clause aimed at *ad hoc* arbitration could be a more legitimate and reasonable solution.

In re HZI Research Center v. Sun Instrument Japan, (1995) WL 562181 (SDNY 1995), XXI YBCA 829 ff, is an interesting case decided by U.S. courts where parties agreed upon that all arbitrators shall be members of *"American or Japanese Arbitrator Society"*. When a dispute arose, claimant initiated arbitration at the *"American Arbitration Association"*. Defendant, on the other hand, raised an objection on the ground that parties had not agreed upon arbitration at the *"American Arbitration Association"*. Thereupon, claimant resorted to U.S. courts in order to compel defendant to arbitration. The Court accepted this request on the grounds that non-existence of *"American or Japanese Arbitrator Society"* does not obstruct enforcement of the arbitration clause since genuine intent of parties is settlement of disputes by arbitration as stated in the arbitration clause, that courts shall enforce arbitration clauses by making a proper designation when parties had made a devoid or incorrect designation about arbitral proceeding and that the *"American Arbitration Association"* was totally a proper arbitral institution for the dispute. However, while non-existence of *"American or Japanese Arbitrator Society"* does not invalidate the arbitration clause despite the condition providing that all arbitrators shall be members of such society, acceptance of the *"American Arbitration Association"*, that was not authorised by parties, as a proper arbitral institution and ruling continuance of arbitral proceeding initiated there result in a legal conclusion exceeding genuine intent of parties. Moreover, although the arbitration clause was aimed at *ad hoc* arbitration, court's decision turning it into an arbitration clause aimed at institutional arbitration results in disregard of parties' common intent. In my opinion, after determining that the provision regarding qualification of arbitrators is incapable of being performed, the court should have directed the parties to an *ad hoc* arbitration under the Federal Arbitration Act, which would be more in conformity with common intent of the parties.

In *Circus Productions, Inc. v. Rosgoscirc*, 1993 U.S. Dist. LEXIS 9797 (SDNY1993), parties provided for settlement of disputes before the *"American Arbitration Association"*first, but then renounced and inserted an arbitration clause referring to *"International Arbitration in the Hague (the Netherlands)"*. When a dispute arose, defendant initiated arbitration at the *"American Arbitration Association"* against claimant. Claimant resorted to U.S. courts in order to stay the arbitral proceeding initiated at the *"American Arbitration Association"* alleging that the parties had agreed upon arbitration in the Hague and even if the arbitral institution mentioned in the arbitration clause is non-existing, arbitral proceeding should be conducted at the Permanent Court of Arbitration of the Hague in Netherlands, which is the most similar arbitral institution. U.S. court held that the intent of the parties would best be approximated by designating the *"American Arbitration Association"* on the grounds that, as conceded by parties, there was neither an arbitral institution entitled *"International Arbitration in the Hague"* in the Netherlands nor any similar arbitral institution in that region, that courts may not compel arbitration at another arbitral institution as a rule if parties had agreed upon a specific arbitral institution but in this case the arbitral institution referred to by parties was non-existing and that parties previously agreed to arbitrate at the *"American Arbitration Association"* in New York but then renounced this choice as a result of defendant's concern over neutrality and then the defendant intented to arbitrate at the *"American Arbitration Association"*. In my opinion, the approach adopted in this decision results in a legal conclusion exceeding genuine intent of parties. The decision of the U.S. court directing the parties to the arbitral institution which was first authorised but then consciously renounced by the mutual intent of the parties is expressly contrary to the clear intent of the parties. Moreover, despite the fact that the arbitration clause was already aimed at *ad hoc* arbitration, first turning it into an arbitration agreement aimed at institutional arbitration and then directing the parties to an institutional arbitration seated in the U.S.A. despite the fact that the parties had clearly agreed upon the Hague as the seat of arbitration, are also contrary to the mutual intent of the parties. In this respect, directing the parties to an *ad hoc* arbitration seated in the Hague could be a more legitimate and reasonable solution which would be more compatible with the wording of the arbitration clause and with the mutual intent of the parties who drafted this arbitration clause.

The most remarkable decisions on this point belong to French courts. Paris Cour d'appel [Regional Court of Appeals] accepted the arbitration clause referring to the *"Paris Chamber of Commerce"* as a valid arbitration clause referring to the *"Arbitration Chamber of Paris"* in *Tovomon v. Amatex* decision of 14.02.1985, Rev. Arb. 325-27, (1987); *see* Born (n 9) 779. However, Paris Cour d'appel [Regional Court of Appeals] accepted the arbitration clause referring to the *"Paris Chamber of Commerce"* as a valid arbitration clause referring to the *"International Chamber of Commerce"* in *Deko v. Dingler* decision of 24.03.1994, Rev. Arb. 515, (1994); *see* Born, (n 9) 779. Similarly, Paris Cour d'appel [Regional Court of Appeals] accepted the arbitration clause providing for settlement of disputes *"before the official Chamber of Commerce in Paris, France"* as a valid arbitration clause referring to the *"International Chamber of Commerce"* on the grounds that there existed no *"official Chamber of Commerce"* in Paris but *"International Chamber of Commerce"* is a private institution located in Paris and recognized either in France or in other states as an institution in point of organising settlement of disputes by arbitration arising from international relations regardless of nature of dispute or of nationality of parties or of applicable law, and that parties referring to *"official Chamber of Commerce in Paris"* had in fact desired to authorise *"International Chamber of Commerce"* in Paris, in *Société Asland c/ Société European Energy Corporation* decision, Rev. Arb. No.2, (1990); *see* Davis (n 6) 369-70.

Completely dissimilar interpretation of the references to the *"Paris Chamber of Commerce"* in different arbitration clauses concluded in different decades by the Paris Cour d'appel [regional court of appeals] in different cases, reveals that it is impossible to make an interpretation which satisfies both of the parties when reference is equidistant to two or more different arbitral institutions and has the nature to cause uncertainty and dilemma about the competent arbitral institution.

In a case concluded by the Swiss Bundesgericht [Federal Supreme Court] on 05.12.2008 (DFT 4A_376/2008, 7.4; *see* Born, *supra* (n 9) 779) arbitration clause providing for settlement of disputes before the *"Arbitration Court of the*

state courts directing parties to enforce such an arbitration clause as it stands might cause deprivation of *"access to justice"* in terms of parties. Furthermore, the arbitral tribunal, that parties are directed to by state court, might lack jurisdiction[11] or even if arbitral tribunal finds itself competent, courts of the arbitral seat might annul the arbitral award or courts of another states where parties shall ask for enforcement of the arbitral award might deny enforcement on the ground that the arbitral award was made by an arbitral tribunal lacking jurisdiction. In this respect, state courts should, depending on certainty of seat of arbitration and according to law of such seat of arbitration, either direct parties to *ad hoc* arbitration by accepting that arbitration agreement aimed at institutional arbitration is turned into an arbitration agreement aimed at *ad hoc* arbitration or hold that the arbitration clause is incapable of being performed and accordingly null-and-void.

C. Holding Such Arbitration Agreements Valid by Turning Them into Arbitration Agreements Aimed at Ad Hoc Arbitration

According to the second approach, if problems regarding validity of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions may not be resolved by way of interpretation in the manner that leaves no room for doubt, only such reference should be held null-and-void but the rest of arbitration agreement should remain valid. In other words, even if parties of an arbitration agreement refer to a non-existing arbitral institution or insert an uncertain reference to arbitral institutions, the parties are accepted to have a mutual intent to arbitrate which is neither invalidated nor dissolved due to such pathology, on the ground that essential and *sine qua non* component of an arbitration agreement is not the reference to an arbitral institution but the mutual intent of parties to arbitrate.[12]

International Chamber of Commerce of Zurich in Lugano" was interpreted as providing an arbitration to be conducted before arbitration court at the *"International Chamber of Commerce in Paris"* seated in Lugano on the ground that there existed no *"International Chamber of Commerce of Zurich"* and the arbitration clause was held valid. However, interpretation of the arbitration clause as referring to the *"Zurich Chamber of Commerce"* which is located in Zurich and stands out for settlement of international commercial disputes by arbitration was also an admissable option according with the wording used in the arbitration clause. In this respect, Swiss Federal Court may be criticised because of designation of competent arbitral jurisdiction upon a presumptional intent of parties and of the legal conclusion exceeding genuine intent of parties. Instead of this, parties could be directed to an *ad hoc* arbitration seated in Lugano by accepting that the arbitration clause aimed at institutional arbitration is turned into an arbitration clause aimed at *ad hoc* arbitration because of uncertainty and dilemma therein, depending on position of law of seat of arbitration.

11 In arbitration proceeding conducted under the auspices of Zurich Chamber of Commerce (Switz.) (ZHK 287/1995), arbitral tribunal righteously lacked jurisdiction upon the arbitration clause referring to *"Arbitration Commission in Switzerland"*. In the case, claimant resorted to the *"Zurich Chamber of Commerce"* whereas parties had referred to *"Arbitration Commission in Switzerland"* for settlement of disputes and the Chamber appointed an arbitral tribunal. Arbitral tribunal lacked jurisdiction on the ground that the parties did not refer to the *"Zurich Chamber of Commerce"* in the arbitration clause. There is no arbitral institution in Switzerland titled exactly as *"Arbitration Commission in Switzerland"* and there is no evidence indicating which of the arbitral institutions operating in Switzerland was intended by the parties in fact. In this way arbitral tribunal ensured save of time, money and effort which might be wasted in case the arbitral award that would be rendered upon such arbitration clause is annulled or enforcement thereof is rejected: 14 ASA Bull. 290 (1996); *see* Karrer, (n 5)123.

