CHAPTER 3

Drafting Arbitration Agreements and Arbitrability

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§3.01 INTRODUCTION

Turkish law has a dual arbitration system with two main pieces of legislation for domestic and international arbitration disputes. Domestic arbitration is governed by the CCP (Chapter 11, Articles 407-444). International arbitration, on the other hand, is governed by the IAL.

For ease of unification, the provisions of the IAL were adopted, to a great extent, when drafting the CCP. The IAL was enacted in 2001 as a separate law consisting of 19 provisions essentially adopted from the UNCITRAL Model Law. The IAL is applicable where the parties agree on the place of arbitration being Turkey and where the dispute involves 'a foreign element'.[1] Therefore, subject to minor exceptions,[2] Turkish legislation on arbitration is mainly based on the UNCITRAL Model Law.

In this Chapter, we will first define the arbitration agreement, setting out the content and validity requirements under Turkish law. Second, and finally, we will touch upon arbitrability under Turkish law in light of various court decisions and scholarly views.

1. See, Chapter 1 for definition of foreign element (Article 2).
2. Such exceptions within the scope of this article will be highlighted for ease of reference.

§3.02 THE ARBITRATION AGREEMENT UNDER TURKISH LAW

[A] Nature, Definition and Content of an Arbitration Agreement

[1] Substantial or a Procedural Contract?

Whether an arbitration agreement is a substantial or a procedural contract has been a long-standing discussion among Turkish legal scholars.[3] The majority opinion considers an arbitration agreement as a contract of procedural law on the ground that arbitration, as an institution, is regulated under the CCP and, with the arbitration agreement, the parties choose a legal procedure to settle their disputes.[4] The Court of Appeal, in line with the majority opinion,[5] has also stated that an arbitration agreement is a contract of procedural law.[6] At the same time, it is almost unanimously accepted under Turkish law that an arbitration agreement also falls under the scope of the Code of Obligations in terms of its formation and, thus, general rules relating to the law of obligations are to be applicable.[7]

[2] Definition of an Arbitration Agreement

Until the enactment of the IAL in 2001, arbitration in Turkey was regulated under Law No. 1086, which did not provide a definition of an arbitration agreement. At that time, there were various but very limited definitions in the legal doctrine, mostly emphasizing the alternative nature of arbitration where the 'parties choose not to apply to State courts for settlement of their disputes'.[8]

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3. Erol Ertekin & İzzet Karataş, *Uygulamada İhtiyari Tahkim ve Yabancı Hakem Kararlarının Tenfizi Tanınması* (*The Practice of Voluntary Arbitration and the Recognition and Enforcement of Foreign Arbitral Awards*) (Ankara: Yetkin Publishing, 1997), 43; C. Yavuz, 'Türk Hukukunda Tahkim Sözleşmesi ve Tabi Olduğu Hükümler' ('Arbitration Agreements under Turkish Law and the Applicable Provisions'), in *II. Uluslararası Özel Hukuk Sempozyumu* (*2nd International Private Law Symposium*) (Istanbul: Marmara University Symposium Publications, 14 February 2009), 140; S. Üstündağ, *Medeni Yargılama Hukuku – Cilt I-II* (*Law of Civil Procedure – Volumes I-II*) (Istanbul: Nesil Publishing, 2000), 935; A. Yeşilırmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi için Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk ve Tahkim: Sorunlar ve Çözüm Önerileri* (*For the Effective Resolution of Disputes through Negotiation, Mediation and Arbitration for the Improvement of Commercial Life and the Investment Environment in Turkey: Problems and Suggestions for Resolution*) (Istanbul: XII Levha Publishing, 2011).
4. Üstündağ, *supra* n. 3, 933; B. Kuru, *Hukuk Muhakemeleri Usulü Cilt VI* (*Law of Civil Procedure Volume VI*) (Istanbul: Demir Demir Publishing, 2001), 5937.
5. Court of Appeal General Legal Assembly (Date: 19 March 2003, File No: 2003/15-142, Decision No: 2003/182) (Please visit www.kazanci.com, August 2014 for all court decisions referred herein).
6. Court of Appeal General Legal Assembly (Date: 6 December 1969, File No: 1969/866, Decision No: 1970/5); 15th Civil Division of the Court of Appeal (Date: 15 June 1989, File No: 1989/1023, Decision No: 1989/2841); Ertekin, *supra* n. 3, 43-44.
7. Kuru, *supra* n. 4, 5937; T. Kalpsüz, 'Tahkim Anlaşması' ('Arbitration Agreement'), in *Ünal Tekinalp'e Armağan – Cilt II* (*In Honour of Ünal Tekinalp – Volume II*) (Istanbul: Beta Publishing, 2003), 1042.
8. Üstündağ, *supra* n. 3, 933; for comparative definitions see, Ertekin, *supra* n. 3, 42.