12 This approach has been adopted especially by U.S. Courts. *See e.g.*, Control Screening L.L.C. v. Tech. Application & Prod. Co., 687 F.3d 163 (3d Cir. 2012); Raheel Ahmad Khan v. Dell, Inc., 669 F.3d 350 (3d Cir. 2012); Travelport Global Distrib.

Therefore, if such reference is detachable from the rest of arbitration agreement without damaging enforceability of arbitration agreement, such pathology does not invalidate arbitration agreement but it is no longer possible to resort to institutional arbitration. Thus, an arbitration agreement aimed at institutional arbitration is, since the arbitral institution referred to in arbitration agreement is non-existing or uncertain, transformed into an arbitration agreement aimed at *ad hoc* arbitration.

This approach, based on the understanding that basic component of arbitration agreement is parties' mutual intent to arbitrate, *prima facie* seems to disregard significant differences between institutional arbitration and *ad hoc* arbitration that could be considered by parties while opting for arbitration. Parties opting for arbitration are not obliged to prefer institutional arbitration while legal systems enable parties to prefer *ad hoc* arbitration. However, there are significant differences between institutional arbitration and *ad hoc* arbitration. Whereas in institutional arbitration almost all procedural problems regarding arbitral proceedings are resolved within arbitral institutions without application to state courts and this facility provides a significant advantage for parties with regard to saving of time; significant part of procedural problems arising in *ad hoc* arbitration may require application to state courts and obtaining results of such applications may likely take a long time. For instance, disputes regarding appointment or rejection of arbitrator(s), extension of duration of arbitration, arbitration costs and arbitrators' fees etc. are usually resolved by arbitral institutions in institutional arbitration but may require application to state courts in *ad hoc* arbitration. Beyond these differences, certain arbitration courts exist within the structure of sectoral or professional organisations which provide arbitration as a service to their members promising proficiency at small costs. Certain arbitral institutions are preferred due to their experience and reputation. Compelling parties, who concluded an arbitration agreement aimed at institutional arbitration considering any of the reasons mentioned above, to *ad hoc* arbitration on the ground that the arbitral institution referred to in arbitration agreement is non-existing or uncertain, is the weakest point of this approach.

However, this weakness does not undermine this approach totally. Because, accepting that parties, who were not aware of non-existence of arbitral institution that they referred to or who were not able to type the title of arbitral institution that they referred to, absolutely preferred institutional arbitration by considering reasonable and desirable reasons mentioned above shall be significantly contradictory. Parties, who pretend to act with high level of conscious while preferring institutional arbitration, are not expected to authorise a non-existing arbitral institution or to type the title of arbitral institution that they referred to incorrectly. In this respect,

Systems BV v. Bellview Airlines, Ltd., 2012 WL 3925856 (SDNY); Gar Energy & Associates v. Ivanhoe Energy, Inc., 2011 WL 6780927 (ED Cal); *In re* Brock Specialty Services, Ltd., 286 S.W. 3d 649 (Texas Ct App 2009); Astra Footwear Indus. v. Harwyn Int'l, Inc., 442 F.Supp. 907 (S.D.N.Y. 1978)

a reference to a non-existing arbitral institution or an uncertain reference to arbitral institutions does not invalidate arbitration agreement totally while the provision regarding such reference is null-and-void but parties' mutual intent to arbitrate remains valid. Therefore, in such circumstances, state courts should direct parties to *ad hoc* arbitration by accepting that arbitration agreement aimed at institutional arbitration is transformed into an arbitration agreement aimed at *ad hoc* arbitration to be conducted according to arbitration rules agreed upon by parties if available, or to law of arbitral seat designated by parties.

It should be underlined that this approach is not strange to Turkish law. For instance, subject of the Turkish Supreme Court 15th Circuit's decision of 15.11.1984[13] was an arbitration clause where parties agreed that each party shall appoint an arbitrator but if one of the parties does not appoint an arbitrator duly, such arbitrator shall be appointed by chief judge of the Istanbul Commercial Court of First Instance; and that if these two arbitrators may not be able to settle the dispute and may not be able to appoint third arbitrator, third arbitrator shall be appointed by chief judge of the Istanbul Commercial Court of First Instance. Pursuant to this provision, two arbitrators appointed by the parties could not be able to settle the dispute but appointed the third arbitrator and the arbitral tribunal rendered an arbitral award. When the defendant appealed[14] the award before the Supreme Court, validity of the arbitration clause became controversial on the ground that the parties assigned chief judge of the Istanbul Commercial Court of First Instance with regard to appointment of arbitrators in the arbitration clause. Moreover, it was stated in the dissenting opinion drafted by two members of 15th Circuit that assignment of chief judge of the Istanbul Commercial Court of First Instance by the parties for appointment of arbitrators was contrary to Art.140(5) of the Constitution of the Republic of Turkey [Türkiye Cumhuriyeti Anayasası] (1982) which provides that judges shall not assume any official or private occupation other than those prescribed by law and that the arbitration clause is invalid because it is incapable of being performed. However 15th Circuit held that: *"...while arbitration agreement is a procedural law contract, conclusion thereof is subject to Code of Obligations like other contracts. According to Art.20(2), invalidity of certain provisions of a contract does not result in dissolution of whole contract but only those provisions are dissolved"*. This conclusion, also supported in the literature[15], seems in conformity with legal nature of arbitration agreements.

13 Turkish Supreme Court 15th Circuit [Yargıtay 15. Hukuk Dairesi], File nr. [Esas No] 1984/1685, Decision nr. [Karar No] 1984/3521, Date [Tarih] 15.11.1984, 6 Yasa Hukuk Dergisi [Yasa Law Journal] 849 ff. (1986)

14 Under the 1086 Code of Civil Procedure [Hukuk Usulü Muhakemeleri Kanunu] (1927) (repealed 2011), which regulated international arbitration in addition to domestic arbitration until the 4686 Code of International Arbitration [Milletlerarası Tahkim Kanunu] (2001) came into force on 05.07.2001, arbitral awards were subject to appellate review carried out by the Turkish Supreme Court. The 4686 Code of International Arbitration (2001) provides annulment of arbitral awards in parallel with UNCITRAL Model Law. The 1086 Code of Civil Procedure (1927) was repealed by the 6100 Code of Civil Procedure [Hukuk Muhakemeleri Kanunu] (2011) on 01.10.2011

15 İzzet Karadaş, *Ulusal (İç) Tahkim [National (Domestic) Arbitration]* (Adalet 2013) 78

In my opinion, adoption of this approach should depend on certainty of seat of arbitration and on toleration of law of such arbitral seat. Rather than a geographic venue, seat of arbitration serves as a connection point indicating the law which governs arbitral proceeding as a whole[16] and also as a connection point indicating the applicable law to validity of arbitration agreements in almost all legal instruments regarding international arbitration and in the UNCITRAL Model Law, unless applicable law is determined by parties. As required by these two functions, seat of arbitration should necessarily be taken into consideration while determining the validity of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions.

It should also be noted that state courts adopting this approach upon an arbitration objection should not confine themselves to rejecting the case on the ground that arbitration agreement is not null-and-void but should explicitly direct parties to *ad hoc* arbitration. Otherwise adoption of this approach might result in undesired legal consequences that may be up to deprivation of access to justice.

D. Holding Such Arbitration Agreements Null-and-Void

Dominating opinion and practise about validity of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions are inclined to hold such arbitration agreements valid by adopting one of the two approaches mentioned above.

However, if problems regarding validity of such arbitration agreements may not be resolved by way of interpretation in the manner that leaves no room for doubt, and if such an arbitration agreement aimed at institutional arbitration may not be transformed into an arbitration agreement aimed at *ad hoc* arbitration since the seat of arbitration is also uncertain or law of arbitral seat does not allow, it is not possible to held such arbitration agreements valid.

Arbitral institution and seat of arbitration are components of a definitive intent to arbitrate each of which shall overcome any problems that may arise because of the other one's deficiency. When arbitral institution is existing and certain, deficiency of seat of arbitration shall most probably not invalidate arbitration agreement, since seat of arbitration is already determined by rules of arbitral institution or since arbitral institution or arbitrator(s) appointed shall almost in any event have the authority to determine seat of arbitration according to rules of such institution.[17] On the other hand, when seat of arbitration is existing and certain, non-existence or uncertainty

16 Ergin Nomer, Nuray Ekşi and Günseli Öztekin-Gelgel, *Milletlerarası Tahkim Hukuku [Law of International Arbitration]* (3rd edn, Beta 2008) 29

17 *See, e.g.*, AAA International Dispute Resolution Procedures Art 17; ICC Rules of Arbitration Art 18; LCIA Arbitration Rules Art 16; ISTAC Arbitration and Mediation Rules Art 11; SCC Arbitration Institute Arbitration Rules Art 25

of arbitral institution shall not invalidate arbitration agreement, since it is possible to direct parties to *ad hoc* arbitration to be conducted according to law of such arbitral seat. But when neither arbitral institution nor seat of arbitration is existing and certain, there will be neither an entity having the authority to determine seat of arbitration other than parties nor a legal basis for an arbitral proceeding.