Article 4 defines the arbitration agreement as 'an agreement between the parties to submit to arbitration all or certain disputes, which have arisen or which may arise in the future, between them in respect of an existing legal relationship, whether contractual or not.' This definition is almost repeated under Article 412 of the CCP as follows: 'An arbitration agreement is an agreement between the parties to submit to an arbitrator or an arbitral tribunal all or certain disputes, which have arisen or which may arise in the future, between them in respect of a legal relationship, whether contractual or not.' As can be seen, both definitions are almost directly adopted from Chapter II, *Option I* of Article 7 of the UNCITRAL Model Law. It is useful to break the definition into the following pieces and elaborate upon each piece one by one:

(a) Parties should 'agree' to submit their dispute to arbitration.

As will be explained in detail under part (3) below, there should be an agreement between the parties demonstrating a clear intent to resolve certain disputes through arbitration.

(b) Parties can go to arbitration 'in respect of an existing legal relationship'.

According to the IAL, there should be an existing legal relationship between the parties. On the other hand, the CCP only mentions a 'legal relationship'. The UNCITRAL Model Law states that the legal relationship should be 'defined' rather than 'existing'.[9] The different wording of the IAL is criticized in the Turkish legal doctrine for not reflecting the *ratio legis* of the provision.[10]

(c) Parties can go to arbitration to resolve a dispute in respect of a legal relationship 'whether contractual or not'.

Therefore, one may resort to arbitration in connection with any legal relationship governed under Turkish law, such as rights of claims arising from tortious acts or unjust enrichments, and there is no need to have a legal dispute arising from a contract.[11]

(d) 'All or certain disputes' between the parties may be submitted to arbitration.

Parties are entitled to agree upon certain disputes and choose to arbitrate only with regards to such disputes. However, it must be made clear as to which dispute(s) they

9. Model Law Chapter II, Option I, Article 7.
10. T. Kalpsüz, *Türkiye'de Milletlerarası Tahkim* (*International Arbitration in Turkey*) (Ankara: Yetkin Publishing, 2010), 37; for further details see, Kalpsüz, *supra* n. 7, 1029.
11. Excluding certain circumstances, which will be explained in detail under the Arbitrability Section.

intend to resolve through arbitration. Otherwise, in case a certain dispute is not defined clearly or in case disputes are defined in a vague manner, the resolution of the dispute(s) through arbitration may become problematic and the dispute may have to be resolved through State courts.[12]

(e) Parties can choose to resolve disputes through arbitration 'which have arisen or which may arise' in the future.

Parties can draft an arbitration agreement to cover future disputes. Needless to say, it is of course a must to have an existing dispute in order to commence arbitration.[13]

[3] The Content of an Arbitration Agreement

The content of an arbitration agreement is not regulated by either the IAL or the CCP.[14] Under Turkish law, the essential content of an arbitration agreement consists of two elements: (i) the element of dispute between the parties, and (ii) clear and absolute intent to arbitrate.[15] The arbitration agreement should clearly determine that the parties' intent is to submit all or certain disputes to arbitration without leaving room for any doubt.