Most of the state courts shall not have the authority to determine seat of arbitration, since UNCITRAL Model Law on International Commercial Arbitration, which is adopted in many states, provides that state courts do not have the authority to determine seat of arbitration whereas determination thereof belongs to parties, and failing such agreement, to arbitral tribunal (Art.20) and whereas extent of state court intervention is limited to matters governed by the Model Law and no state court shall intervene except where so provided in this Law (Art.5). The 4686 Code of International Arbitration (2001) [Milletlerarası Tahkim Kanunu], as adapted from the Model Law, contains the same provisions in Art.9 and in Art.3. Therefore, when neither arbitral institution nor seat of arbitration is existing and certain, Turkish Courts shall not have the authority to determine seat of arbitration in case the 4686 Code of International Arbitration (2001) shall apply. Nevertheless, the position will be opposite in the states where codes of international arbitration grant state courts the authority to determine seat of arbitration.

Besides, when neither arbitral institution nor seat of arbitration is existing and certain, most probably there will not be a legal basis for an arbitral proceeding in international commercial arbitration. For instance, the 4686 Code of International Arbitration (2001) shall apply in cases where seat of arbitration is in the territory of Turkey or where the provisions thereof are chosen by parties or by arbitrators (Art.1). Considering that the Model Law contains the same provision in Art.1, uncertainty of seat of arbitration shall result in nonapplication of codes on international arbitration adapted from the Model Law. Nevertheless, the position will be opposite in the states where application of codes of international arbitration is not limited to cases where seat of arbitration is in the territory of such state. It should be underlined that this issue is far apart from the debate on seat theory and delocalisation theory, because here parties' mutual intent is not aimed at delocalised arbitration but at institutional arbitration. Therefore, their arbitration agreement shall not contain sufficient provisions to conduct a delocalised arbitration when neither arbitral institution nor seat of arbitration is existing and certain. Hence, when neither arbitral institution nor seat of arbitration is existing and certain, there will be neither an arbitration agreement solely adequate to constitute the legal basis of an arbitral procedure nor rules of an arbitral institution and nor law of an arbitral seat that might constitute the legal basis of an arbitral procedure.

In conclusion, in addition to non-existence or uncertainty of arbitral institution, if seat of arbitration is also uncertain, arbitration agreement shall become incapable of being performed and accordingly null-and-void.[18]

In such circumtances, state courts should neither rewrite or change the arbitration agreement by putting themselves in parties' place[19] nor compel arbitration since parties may not find an arbitration court to resort and may be deprived of access to justice.

Considering all these reasons indicated above, arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions should be held incapable of being performed and accordingly null-and-void if neither interpretation method works[20] nor such arbitration agreement may be transformed into an arbitration agreement aimed at *ad hoc* arbitration[21].

18 However, it is crucial to state that legal position is totally different for domestic arbitration under Turkish law where the 6100 Code of Civil Procedure (2011) constitutes the sole legal basis and contains provisions efficient for any kind of deficiency or pathology in an arbitration clause.

19 Born, (n 9) 780.

20 In a case concluded by the Hamm Court of Appeals [Oberlandesgericht (OLG) Hamm] on 15.10.1994 (Ger.) (XXII Y.B.C.A. 707 ff), claimant brought a file before German courts where parties had provided for arbitration as such: *"If [a friendly settlement] is impossible, [all disputes] shall be settled by the arbitral tribunal of the International Chamber of Commerce in Paris, seat in Zurich."* Upon arbitration objection raised by defendant validity of the arbitration clause became disputable. Court of Appeals held the arbitration clause null-and-void on the grounds that an arbitration agreement is null-and-void when the competent arbitral tribunal is neither unambiguously determined nor unambiguously determinable, that the reference to *"the arbitral tribunal of the International Chamber of Commerce in Paris, seat in Zurich"* has more than one meaning -since not only the *"International Chamber of Commerce"* in Paris but also the *"Zurich Chamber of Commerce"* have a permanent arbitration court and their own Rules-, that the clause could be read to mean an arbitral tribunal under the auspices of the *"International Chamber of Commerce"* in Paris with Zurich as the seat of the proceedings, which would be possible according to the Rules of the *"International Chamber of Commerce"* but it was uncertain whether this would be in accordance with the expectations of the parties. However, I do not agree with the conclusion of the Court stating that the reference to *"the arbitral tribunal of the International Chamber of Commerce in Paris, seat in Zurich"* has more than one meaning. Because the parties evidently agreed upon the competence of arbitration court of the "*International Chamber of Commerce*" and the arbitration court in Zurich is not within "*International Chamber of Commerce*" but within "*Zurich Chamber of Commerce*". In other words, there exists no "*International Chamber of Commerce*" located in Zurich. In addition to this, the phrase *"seat in Zurich"* used in the arbitration clause does not indicate where the arbitral institution is located but serves a function as a connection point indicating the law which governs arbitral proceeding as a whole in international arbitration literature. In this respect, this arbitration clause, among the other ones referred to in this paper, is one of the most evident arbitration agreements which may easily be held valid by way of interpretation. In my opinion, the arbitration clause clearly provides for settlement of disputes via arbitration to be conducted under the auspices of the *"International Chamber of Commerce in Paris"* with Zurich as the seat of arbitration.

21 In *National Material Trading v. M/V Kaptan Cebi et al*, American Maritime Cases 201 ff (1998) parties had agreed upon settlement of disputes under *"Chamber of Commerce and Industry of Switzerland"* with London as seat of arbitration. The claimant objected that the arbitration clause is unenforceable because of the reference to court of arbitration at the *"Chamber of Commerce and Industry of Switzerland"*, when such a forum does not exist. The defendant conceded that arbitration centers in Switzerland are set up by regions or cantons and prayed that the *"Chamber of Commerce and Industry of Lugano"* be substituted to reform a mutual mistake in the arbitration clause misnaming arbitral institution. The Court declared the arbitration clause null-and-void on the grounds that construing validity of arbitration clauses, it must be determined whether essential terms are sufficiently definite so as to enable the Court to give them an exact meaning, that parties had named an arbitral institution which simply does not exist, that the Court can give no meaning to the arbitration terms so as to validate this clause, that it is undisputed that there are numerous chambers of commerce in Switzerland presumably each of which has its own rules of evidence and procedure, that the Court has no authority to rewrite the contract by choosing which of those courts was intended by the arbitration clause, that if the Court were to compel the parties to arbitration at the forum specified in the contract, the parties could not implement such an order because recourse cannot be had to a non-existing forum, and that consequently no meaningful effect may be given to this clause.
However, seat of arbitration was existing and certain, whereas the arbitral institution referred to in the arbitration clause was uncertain. If one of these components are existing and certain, arbitration clause may be held valid and enforceable. When seat of arbitration is existing and certain, as in the case, non-existence or uncertainty of arbitral institution should not invalidate the arbitration clause, since it is possible to direct parties to *ad hoc* arbitration to be conducted according to law

E. The Turkish Supreme Court [Yargıtay] Decisions on Validity of Arbitration Agreements Referring to Non-Existing Arbitral Institutions or Including Uncertain References to Arbitral Institutions

A. In General

Turkish courts have dealt with problems arising from arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions in four different cases.

In the first case, the Supreme Court had to make a decision on validity of an arbitration clause where the institution referred to in arbitration clause was not engaged in arbitration activity and had to discuss whether it is possible to assume that parties had in fact desired to authorise an existing arbitral institution which accords with wording used in arbitration clause, by way of interpretation of parties' genuine intent.

In the second case, claimant brought a case before a Turkish court alleging that there existed no arbitral institution matching up completely with the wording and description used in arbitration clause in order to authorise two different arbitral institutions optionally; upon raising of arbitration objection by defendant, court had to make a decision on validity of the arbitration clause and finally the case was rejected upon acceptance of arbitration objection.

In the third case, reference in arbitration clause to arbitral institution was so indefinite and so broad that it was impossible to assume, by way of interpretation of parties' genuine intent that parties had in fact desired to authorise an existing arbitral institution which accords with wording used in arbitration clause. Nevertheless, claimant initiated arbitration proceedings at an arbitral institution and then brought an action before Turkish courts in order to enforce the arbitral award rendered. The Supreme Court rejected the enforcement claim on the ground that the award was rendered by an arbitral tribunal which had no jurisdiction.

In the last case, parties authorised a non-existing arbitral institution in arbitration clause and when the dispute arose, claimant, who could not find any judicial authority to resort to, brought an action before the Turkish court located at the place where defendant is resident. Upon arbitration objection of defendant, validity of the arbitration clause became debatable and court of first instance decided on the problem, this decision was approved by the Supreme Court and then claimant carried the problem before the Turkish Constitutional Court by an individual application.

of such arbitral seat. In this respect, I disagree with the decision of the Court holding the arbitration clause null-and-void disregarding the fact that the parties had determined London as the seat of arbitration. The ideal solution is to determine the validity of the arbitration clause according to English law. If the arbitration clause was accepted valid and enforceable under English law, the U.S. Court could have rejected the case upon the arbitration objection. If the arbitration clause was accepted null-and-void under English law, the U.S. Court could have rejected arbitration objection and found herself competent.

B. The Turkish Supreme Court 11th Circuit's Decision of 07.07.1981 on Validity of an Arbitration Clause Referring to an Arbitral Institution Which Is Not Engaged in Arbitration Activity

In the case concluded by the 11th Circuit on 07.07.1981, even though the parties provided for settlement of disputes via arbitration under the auspices of *"Paris Chamber of Commerce"* in cement sales contract, defendant initiated arbitration at the *"International Chamber of Commerce in Paris"* about the dispute on the quality of cement.[22]

Thereupon, claimant brought an action before the Ankara 2nd Commercial Court of First Instance and asked for a decision that holds arbitration clause incapable of being performed and accordingly null-and-void on the grounds that the defendant -despite objection of the claimant- initiated arbitration at the *"International Chamber of Commerce in Paris"* instead of *"Paris Chamber of Commerce"* referred to in the arbitration clause and that the arbitration procedure was not conducted and the arbitral award was not made under the auspices of *"Paris Chamber of Commerce"* referred to in the arbitration clause.