The clear intent of the parties to arbitrate is considered as the founding element of the arbitration agreement.[16] According to the established practice of the Court of Appeal, the absolute intent of the parties to arbitrate should be made crystal clear.[17] There should be no provision that may raise any doubt with respect to the intent of the parties to arbitrate, such as a provision in the agreement authorizing courts despite the presence of an arbitration clause therein.[18] There are even Court of Appeal decisions which deem an arbitration agreement invalid if it states that any dispute that cannot be resolved by arbitration should be resolved by the Turkish courts.[19]

12. Z. Akıncı, *Milletlerarası Tahkim (International Arbitration)* (Istanbul: Vedat Publishing, 2013), 96.
13. *Ibid.*, 96.
14. Law No. 4501, enacted specifically for the purpose of regulating principles to be applied in case of arbitration proceedings regarding disputes relating to public concession agreements, provides a detailed list with regards to the content of an arbitration agreement. The said Law is not, however, within the scope of this article.
15. Yavuz, *supra* n. 3, 151; Akıncı, *supra* n. 12, 104; Ertekin, *supra* n. 3, 65.
16. Akıncı, *supra* n. 12, 100.
17. 9th Civil Division of the Court of Appeal (Date: 25 February 2013, File No: 2013/1773, Decision No: 2013/6664).
18. 15th Civil Division of the Court of Appeal (Date: 13 April 2009, File No: 2009/1438, Decision No: 2013/2153); 15th Civil Division of the Court of Appeal (Date: 2 March 1998, File No: 1998/5217, Decision No: 1998/738); 15th Civil Division of the Court of Appeal (Date 18 June 2007, File No: 2007/2680, Decision No: 2007/4137).
19. 15th Civil Division of the Court of Appeal (Date: 13 March 2007, File No: 2007/769, Decision No: 2007/1572).

[B] Form of an Arbitration Agreement

[1] A Separate Arbitration Agreement or an Arbitration Clause?

Both the IAL and the CCP, respectively under Articles 4 and 412, state that an arbitration agreement can be concluded as an 'arbitration clause' in a contract or as a 'separate agreement'. Generally in practice, arbitration agreements are drafted as an arbitration clause in an underlying contract and not as a separate agreement.[20] Therefore, it is crucial to determine the validity of an arbitration clause in case of a dispute on the validity of the underlying contract between the parties. Both the IAL and the CCP endorse the concept of severability and deem the arbitration clause and the underlying agreement executed between the parties as independent and severable. Article 4 and Article 412 of the CCP are identical and read as follows: 'An objection cannot be made against an arbitration agreement that the underlying contract is invalid or that the arbitration agreement relates to a dispute which has not yet arisen.' Therefore, the validity of an arbitration clause does not depend on the validity of the underlying contract and, accordingly, the invalidity of the underlying contract does not necessarily affect the validity of the arbitration clause therein. In a decision rendered by the Court of Appeal General Legal Assembly on 11 October 2000, the Court clearly determined that the validity of the agreement in which an arbitration agreement was incorporated therein is independent from the validity of that arbitration agreement.[21] Although this decision was rendered under Law No. 1086, it remains applicable.

[2] Requirement as to Written Form

As determined under the UNCITRAL Model Law, the IAL and the CCP regulate that an arbitration agreement shall be in written form. The IAL and the CCP also provide types of written forms as follows: 'An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telegrams, telex, facsimile or similar means of telecommunications as well as electronically kept records...'[22] The reasoning of Article 412 of the CCP states that this is a list of examples of written forms and is therefore not an exhaustive list. Hence, provided that they are not contrary to this provision, principles on the written form requirement regulated under the Code of Obligations[23] and the requirement of secure electronic signature, as regulated under the Electronic Signature Law,[24] shall also be applied where necessary. Although secure electronic signature is not mandatory pursuant to Article 4 and Article 412 of the CCP, it is advised in doctrine, in the light of Article 14 of the Code of Obligations and Article 5 of the Electronic Signature Law, that the parties should sign arbitration agreements

20. Akıncı, *supra* n. 12, 98.
21. Court of Appeal General Legal Assembly (Date: 11 October 2000, File No: 2000/19-1122, Decision No: 2000/1256).
22. Article 4 of the IAL and Article 412 of the CCP.
23. Akıncı, *supra* n. 12, 116.
24. Law on Electronic Signatures, Law No. 5070 of 15 January 2004, published in the Official Gazette Numbered 25355 and dated 23 January 2004.

with secure electronic signature to eliminate any doubts as to the identity of the signatories.[25]

[3] Absence of Objection to the Statement of Claim

As an exception to the written form requirement explained above, according to Article 4 and Article 412 of the CCP, a dispute can be settled by arbitration in case one submits a dispute to arbitration in the absence of an arbitration agreement between the parties, and the counter-party does not raise an objection in its statement of defence that a valid arbitration agreement does not exist between the parties. Article 4 and Article 412 of the CCP are identical in this respect and read as follows: 'An agreement is in writing if ... in an exchange of statements of claim and defence where the existence of a written arbitration agreement is alleged by one party and not denied by another.'

A respondent who does not object to and joins the arbitration proceedings by submitting its statement of defence will be deemed to have accepted the existence of an arbitration agreement. In this case, a written arbitration agreement is deemed to exist between the parties, and thus the dispute should be settled by arbitration.[26] It is unanimously accepted in the doctrine that raising an objection against the existence of an arbitration agreement after the settlement of the dispute through arbitration will be both contrary to Article 4 and Article 412 of the CCP and also to the principle of good faith under Turkish law.[27] The consistent approach of the Court of Appeal is also to accept objections only at the beginning of the proceedings with the statement of defence.[28]

[4] Reference to Any Document Containing an Arbitration Clause

According to Article 4 and Article 412 of the CCP, a reference to any document containing an arbitration clause with the clear intention to make that document a part of the underlying contract also constitutes an arbitration agreement between the parties. Article 4 and Article 412 of the CCP read as follows: 'The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause a part of the contract.'

[5] In-Court Arbitration Agreements

The IAL and the CCP also provide for what may be referred to as 'in-court arbitration agreements' or 'arbitration agreements made before State courts'. The relevant paragraph of Article 5 reads as follows: 'If the parties agree to arbitrate during court

25. Akıncı, *supra* n. 12, 119.
26. Please note that the Model Law does not accept this as a written form of arbitration agreement unlike Turkish law which may give rise to problems in enforcement of arbitral decisions outside of Turkey. Also see, Akıncı, *supra* n. 12, 121 for further information.
27. Akıncı, *supra* n. 12, 120.
28. *Ibid.*, 121.

proceedings, the case file shall be sent to the related arbitrator or the arbitral tribunal by the court.' Article 412 of the CCP contains identical provisions and states that a case file shall be sent to the related arbitrator or arbitral tribunal in case parties reach an agreement during court proceedings to resolve their dispute through arbitration. The reasoning of Article 412 of the CCP states that this provision regulates the possibility of choosing arbitration even where the parties initially applied to resolve the dispute before the State courts.

[C] Validity of an Arbitration Agreement

Validity of an arbitration agreement is not specifically governed under the UNCITRAL Model Law but it is regulated under Turkish law specifically. According to Article 4, in case parties have not chosen a law to be applied to the arbitration agreement, the arbitration agreement shall be valid only if it is in compliance with Turkish law. The relevant paragraph of Article 4 is as follows: 'The validity of the arbitration agreement is subject to the law agreed by the parties, failing such agreement, to Turkish law.' Therefore, in order for the arbitration agreement to be valid under Turkish law, it should first comply with all conditions explained in detail under sections §4.02. [A] and [B] above. Second, the arbitration agreement should also comply with the special authorization requirement for the execution of arbitration agreements by representatives. Due to the significance of an arbitration agreement, any power given to a representative, agent and/or attorney should include specific authority to execute arbitration agreements or clauses. [29] , The consistent approach of the Court of Appeal on the matter is clearly stipulated in a decision rendered by the Court of Appeal General Legal Assembly on 22 February 2012, in which the arbitration agreement was found invalid due to the lack of special authority of the signatory of the agreement to execute an arbitration agreement.[30] Finally, validity of an arbitration agreement depends on the arbitrability under Turkish law of the dispute concerned, as explained in detail under section §3.03. below.