In response, the defendant requested for rejection of the case on the grounds that they had agreed with the claimant to resort to arbitration in general, that the arbitral institution which the parties in fact intended to authorise is not *"Paris Chamber of Commerce"* but *"International Chamber of Commerce in Paris"* as the *"Paris Chamber of Commerce"* is not engaged in arbitration activity, that the claimant had admitted jurisdiction of the *"International Chamber of Commerce in Paris"* by joining the constitution of the arbitral tribunal and that the objection of the claimant had been rejected by the arbitral tribunal.

The Court, by using the power of interpretation granted by the 818 Turkish Code of Obligations [Türk Borçlar Kanunu] (1926) (repealed 2011) Art.18(1) [6098 Turkish Code of Obligations (2011) Art.19(1)], rejected the case on the ground that the genuine intent of the parties was the settlement of disputes arising from the cement sales contract via arbitration at the *"International Chamber of Commerce in Paris"*.

This decision was approved by the Turkish Supreme Court 11th Circuit by a majority vote.

According to the dissenting opinion of two members of the 11th Circuit; the dispute between the parties arose from the arbitration clause of the cement sales contract which provided that disputes would be resolved by mutual agreement and amicably, failing this Paris Chamber of Commerce arbitration would be competent; "arbitration

22 Turkish Supreme Court 11th Circuit [Yargıtay 11. Hukuk Dairesi], File nr. [Esas No] 1981/2726, Decision nr. [Karar No] 1981/3508, Date [Tarih] 07.07.1981: 11 Yargıtay Kararları Dergisi [Journal of Supreme Court Decisions] 1449 ff. (1981)

agreements" and "agreements between parties and arbitrators" should be dissociated and as required by the nature of agreement between parties and arbitrators, if the arbitrator appointed by parties refuses to act as arbitrator or resigns or dies or loses the qualities required, arbitration agreement shall become null-and-void; the dispute did not arise from the arbitration agreement but from the agreement between the parties and the arbitrator where there exists no possibility to make a broad interpretation; the *"Paris Chamber of Commerce"* and the *"International Chamber of Commerce"* are both in Paris; the parties authorised the *"Paris Chamber of Commerce"* as arbitrator in the arbitration clause but it is clear that the *"Paris Chamber of Commerce"* is not engaged in arbitration activity; since the arbitrator which the parties agreed upon refuses to act as arbitrator, arbitration clause shall become incapable of being performed; since the *"Paris Chamber of Commerce"* does not act as arbitrator, it is not possible to accept, by way of interpretation, that the *"International Chamber of Commerce in Paris"* shall be the arbitrator.

It should be first noted that the conclusion of the dissenting opinion is incorrect since it is based on viewpoint that the *"Paris Chamber of Commerce",* referred to in the arbitration clause, shall not act as an arbitral institution to organise arbitration procedure but as an arbitral tribunal to conduct arbitration procedure and to make an award in propia persona. However, the parties, by referring to the *"Paris Chamber of Commerce"* in the arbitration clause, did not agree upon the fact that *"Paris Chamber of Commerce"* shall act as an arbitrator but upon the fact that the disputes shall be settled via arbitration conducted under the auspices of the *"Paris Chamber of Commerce"*. If the *"Paris Chamber of Commerce"* is not engaged in arbitration activity, the arbitration clause may be held valid by accepting the reference to the *"Paris Chamber of Commerce"* as a reference to an existing and definite arbitral institution engaged in arbitration activity. However, in order to hold an arbitration clause -including a pathological reference- valid by way of interpretation, the arbitration clause should not be equidistant to two or more different arbitral institutions and should not have the nature to cause uncertainty and dilemma about the competent arbitral institution. But, the reference to *"Paris Chamber of Commerce"*, as understood from the decisions of the Paris Court of Appeals cited above, may be accepted as a reference to *"Paris Chamber of Arbitration" (Chambre Arbitrale Internationale de Paris)* founded in 1926 and engaged in both national or international arbitration activity on the one hand, may also be accepted as a reference to the *"International Chamber of Commerce"* in Paris on the other hand. Since the reference to the *"Paris Chamber of Commerce"* in the arbitration clause is equidistant to two different arbitral institutions and have the nature to cause uncertainty and dilemma about the competent arbitral institution, it seems impossible to make an interpretation which satisfies both of the parties. Directing parties to one of these arbitral institutions by way of interpretation of the arbitration clause which is equidistant to two or more different arbitral

institutions connotes designation of the competent arbitral institution by the court upon a presumptional intent of the parties by putting herself in the parties' place and shall result in a legal conclusion exceeding the genuine intent of the parties. It seems impossible to give a satisfactory explanation to the question why the court did not find the *International Chamber of Commerce in Paris"* competent when it finds that *"Paris Chamber of Arbitration"* is competent or vice versa. In this respect, the court should have, depending on certainty of seat of arbitration and according to law of such seat of arbitration, either directed parties to *ad hoc* arbitration by accepting that arbitration agreement aimed at institutional arbitration is transformed into an arbitration agreement aimed at *ad hoc* arbitration or held that the arbitration clause is incapable of being performed and accordingly null-and-void if seat of arbitration is uncertain or if law of arbitral seat does not allow such a transformation.

It should be underlined that attendance of the claimant to the arbitration procedure conducted under the auspices of the "*International Chamber of Commerce"* in Paris, as understood from declarations of both parties, does not abolish the right to raise an objection about validity of arbitration agreement and/or jurisdiction of arbitrators in further stages since the claimant had objected to jurisdiction of arbitral tribunal during arbitration procedure.

C. The Turkish Supreme Court 19th Circuit's Decision of 21.06.1999 on Validity of an Arbitration Agreement Referring to Non-Existing Arbitral Institutions

In the case concluded by the 19th Circuit on 21.06.1999[23], parties concluded in the arbitration clause that disputes would be settled by *"Tashkent Chamber of Commerce and Industry Arbitration Court"* or by *"Geneva International Court of Arbitration"*. Claimant brought an action on a dispute arising from the contract against defendant before Istanbul 6th Commercial Court of First Instance, alleging that the arbitration clause is null-and-void since it refers to a non-existing arbitral institution. Defendant argued that the Court lacks jurisdiction because of the arbitration clause and thereby the Court faced the debate on validity of such arbitration clause.

The Istanbul 6th Commercial Court of First Instance accepted the arbitration objection of the defendant and rejected the case by holding that the claimant argued that the arbitral institution referred to in the arbitration clause was non-existing, but did not provide any satisfactory information and document in this direction and that the defendant argued on the contrary.[24] This decision was approved by the Turkish Supreme Court 19th Circuit.

23 Turkish Supreme Court 19th Circuit [Yargıtay 19. Hukuk Dairesi], File nr. [Esas No] 1999/3348, Decision nr. [Karar No] 1999/4304, Date [Tarih] 1.06.1999: *See* Şanlı, *supra* n. 1, at 438 for the summary of the unreported decision.

24 Istanbul 6th Commercial Court of First Instance [İstanbul 6. Asliye Ticaret Mahkemesi], File nr. [Dosya No] 1997/1220, Decision nr. [Karar No] 1998/1954, Date [Tarih] 24.11.1998: *See* Şanlı (n 1) 438 for the summary of the unreported decision.

It is asserted in the Turkish scholarly literature that the conclusion reached by the Supreme Court in this decision might be accepted as the Supreme Court holds arbitration agreements referring to non-existing arbitral institutions null-and-void. According to this opinion, if claimant had proven with proper evidence that the arbitral institution referred to in the arbitration clause was non-existing, it would have been possible to presume that the arbitration clause would be held null-and-void. Accordingly, it is asserted that arbitration agreements referring to non-existing arbitral institutions shall be held null-and-void by Turkish courts as a conclusion derived from such decision of the Supreme Court.[25]

The *"Tashkent Chamber of Commerce and Industry Arbitration Court",* referred to by the parties in the arbitration clause as one of the two options, has never existed. The *"Uzbekistan Chamber of Commerce and Industry",* which was founded on 7.7.2004, is in Tashkent and there is an arbitration court acting under the auspices thereof. If the *"Uzbekistan Chamber of Commerce and Industry"* had been established by the contract date, the reference to the arbitration court at the *"Tashkent Chamber of Commerce and Industry"* could have been interpreted as the parties in fact intended to authorise the arbitration court of the *"Uzbekistan Chamber of Commerce and Industry"* located in Tashkent but wrote its name incorrectly; depending on whether there is another arbitration court in Tashkent organised under a chamber and engaged in arbitration activity, it could be accepted that such pathology might be cleared up by way interpretation and shall not affect validity of the arbitration clause. However, since there existed no arbitral institution in Tashkent both by the contract date and by the date the Turkish court ruled on validity of the arbitration clause and since the parties did not determine any seat of arbitration, the reference to the arbitration court of the *"Tashkent Chamber of Commerce and Industry"* should be held incapable of being performed and accordingly null-and-void.