§3.03 ARBITRABILITY UNDER TURKISH LAW

Although it is not defined under either the IAL or the CCP, and likewise in the UNCITRAL Model Law, the term arbitrability may be simply defined as the ability of a dispute being duly and finally resolved through arbitration under the applicable laws. There is no special provision regulating arbitrability under the IAL. However, Article 1(4) provides the following:[31] 'This law shall not be applicable to disputes relating to

29. Article 504 of the Code of Obligations and Article 74 of the CCP.
30. Court of Appeal General Legal Assembly (Date: 22 February 2012, File No: 2011/11-742, Decision No: 2012/82).
31. There are discussions among Turkish legal scholars whether this is a provision regarding arbitrability or the scope of the IAL. Prof. Akıncı is of the opinion that even though it is regulated under the article determining the scope of the IAL, the *ratio legis* is to regulate arbitrability and thus the actual intent is to determine disputes that could not be finally resolved in arbitration

real (in rem) rights concerning immovable property located in Turkey and to disputes that are not at the free will of the parties.' The CCP contains a special provision regulating arbitrability under Article 408, entitled 'Arbitrability', which is identical to the above mentioned provision of the IAL in terms of its content: 'Disputes relating to real (in rem) rights concerning immovable property or disputes that are not at the free will of the parties are not arbitrable.'

According to both the wording of the provision and the scholarly views, Article 408 of the CCP is an imperative provision[32] but it shall not be strictly interpreted in a way that will prevent the use of arbitration.[33] As a presumption, most disputes under Turkish law fall under the scope of arbitrable disputes. However, the following disputes are not arbitrable:

[A] Disputes Relating to Real Rights Concerning Immovable Property

Real rights are in rem rights that give the owner direct control over the movable or immovable property. Immovable properties are listed under Article 704 of the Civil Code[34] and are the following: (i) land; (ii) independent and continuous rights recorded separately in the land title registry; and (iii) independent units registered at the condominium registry.

In light of the foregoing, any disputes relating to real rights concerning an immovable property located in Turkey or any dispute that may result in the transfer of such real rights from one to another are, as a rule, not arbitrable. For example, a dispute concerning cancellation of a land title deed will not be arbitrable under Turkish law since it would be originating from a real right.[35]

However, a dispute relating to a personal right (not a real right) concerning an immovable property, for instance disputes arising from lease agreements, can be finally resolved by way of arbitration under Turkish law. Yet, there are various decisions of the Court of Appeal where the Court found such disputes as being not arbitrable based on the ground that the weaker party, the lessee, should be protected against the lessor.[36]

Therefore, not every dispute relating to a personal right concerning an immovable property is arbitrable, and each case should be evaluated as to whether there is an imbalance of power between the parties as stated by the Court of Appeal, or there is a special law that does not permit arbitration justifying such conclusion.

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under Turkish law. On the other hand, Prof. Kalpsüz is of the opinion that it is not a provision regulating arbitrability, but it specifically regulates the scope of the IAL. For further details see, Akıncı, *supra* n. 12, 78; Kalpsüz, *supra* n. 10, 143.

32. Ergin Nomer, Nuray Ekşi & Günseli Öztekin, *Milletlerarası Tahkim Hukuku (International Arbitration Law)* (Istanbul: Beta Publishing, 2013), 17, fn. 4; M. Kılıçoğlu, *6100 Sayılı Hukuk Muhakemeleri Kanun El Şerhi (Annotation of the Code of Civil Procedure Numbered 6100)* (Istanbul: Legal Publishing, 2012), 1522.
33. Nomer, *supra* n. 32, 17.
34. Civil Code, Law No. 4721 of 22 November 2001, published in the Official Gazette Numbered 24607 and dated 8 December 2001.
35. Akıncı, *supra* n. 12, 80.
36. For a detailed list of the Court of Appeal decisions see, Akıncı, *supra* n. 12, 79.