The "*Geneva International Court of Arbitration",* referred to by the parties in the arbitration clause as the other option, has never existed either. However, there is an arbitration court at *"The Geneva Chamber of Commerce, Industry and Services",* which was founded in 1865 as *"The Geneva Chamber of Commerce"* and title of which was changed with the addition of the terms "industry" in 1961 and "services" in 2006. The contract date is not mentioned in the decision of the Court, but, by way of estimation with reference to the decision's date, it is possible to declare that the only arbitral institution in Geneva by the contract date was the arbitration court at *"The Geneva Chamber of Commerce and Industry"*. There is no doubt that the parties who referred to *"The Geneva International Court of Arbitration"* in the arbitration clause have the common intention to authorise an arbitral institution located in Geneva and the only arbitral institution in compliance with the description of the parties may be

25 ibid 438

the arbitration court at the *"The Geneva Chamber of Commerce and Industry"*. The arbitration clause involving such an indefinite reference to the arbitral institution is not an arbitration clause which is equidistant to two or more different institutions or which has the nature to cause uncertainty or dilemma about the competent arbitral institution and therefore it is a valid arbitration clause authorising the arbitration court at *"The Geneva Chamber of Commerce and Industry"*.

In this respect, acception of arbitration objection of the defendant by the Court is correct in point of conclusion. However, justification of the Court while coming to this conclusion is incorrect. Because the Court rejected the objection of the claimant, who alleged that the arbitral institutions referred to in the arbitration clause are non-existing, on the ground that the claimant did not provide any satisfactory information or document in this direction and did not perform the burden of proof. Other justification of the Court was that the defendant had argued on the contrary. However, the claimant asserted a negative claim by alleging that the arbitral institutions referred to in the arbitration clause did not exist. By nature of this allegation, burden of proof should move to the defendant who alleged that such arbitral institutions existed. Arbitration objection should have been accepted if the defendant proved that the arbitral institutions referred to in the arbitration clause existed. However, the Court asked the claimant to prove the allegation that the arbitral institutions referred to in the arbitration clause did not exist with information and documents on the one hand, but confined with the allegation of the defendant that the arbitral institutions referred to in the arbitration clause existed on the other hand.

D. The Turkish Supreme Court 19th Circuit's Decision of 07.06.2011 on Validity of an Arbitration Clause Including an Uncertain Reference to Arbitral Institutions

Despite the fact that parties had provided for settlement of disputes arising from the contract of 31.03.2006 at the *"International Court of Arbitration in England",* Australian seller company initiated arbitration against the Turkish buyer company at the *"International Chamber of Commerce International Court of Arbitration"* and then resorted to Kütahya 1st Civil Court of First Instance for enforcement of arbitral award where the Court held that there was no obstacle to enforcement of the award.[26]

Upon the appeal of this decision, the Turkish Supreme Court 19th Circuit reversed this decision on the grounds that the award was not made by the arbitral tribunal determined by the parties, that the parties had referred to *"International Court of Arbitration in England"* but the claimant had initiated arbitration at the *"International Court of Arbitration at the International Chamber of Commerce"* in Paris, and that

26 Kütahya 1st Civil Court of First Instance [Kütahya 1. Asliye Hukuk Mahkemesi], File nr [Dosya No] 2008/384, Decision nr [Karar No] 2009/52, Date [Tarih] 11.03.2009 (unreported)

the Court of First Instance should have checked whether there exists an arbitral institution matching up to *"International Court of Arbitration in England"*.[27]

The Kütahya 1st Civil Court of First Instance reconsidered the case upon the reversal of the Supreme Court and first asked the Directorate General for International Law and Foreign Relations of the Turkish Ministry of Justice whether there exists an *"International Court of Arbitration in England"* and if any, since when it has been engaged in arbitration activity, and then, by taking into consideration the response of the Directorate, rejected the case on the ground that the *"London Court of International Arbitration"* is the competent judicial authority with regard to the arbitration clause.[28]

Upon the appeal of this decision, the Turkish Supreme Court 19th Circuit reached the same conclusion with the court of first instance on the grounds that the *"London Court of International Arbitration"* is an international arbitration institution which is a different entity from the "*International Chamber of Commerce International Court of Arbitration"* in Paris and that the arbitral award was not made by the arbitration court designated by the parties since the "*International Chamber of Commerce International Court of Arbitration"* is not the arbitral institution which the parties had referred to in the arbitration clause.[29]

Parties referred to *"International Court of Arbitration in England"* in the arbitration clause. In England, there is no arbitral institution exactly matching up with *"International Court of Arbitration in England"*. Nevertheless, there are many arbitral institutions in England engaged in international arbitration activity but the most similar arbitral institution to the one described in the arbitration clause seems to be the *"London Court of International Arbitration"* and thus, it might be alleged that genuine intent of the parties is to authorise the *"London Court of International Arbitration"*. Other probability might be the allegation that there are many arbitral institutions in England, any of which might be accepted to be authorised by the parties who referred to *"International Court of Arbitration in England"* in the arbitration clause. Designation of the competent arbitral institution according to such an arbitration clause which is equidistant to two or more different arbitral institutions connotes designation of the competent arbitral jurisdiction upon presumptional intent of the parties and shall result in a legal conclusion exceeding the genuine intent of the parties. Therefore, the relevant part of the arbitration clause referring

27 Turkish Supreme Court 19th Circuit [Yargıtay 19. Hukuk Dairesi], File nr [Dosya No] 2009/5703, Decision nr [Karar No] 2009/8256, Date [Tarih] 15.09.2009, http://www.kazanci.com/kho2/ibb/files/19hd-2009-5703.htm (accessed 21April 2017).

28 Kütahya 1st Civil Court of First Instance [Kütahya 1. Asliye Hukuk Mahkemesi], File nr [Dosya No] 2010/133, Decision nr [Karar No] 2010/344, Date [Tarih] 28.10.2010 (Turk.) (unreported).

29 Turkish Supreme Court 19th Circuit [Yargıtay 19. Hukuk Dairesi], File nr [Dosya No] 2011/4149, Decision nr [Karar No] 2011/7619, Date [Tarih] 07.06.2011, http://www.kazanci.com/kho2/ibb/files/19hd-2011-4149.htm (accessed 21 April 2017).

to *"International Court of Arbitration in England"* might be held incapable of being performed but the remaining part of the arbitration clause stays valid and it means that the parties have a common intent to settle disputes via *ad hoc* arbitration with the seat of arbitration in England. Third probability is, as happened in the case, to accept that the parties, by referring to *"International Court of Arbitration in England"* in the arbitration clause, had indeed intended to arbitrate disputes under the auspices of the *"International Chamber of Commerce International Court of Arbitration"* with seat of arbitration in England.[30]

However, the probabilities mentioned above would have carried a meaning if the parties had resorted to state courts alleging that there existed no definite arbitration court to be resorted to. If the claimant, before initiating arbitration in any arbitral institution, had resorted to English courts, as the seat of arbitration decided by the parties, or to Turkish courts, as the place where the defendant is resident and where enforcement of a prospective award would most likely be sought, such courts could have directed parties to the proper arbitral institution by way of interpretation or could have directed parties to *ad hoc* arbitration to be conducted in England by accepting that the arbitration clause aimed at institutional arbitration was transformed into an arbitration clause aimed at *ad hoc* arbitration or could have held that the arbitration clause was incapable of being performed and accordingly null-and-void. Thus, the problems occured in the enforcement case could have been initially avoided. But, the claimant preferred to initiate an arbitration procedure before the *"International Chamber of Commerce International Court of Arbitration"* and then resorted to Turkish courts in order to enforce the arbitral award rendered.

In my opinion, the *"International Chamber of Commerce International Court of Arbitration",* under the auspices of which the arbitral award was made, does not match up with the arbitral institution that the parties referred to in the arbitration clause. There exists no arbitral institution exactly matching up with the arbitral institution that the parties described in the arbitration clause. The parties used so general terms having broad meaning in the arbitration clause in order to describe the arbitral institution which they intended to authorise that many of the arbitral institutions all over the world might be accepted to be under the scope of this reference. However, the phrase *"in England"* limits the scope of the reference in the arbitration clause with the arbitral institutions located in England. There are many arbitral institutions in England, any of which might be accepted within the scope of the reference to *"International Court of Arbitration in England",* but the most similar

30 It is pointed out in the literature that an arbitration clause referring resolution of disputes to *"London Arbitral Chamber"* may not be cured through interpretation and that although it is clear that parties intended to refer disputes to arbitration, the inaccuracy of arbitration clause is of such a nature so as not to allow determination, with reasonable certainty, of which arbitral institution was chosen by parties to conduct arbitral proceedings. Since the reference to *"London Arbitral Chamber"* may well be construed as referring either to LCIA arbitration to be conducted in London, or to ICC arbitration with a London seat, such arbitration clause should not be upheld. Molfa (n 5) 181-182

arbitral institution to the one described in the arbitration clause is the *"London Court of International Arbitration"*. Therefore, the award was made under the auspices of an arbitral institution located in Paris that was not authorised by the parties in the arbitration clause.

This conclusion might constitute contradiction with certain conditions for enforcement of foreign arbitral awards.

According to Art.V(1)(c) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, enforcement of the award may be refused if the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration. The arbitral award, which was made under the auspices of an arbitral institution that was not authorised by parties in arbitration agreement, shall totally exceed the scope of arbitration agreement which grants jurisdiction to arbitrators and which constitutes the legal basis of the arbitral award.[31] Therefore, enforcement of this arbitral award may be refused according to Art.V(1)(c).

On the other hand, according to article V(1)(d) of the New York Convention, there is an obstacle to enforcement of an award if appointment of arbitrators or arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. The parties, by referring to *"International Court of Arbitration in England",* also authorised its arbitration rules for appointment of arbitrators and arbitral procedure; if there existed no such arbitral institution, appointment of arbitrators or arbitral procedure would be conducted according to English law since the parties determined England as the seat of arbitration. However, the award was rendered under the auspices of *"International Chamber of Commerce International Court of Arbitration"* and also appointment of arbitrators and arbitral procedure were conducted according to arbitration rules of this arbitral institution. This is contrary to New York Convention Art.V(1)(d) and constitutes an obstacle to enforcement of the award in Turkey.[32]

It should be noted that the decision of the *"International Chamber of Commerce International Court of Arbitration",* one of the most prestigious and important arbitral institutions of the world, accepting jurisdiction upon such an arbitration clause is surprising. At this point, it is remarkable whether the defendant had raised an objection regarding jurisdiction of the *"International Chamber of Commerce International Court of Arbitration"*. However, neither the Turkish Supreme Court

31 *See* Ziya Akıncı, Milletlerarası Tahkim [International Arbitration] (4th edn, Vedat 2016) 378 ff; Fouchard, Gaillard and Goldman (n 6) 988; Şanlı, (n. 1) 442.

32 *See* Şanlı (n 1) 452

19th Circuit's decision nor the Kütahya 1st Civil Court of First Instance's decision is informative on this issue. If the defendant joined the arbitration proceeding, conducted under the auspices of the *"International Chamber of Commerce International Court of Arbitration",* without raising any objection with regard to jurisdiction of arbitrators or to appointment of arbitrators or to arbitral procedure, it is accepted that the defendant gave consent to such issues and accordingly lost the right to raise any objection in the annulment or enforcement procedures regarding jurisdiction of arbitrators or appointment of arbitrators or arbitral procedure.[33] In this respect, if the defendant joined the arbitration procedure conducted under the auspices of *"International Chamber of Commerce International Court of Arbitration"* by raising or by reserving the right to raise any objection with regard to jurisdiction of arbitrators or to appointment of arbitrators or to arbitral procedure, the defendant preserved the right to raise any objection in the annulment or enforcement procedures regarding the above mentioned issues.

In conclusion, rejection of the claim regarding enforcement of the arbitral award made under the auspices of the *"International Chamber of Commerce International Court of Arbitration"* is rightful, save for the exception mentioned in the previous paragraph.

This conclusion seems fatal when expenses and time spent and endeavour made by the claimant are taken into consideration. However the parties, who gave rise to this problem first by drafting such a pathological arbitration clause and then by initiating arbitration at an arbitral institution which is less similar to the arbitral institution described in the arbitration clause, instead of resorting to the courts in the seat of arbitration or in any potential state for enforcement of arbitral award in order to remove the pathology in the arbitration clause or instead of resorting to the arbitral institution which is most similar to the arbitral institution described in arbitration clause, have run the risk of non-enforcement of the arbitral award.

E. The Turkish Supreme Court 15th Circuit's Decision of 01.07.2014 on Validity of an Arbitration Clause Referring to Non-Existing Arbitral Institution

In the case before the Istanbul Anadolu 21st Commercial Court of First Instance about a dispute arising from a sales contract between claimant company resident in the Czech Republic and defendant company resident in the Turkish Republic, the defendant raised an arbitration objection upon the arbitration clause of the contract.

The Court accepted the arbitration objection on the ground that the parties had agreed in the arbitration clause upon settlement of disputes arising from the contract

33 For more information, *see* Emre Esen, *Uluslararası Ticarî Tahkimde Tahkim Anlaşmasının Üçüncü Kişilere Teşmili [Extension of Arbitration Agreements to Non-Signatories in International Commercial Arbitration]* (Beta 2008) 227 ff

by *"International Commercial Arbitration Court of the Chamber of Commerce and Industry of European Community"* and rejected the case, despite the objection of the claimant that the arbitration clause is null-and-void since arbitral institution authorised in the arbitration clause is non-existing and since it is not possible to file a lawsuit before a non-existing judicial authority. According to the Court, both parties were merchants and had to act prudentially since merchant title is subject to liabilities and obligations arising from the 6102 Turkish Commercial Code [Türk Ticaret Kanunu] (2011) provisions. For this reason the Court refused to respect claimant's relevant arguments.[34]

Upon the appeal of the case, the Turkish Supreme Court 15th Circuit approved the decision of the Court of First Instance on the ground that there existed an arbitration clause in the contract concluded by the parties.[35]

Thereupon the claimant made an individual application to the Turkish Constitutional Court claiming that the decisions mentioned above had restricted the right to "access to justice". The Constitutional Court held that: according to the Constitution of Republic of Turkey (1982) Art.148(4), complaints regarding the issues which should be made subject of the means of appeal are not within the scope of rights to individual application and therefore the issues discussed before courts, such as proof of facts or assessment of evidence or interpretation and application of law rules or whether the conclusion reached about the dispute is fair, may not be the subject of individual application but evident fault of discretion or determinations or conclusions involving express arbitrariness which interrupt rights and liberties within the scope of rights to individual application might be the subject of individual application. According to the Constitutional Court, in the present case, the Court of First Instance examined the allegations with regard to the arbitration clause between the parties and rejected the case on the ground that the dispute must be resolved via arbitration and rejected the allegations of the claimant with regard to the arbitration clause since both parties are merchants and have to act prudentially since merchant title is subject to liabilities and obligations arising from the 6098 Turkish Commercial Code (2011) provisions as the claimant did not produce any information or document regarding being given no opportunity to submit any allegation or evidence during the proceeding or regarding disregard of the allegations by the Court of First Instance. The Constitutional Court also considered that the decision of the Court of First Instance was not without justification, that there existed no aspect constituting arbitrariness in the decision and that the alleged violation of the right to a fair trial was without merit.[36]

34 Istanbul Anadolu 21st Commercial Court of First Instance [İstanbul Anadolu 21. Asliye Ticaret Mahkemesi], File nr [Dosya No] 2013/456, Decision nr [Karar No] 2014/191, Date [Tarih] 01.07.2014 (Turk.) (unreported)

35 Turkish Supreme Court 15th Circuit [Yargıtay 15. Hukuk Dairesi], File nr [Dosya No] 2015/3849, Decision nr [Karar No] 2015/4786, Date [Tarih] 15.10.2015 (unreported)

36 Turkish Constitutional Court [Anayasa Mahkemesi], Application nr. [Başvuru No] 2016/1198, Date [Tarih] 30.05.2016 (unreported)

However, I am of the opinion that the decisions of either the Court of First Instance or the Supreme Court, rejecting the case only upon the fact that there existed an arbitration clause in the contract but involving no determination about the allegation that the arbitration clause was null-and-void, are incorrect and that The Constitutional Court could not even comprehend the argument of the claimant.

It is undisputed that the arbitral institution referred to in the arbitration clause by the parties is non-existing. In addition to this, there existed no arbitral institution that is similar to the arbitral institution referred to in the arbitration clause. The parties did not agree upon seat of arbitration as well. Accordingly, the parties concluded an arbitration agreement but neither the arbitral institution where the parties might initiate arbitration in case of dispute nor the seat of arbitration which is the main factor determining legal regime of arbitration proceeding and of arbitration agreement was designated.

At this point, it should be discoursed on whether Turkish courts might hold an arbitration agreement aimed at institutional arbitration valid by transforming it into an arbitration agreement aimed at *ad hoc* arbitration. In the present case, the parties did not agree upon seat of arbitration so seat of arbitration is not in Turkey. Therefore, this arbitration is not subject to the 4686 Code on International Arbitration (2001), which has a scope of application limited with the disputes where seat of arbitration is in Turkey. Only Art.5 and Art.6 of 4686 Code on International Arbitration (2001) might be applied even if seat of arbitration is out of Turkey. Article 5 is about arbitration objection raised before Turkish courts while article 6 is about provisional measures. Thus application of 4686 Code on International Arbitration (2001) in the present case is limited with article 5, which is about raising of arbitration objection and assessment of objections about validity of arbitration agreements and which provides for application of relevant provisions of 6100 Code of Civil Procedure [Hukuk Muhakemeleri Kanunu] (2011) about preliminary objections. Turkish courts, while determining validity of an arbitration agreement under an arbitration objection, may rule that an arbitration agreement aimed at institutional arbitration remains valid by transforming into an arbitration agreement aimed at *ad hoc* arbitration. In other words, Turkish courts may hold that parties' common intent to arbitrate is existing and valid, but reference to a non-existing arbitral institution is incabaple of being performed and accordingly null-and-void.[37] However, in the present case, not only arbitral institution is non-existing but also seat of arbitration is uncertain. If Turkish courts rule in such circumstances that arbitration clause remains valid by transforming into an arbitration clause aimed at *ad hoc* arbitration, parties would be directed to an international arbitration procedure which has an indefinite feature about the law

37 *See* the decision of the Turkish Supreme Court 15th Circuit [Yargıtay 15. Hukuk Dairesi], File nr [Dosya No] 1984/1685, Decision nr [Karar No] 1984/3521, Date [Tarih] 15.11.1984: 6 Yasa Hukuk Dergisi [Yasa Law Journal] 849 ff. (1986)

which it is subject to. Because other provisions of the 4686 Code on International Arbitration (2001) is not applicable. Therefore, conduct of arbitration proceedings may become impossible due to uncertainty about applicable rules of law about appointment or challenge or abdication of arbitrators and about competent judicial authority for settlement of disputes arising from such issues. Likewise, duration of arbitration and competent judicial authority to rule on time extension is unknown as the parties did not need to agree upon such issues separately since they concluded an arbitration agreement aimed at institutional arbitration. After all that, holding that the arbitration clause aimed at institutional arbitration, involving a reference to a non-existing arbitral institution and no seat of arbitration, is transformed into an arbitration clause aimed at *ad hoc* arbitration, means that the law which the arbitration procedure is subject to and the judicial authority which shall provide assistance for conduct of arbitration are unknown or non-existing. Unless parties agree upon seat of arbitration or upon the law which the international arbitration proceeding is subject to, accepting that an arbitration clause aimed at institutional arbitration remains valid by transforming into an arbitration clause aimed at *ad hoc* arbitration is tantamount to create an arbitration clause incapable of being performed. According to 4686 Code on International Arbitration (2001), where parties did not designate any seat of arbitration, Turkish courts have no authority to determine seat of arbitration. In terms of Turkish arbitration law, where seat of arbitration is indefinite, accepting that an arbitration clause aimed at institutional arbitration remains valid by transforming into an arbitration clause aimed at *ad hoc* arbitration, while arbitral institution referred to in arbitration clause is non-existent, is tantamount to a decision of lack of jurisdiction where there is no other judicial authority that might be competent for the dispute.