[B] Disputes That Are Not at the Free Will of the Parties

Since the essential element of an arbitration agreement is the clear intent of the parties to arbitrate, it is natural that subject matters that are not at the free will of the parties are not arbitrable. Under Turkish Law, matters that could be subject to free and final agreements (especially settlements) by the parties are arbitrable.[37] There is no list in Turkish law as to which subjects are not at the free will of the parties. However, pursuant to the general principles of law and the decisions of the Court of Appeal, we are at least able to come up with a non-exhaustive list to demonstrate what matters are regarded as being not subject to the free will of the parties.

Most commercial law related disputes, which are at the free will of the parties, are arbitrable. However, criminal law, administrative law,[38] family law, bankruptcy law, labour law, consumer law and, to some extent, corporate law related disputes cannot be resolved in arbitration. According to both the legal doctrine[39] and case law,[40] for instance, disputes on cancellation of general assembly decisions of joint stock companies or of shareholder assembly decisions of limited liability companies cannot be resolved in arbitration and should be settled before the Turkish courts. Even where there is an arbitration clause in the articles of association of a company, a dispute regarding the dismissal of a manager of a company shall also not be settled in arbitration according to the Court of Appeal.[41] Furthermore, family law related disputes arising from, for instance paternity issues, are deemed as relating to public policy and thus not arbitrable.[42] Likewise, criminal law and administrative law related disputes are also not arbitrable due to reason of public policy.[43]

Labour law and consumer law related disputes are also considered by the Court of Appeal as being not arbitrable.[44] The Court of Appeal held in its various decisions that such matters are deemed not arbitrable in order to protect employees[45] and consumers.[46] According to the Court of Appeal, due to the very nature of the said legal relationships, usually the employee or the consumer does not possess the power to

37. Ertekin, *supra* n. 3, 76.
38. There is one exception with respect to administrative law which is regulated under Article 1 of the IAL and which states that the IAL shall also be applicable to the resolution, through international arbitration, of disputes concerning concession contracts which relate to public services containing a foreign element.
39. Akıncı, *supra* n. 12, 82-83.
40. 11th Civil Division of the Court of Appeal (Date: 5 December 2012, File No: 2012/13485, Decision No: 2012/19915).
41. 11th Civil Division of the Court of Appeal (Date: 4 February 1980, File No: 2012/448, Decision No: 2012/512).
42. Hakan Pekcanıtez, Oğuz Atalay & Muhammet Özekes, *Medeni Usul Hukuku* (*Law of Civil Procedure*) (Ankara: Yetkin Publishing, 2013) 1070.
43. Yavuz, *supra* n. 3, 158.
44. Akıncı, *supra* n. 12, 81-90.
45. 9th Civil Division of the Court of Appeal (Date: 20 January 2009, File No: 2008/44630, Decision No: 2009/537).
46. 13th Civil Division of the Court of Appeal (Date: 20 October 2008, File No: 2008/6195, Decision No: 2008/12026); 13th Civil Division of the Court of Appeal (Date: 25 September 2008, File No: 2008/3492, Decision No: 2008/11120); 13th Civil Division of the Court of Appeal (Date: 25 September 2006, File No: 2006/7789, Decision No: 2006/12275).

negotiate either the underlying contract or the arbitration agreement with the employer or the seller and, thus, procedural rules to be applied in a dispute may be decided to the detriment of the employee or the consumer. In other words, the main reason behind this practice is the belief of the Court of Appeal that State courts will be able to protect the rights of weaker parties and that such rights could not properly be protected in the arbitration proceedings.[47]