Due to the reasons mentioned above, there's no choice for the claimant other than state courts. In cross-border disputes, which courts of which state shall have jurisdiction is determined by rules of international jurisdiction.[38] Each state has its own rules of international jurisdiction and international jurisdiction of the courts of a state shall be determined exclusively by international jurisdiction rules of that state. In accordance with the circumstances of the case, all the facts that might be taken into consideration in order to establish jurisdiction of state courts refer to Turkish courts, since the defendant Turkish company is resident in Turkey and its all assets, goods and money are located in Turkey while the place of conclusion or place of performance of the contract is also in Turkey. Correspondingly, there seems no reason in order to establish jurisdiction of courts of another state, other than Turkish courts: in other words, when Turkish courts lack jurisdiction in the present case, there is no other judicial authority that the claimant may resort to all around the world.

38 Aysel Çelikel and B Bahadır Erdem, *Milletlerarası Özel Hukuk [Private International Law]* (14th edn. Beta 2016) 515 ff; Nuray Ekşi, *Türk Mahkemelerinin Milletlerarası Yetkisi [International Jurisdiction of Turkish Courts]*(2nd edn, Beta 2000) 18 ff; Ergin Nomer, *Devletler Hususî Hukuku [Private International Law]* (21st edn, Beta 2015) 445 ff; Cemal Şanlı, Emre Esen and İnci Ataman-Figanmeşe, *Milletlerarası Özel Hukuk [Private International Law]* (5th edn, Vedat 2016) 358 ff

In this respect, if the Court, where the claimant had brought the action before and which is located in Istanbul where the defendant Turkish company is resident, lacks jurisdiction, the claimant may be deprived of "access to justice".

The "access to justice" is defined as the principle that provides concrete and efficient functioning of the "right to legal remedies".[39] The "right to legal remedies" is, as one of the irrevocable elements of state of law and of the "right to a fair trial", prescribed by the Constitution of the Republic of Turkey (1982) Art.36 as everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures. The "access to justice", taking its source from the "right to legal remedies" and from the "right to a fair trial" which is provided in article 6 of the European Convention on Human Rights (ECHR), is accepted as one of the human rights.[40] With reference to article 6 of the ECHR which regulates that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, everyone should *a fortiori* be provided the opportunity to bring forward claims and arguments before a judicial authority.

However, the Court, located in the place where the defendant is resident and that would have jurisdiction according to the 6100 Code of Civil Procedure (2011) Art.6 in case the arbitration clause is held null-and-void, did not take into consideration the objection of the claimant that the arbitral institution referred to in the arbitration clause was non-existing, did not examine the existence of such arbitral institution or validity of the arbitration clause, did not determine whether there was another judicial authority before which the claimant might bring the action in case the Court lacks jurisdiction, although those allegations were insistently raised by the claimant in every stage of the proceeding. The Court rejected the case on the ground that there existed an arbitration clause in the contract concluded by the parties, by taking into consideration that the parties -acting as merchants- should have taken the responsibility of concluding an arbitration clause, but did not consider whether the claimant would be deprived of "access to justice" if the arbitration clause was incapable of being performed and null-and-void.

However, "merchant" title of the parties and/or existence of an invalid arbitration agreement between the parties may never be legitimate reasons that justify any deprivation of "access to justice". The parties may not be deprived of the opportunity

39 *See* Hakan Pekcanıtez, Oğuz Atalay and Muhammet Özekes, *Medeni Usul Hukuku [Law of Civil Procedure]* (14th edn, On İki Levha 2013) 45

40 *See generally* Şeref Gözübüyük and Feyyaz Gölcüklü, *Avrupa İnsan Hakları Sözleşmesi ve Uygulaması [European Convention on Human Rights and Its Application]*(10th edn, Turhan 2013) 276-77; Sibel İnceoğlu, *İnsan Hakları Avrupa Mahkemesi Kararlarında Adil Yargılanma Hakkı [The Right to a Fair Trial in Decisions of European Court of Human Rights]*, 106 (4th edn., Beta 2013); Mustafa Özbek, 'Sosyal Devletin Gereği, Adalete Erişim [Requirement of Social State, Access to Justice]' (2006) (1) Legal Medeni Usul, İcra ve İflas Hukuku Dergisi [Legal Journal of Law of Civil Procedure, Execution and Bankruptcy] 149

to bring forward claims and arguments before a judicial authority even if they are merchants. Despite the arbitration clause between the parties, when one of the parties request for "effective legal protection" before Turkish courts, the "right to legal remedies" and the "access to justice" which are the elements *sine qua non* of the "right to a fair trial" must be taken into consideration by Turkish courts while determining jurisdictional issues and validity of the arbitration clause. Any decision in contrast with this conclusion shall violate article 6 of the ECHR.

It should be underlined that acceptance of an arbitration agreement as null-and-void on the ground that holding it valid shall contradict with the "right to legal remedies", is an approach accepted by the Turkish Supreme Court before. In the decision of 15.02.2011, Supreme Court 11th Circuit ruled, regarding an asymmetrical arbitration agreement where only one of the parties was entitled to initiate arbitration, that if outcome of a decision holding an arbitration agreement valid contradicts with *"the general principles of law regarding the right to legal remedies of interested persons",* such arbitration agreement should be held null-and-void.[41]

Furthermore, because of non-existence of arbitral institution referred to in the arbitration clause and undetermination of seat of arbitration, the arbitration clause became incapable of being performed under 6098 Turkish Code of Obligations (2011).[42] As accurately ruled by the Turkish Supreme Court 13th Circuit in the decision of 25.04.1991, arbitration agreement is a kind of contract under Law of Obligations and general provisions of contract law are also binding for arbitration agreements. By this means, the reasons restricting the freedom of contract under 6098 Turkish Code of Obligations (2011) Art.20 and Art.21 shall be directly taken into consideration while examining validity of arbitration agreements and immoral arbitration agreements shall be held null-and-void.[43] According to Art.27 of the 6098 Turkish Code of Obligations (2011), impossibility is also a ground that invalidates contracts. Thus, non-existence of arbitral institution referred to in the arbitration clause and undetermination of seat of arbitration cause the arbitration clause to become incapable of being performed and dissolve the obligation to arbitrate for both parties.

41 Turkish Supreme Court 11th Circuit [Yargıtay 11. Hukuk Dairesi], File nr [Dosya No] 2009/3257, Decision nr [Karar No] 2011/1675, Date [Tarih] 15.02.2011. For the text and critique of the decision see Emre Esen, **'**Taraflardan Sadece Birine Tahkime Müracaat Hakkı Tanıyan Tahkim Anlaşmalarının ve Özellikle Kıyı Emniyeti Genel Müdürlüğü'nün Kurtarma Yardım Sözleşmesi'nde Yer Alan Tahkim Şartının Geçerliliği [Validity of Arbitration Agreements Where Only One Party Holds The Right to Resort to Arbitration and Especially Validity of The Arbitration Clause of The Turkish Open Form]**'** **(**2010) 9(2) İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi (Journal of Istanbul Kultur Universıty Law Faculty) 145–55 *See* also Nuray Ekşi, *Hukuk Muhakemeleri Kanunu'nda Tahkim [Arbitration under the Code of Civil Procedure]* (Beta 2013) 83 ff; Şanlı, (n 1) 329 ff.

42 It should be noted that, applicable law may not be other than Turkish law whereas the parties determined neither the applicable law to the arbitration clause nor seat of arbitration.

43 Turkish Supreme Court 13th Circuit [Yargıtay 13. Hukuk Dairesi], File nr. [Esas No] 1990/8778, Decision nr. [Karar No] 1991/4492, Date [Tarih] 25.04.1991: 8 Yargıtay Kararları Dergisi [Journal of Supreme Court Decisions] 1222-23 (1991)

At the final point, the claimant may neither initiate arbitration since the arbitral institution authorised by the parties is non-existing nor achieve "effective legal protection" before Turkish courts since the Court of First Instance lacked jurisdiction upon the fact that there existed an arbitration clause between the parties and this decision was approved by the Supreme Court and the Constitutional Court found no violation of the right to "access to justice". The claimant may not bring the action before courts of another state as well, since all the facts that might be taken into consideration in order to establish jurisdiction of state courts refer to Turkish courts. Thus, the claimant became deprived of "access to justice".

The Constitutional Court made an examination limited to compliance of conduct of proceedings by the Turkish court with the right to a fair trial. However, rejection of a case on a procedural ground might solely constitute a violation of "access to justice" and accordingly of the right to a fair trial. Thus, as explained above, since the acceptance of arbitration objection –despite the fact that the arbitral institution referred to in the arbitration clause is non-existing– resulted in restriction of "access to justice", it should have been accepted as one of the determinations and conclusions that constitute violation to the rights and liberties under the individual application.

At this stage, the claimant may apply to European Court of Human Rights against Republic of Turkey on the ground that the right to "access to justice" was restricted by the decisions of Turkish courts.

However, the claimant may seek to bring the same action again before a Turkish court which would have jurisdiction according to Turkish rules of law on jurisdiction in case the arbitration clause is null-and-void. Then the decision of lack of jurisdiction, rendered by the Court of First Instance and approved by the Supreme Court, is a final decision according to Art.294 of the 6100 Code of Civil Procedure (2011) but does not constitute *res judicata* since it contains no determination about merits of the case. According to Art.20 of the 6100 Code of Civil Procedure (2011), unless one of the parties does not apply to the court, which rendered the decision of lack of jurisdiction, in order to transfer the file to the court which has jurisdiction, the case shall be accepted as non-filed. This provision is also applicable for the decision of lack of jurisdiction rendered upon arbitration objection. The claimant may file the case by paying case fee again, which is not a continuation of the case accepted as non-filed, but a new case.[44]

In this respect, if the claimant brings the same action again before a Turkish court which would have jurisdiction according to Turkish rules of law on jurisdiction in case the arbitration clause is null-and-void, the decision of lack of jurisdiction, even if it was approved by the Supreme Court, does not constitute *res judicata* and is not

44 *See* Baki Kuru, *Hukuk Muhakemeleri Usulü [Law of Civil Procedure]*(6th edn, Yetkin 2001) 627, 5038, 5978

binding for the new case and court hearing the new case shall be able to determine its jurisdiction independently. Therefore, the decision of lack of jurisdiction rendered in the previous case shall not prevent courts from discussing and determining validity of the arbitration clause while considering arbitration objection that shall probably be raised by the defendant in the new case. Moreover, in the decision of lack of jurisdiction the sole justification of the Court was the existence of the arbitration clause between the parties and the Court neither discussed nor determined whether the arbitration clause was null-and-void. This aspect of the decision constitutes another basis for courts to rule on validity of the arbitration clause and to determine merits of the dispute in case it finds the arbitration clause null-and-void in the new case.

F. Role of the Competence-Competence Principle

In a case subject to an arbitration agreement and brought before a Turkish court, if defendant duly raises an arbitration objection and if claimant alleges in return that such arbitration agreement is null-and-void on the ground that arbitral institution referred to in the arbitration agreement is non-existing or the arbitration agreement includes an uncertain reference to arbitral institutions, scope and nature of examination that shall be made by Turkish courts should be discussed in terms of *Competence-Competence* principle.

According to Art.II(3) of the New York Convention, the court of a contracting state, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the arbitration agreement is null-and-void, inoperative or incapable of being performed.

On the same matter, the 4686 Code of International Arbitration (2001) Art.5 provides that if a case subject to an arbitration agreement is brought before a court, defendant may raise an arbitration objection and that raising of arbitration objection and settlement of disputes with regard to validity of arbitration agreement are subject to the provisions of the 6100 Code of Civil Procedure (2011) about preliminary objections. In case of acceptance of arbitration objection court shall reject the case on procedural grounds.

However, there is a debate over the interrelation between the Competence-Competence principle and the two prosivions mentioned above.

In terms of Art.II(3) of the New York Convention, scope and nature of examination on validity of arbitration agreements has been subject of contradictory decisions of different state courts and is considered as an open-ended issue in the literature. Certain state courts prefer a *prima facie* examination while others prefer a more extensive

examination. It was argued in the literature that examination on validity of arbitration agreements should be limited with non-existence of an arbitration agreement or with very evident cases of invalidity.[45]

The same issue is also controversial under the 4686 Code of International Arbitration (2001) both in literature and in practice. Article 7(H) of the 4686 Code of International Arbitration (2001) grants competence to arbitrators to rule on their own jurisdiction, while Art.5 mentions "*settlement of disputes with regard to validity of arbitration agreement"* under determination of arbitration objection.

According to first approach, in order to prevent waste of vast sum of money or of long period of time in case an arbitration agreement is null-and-void, courts should make an extensive examination under Art.5 of the 4686 Code of International Arbitration (2001) and render a decision that shall be binding in proceedings for the annulment of arbitral award.[46] According to second approach, which attributes more importance to the *Competence-Competence* principle, such examination should be limited with examining *prima facie* whether there exists an arbitration agreement and whether there is a very evident case of invalidity.[47] In order to prevent *mala fide* objections aimed at detainment and disturbance of proceedings, courts should not make an extensive examination under Art.5 and should not render a decision that shall be binding in proceedings for the annulment of arbitral award.

However, it should be noted that the debate mentioned above makes no difference with regard to the arbitration agreements analysed in this paper. Because the pathology of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions, does not require an extensive examination and may be understood *prima facie*. In this respect, *Competence-Competence* principle does not prevent determination of validity of the arbitration agreements analysed in this paper.[48]

Conclusion

The three approaches adopted for resolution of the problems arising from validity of arbitration agreements referring to non-existing arbitral institutions or including uncertain references to arbitral institutions constitute a three-step mechanism.

45 Albert Jan Van Den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Wolters Kluwer 1981) 154-61 *See* also Circus Productions, Inc. v. Rosgoscirc, 1993 U.S. Dist. LEXIS 9797 (SDNY 1993)

46 *See* Akıncı, (n. 45) 130 ff; Nuray Ekşi, *Milletlerarası Deniz Ticareti Alanında 'Incorporation' Yoluyla Yapılan Tahkim Anlaşmaları [Arbitration Agreements Concluded by Incorporation in International Maritime Commerce]* (Beta 2004) 65

47 *See* Emre Esen, 'Uluslararası Tahkime Tâbi Bir Uyuşmazlığın Devlet Mahkemelerine Götürülmesi Hâlinde Tahkim Anlaşmasının Geçerliliğine İlişkin İtirazların İncelenmesi ve Kompetenz–Kompetenz Prensibi [Determination of Objections regarding Validity of Arbitration Agreements by National Courts in Cases Subject to International Arbitration and the Principle of Competence–Competence],' 2011(1) Galatasaray Üniversitesi Hukuk Fakültesi Dergisi [Journal of Galatasaray University Law Faculty], Atâ Sakmar Armağanı [Festschrift for Atâ Sakmar] 355 ff

48 *See* Circus Productions, Inc. v. Rosgoscirc, 1993 US DistLEXIS 9797 (SDNY 1993).

In the first step, such problems might be resolved by way of interpretation if possible. If not, depending on position of law of arbitral seat, such an arbitration agreement aimed at institutional arbitration might be accepted to be transformed into an arbitration agreement aimed at *ad hoc* arbitration by holding only such pathological reference null-and-void but the rest of the arbitration agreement valid. However, in addition to the pathology about arbitral institution referred to in arbitration agreement, if seat of arbitration is also uncertain, arbitration agreement should be held incapable of being performed and accordingly null-and-void.

Attitude of the Turkish Supreme Court, as derived from the decisions analysed above, seems in conformity with the three approaches to a large extent and may be qualified as satisfactory. Also certain lessons may be derived from such decisions.

For instance, in the first decision, the Supreme Court adopted the interpretation approach, which –even if I disagree– represents a commonly-held understanding and which is parallel with the decisions of Paris Court of Appeals rendered in similar cases.

The second decision is an incorrect but a didactic precedent regarding burden of proof, which should be on the party who alleges that the arbitral institution referred to in arbitration agreement does exist. Furthermore, the arbitration clause in this case contained two references authorising two different arbitral institutions optionally and the first reference is a good example of pathological references which may not be resolved by way of interpretation, whereas the second reference is a good example of pathological references which may be resolved by way of interpretation.

The third decision is a precedent where the problem came up before Turkish courts at the stage of enforcement of arbitral award and reveals that when such pathological arbitration agreements exist, initiating arbitration before ensuring determination of validity of the arbitration agreement and of competent judicial authority may cause loss of time and money and effort as well.

The fourth decision has resulted in a so unfavourable legal consequence that went beyond all the decisions reported all over the world and that indicated another possibility far worse than the one mentioned as the worst in the literature: restriction of the right of *access to justice*. This precedent reveals that state courts must necessarily take the right of *access to justice* into consideration while determining arbitration objections.

Considering the decisions cited in this paper, except for a few decisions, it might be declared that courts determine validity of such arbitration agreements without reference to any law applicable. This is not surprising for Turkish courts while they disregard applicable law issues not only in this subject but also in any case regarding

validity of arbitration agreements. But it is surprising for the courts of other states which determine the applicable law in many issues regarding validity of arbitration agreements. Nevertheless, it is less surprising in terms of the first approach which comprises of interpretation of arbitration agreements and may be carried out according to general principles of law such as *bona fides* principle. However, in terms of second or third approaches, determination of validity of such arbitration agreements by state courts without reference to any law applicable might be accepted that they consider the issue subject to *lex fori* or consider it as an issue which does not require application of any state law. In my opinion, state courts' attitude in second and third approaches connotes that they consider the issue as an issue of interpretation by means of supporting parties' common intent towards arbitration and of protecting legitimate expectations of parties in compliance with *bona fides* principle[49], which is tantamount to tacit application of *lex mercatoria*.

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