In addition to the above, bankruptcy lawsuits in which a creditor claims bankruptcy of its debtor(s) are also not arbitrable.[48] Bankruptcy lawsuits relate to the public policy and thus an arbitration agreement will be deemed invalid; the commercial courts possess exclusive jurisdiction over bankruptcy lawsuits.[49] Bankruptcy proceedings must also be initiated before execution offices. If a bankruptcy decision is given, even in the presence of an arbitration agreement, one must first apply to the bankruptcy estate to record its receivable before the bankruptcy estate. The bankruptcy administration may reject or accept such claim and record that claim to the bankruptcy estate. In the event the application is rejected, one must file an objection lawsuit to the bankruptcy administration.[50] On the other hand, and similar to bankruptcy proceedings, a creditor must initiate execution proceedings before the execution offices even if the parties have a valid arbitration agreement. Nevertheless, in the presence of an arbitration agreement, a creditor cannot file a lawsuit before the courts for annulment of an objection to an execution proceeding, but have to apply to arbitration.[51]

[C] Consequences of Non-arbitrability

Article 15(2)(a), entitled 'Recourse Against Arbitral Awards', regulates reasons for recourse against arbitral awards and determines that an arbitral award (among other reasons which are not subject of this article), may be set aside if the court finds that the subject-matter in dispute is not arbitrable under Turkish law. Most of the grounds for annulment are required to be proven by the asserting party, whilst matters relating to 'arbitrability' and 'public policy', due to their significance, are required to be taken into account by the courts *ex officio*. Therefore, for a court to render a decision on arbitrability pursuant to Article 15(2)(a), first there should be an arbitral award subject to recourse by one of the parties. According to the decisions of the Court of Appeal,[52] courts are not entitled to review and evaluate whether a dispute is arbitrable or not

47. Yavuz, *supra* n. 3, 157; Akıncı, *supra* n. 12, 79.
48. Kalpsüz, *supra* n. 10, 144; Akıncı, *supra* n. 12, 267; E. Nomer, *Devletler Hususi Hukuku (International Private Law)* (Istanbul: Beta Publishing, 2011), 560; *contra*, C. Şanlı, *Milletlerarası Özel Hukuk (International Private Law)* (Istanbul: Vedat Publishing, 2014), 366.
49. 19th Civil Division of the Court of Appeal (Date: 13 October 2005, File No: 2005/5976, Decision No: 2005/10004). Article 154(3) of the EBL; B. Kuru, *İcra ve İflas Hukuku (Execution and Bankruptcy Law)* (Ankara: Adalet Publishing, 2013), 194 and 1107.
50. Kuru, *supra* n. 49, 1235.
51. *Ibid.*, 193-194.
52. 15th Civil Division of the Court of Appeal (Date: 27 June 2007, File No: 2007/2145, Decision No: 2007/4389).

before an arbitral award is rendered by the arbitral tribunal.[53] Second, such an award shall be subject to recourse by one of the parties so that the court will be able to examine *ex officio* whether the dispute resolved in arbitration is arbitrable or not.[54] In other words, the court will, even in the absence of 'arbitrability' objection of a party, check whether the subject-matter in dispute is arbitrable or not. Finally, according to Article 15, if the court finds that the subject-matter of the dispute is not arbitrable under Turkish law due to any of the foregoing reasons, such award will be annulled.

§3.04 CONCLUSION

Under Turkish law, the drafting of a valid arbitration agreement/clause requires the fulfilment of a number of conditions. First, the clear and absolute intent of the parties to arbitrate should be evident from the arbitration agreement/clause and it should be clear as to which disputes between the parties are covered by the arbitration agreement/clause, without leaving room for any doubt.

The standard form of an arbitration agreement/clause is in the written form. However, one can come across, although not very frequently, alternative forms of arbitration agreements such as arbitration agreements deemed to be made due to absence of objection to the statement of claim, via a reference to a document containing an arbitration clause, or in-court arbitration agreements concluded by the parties before the court.

It is also crucial to check whether or not the subject-matter in dispute is arbitrable under Turkish law. In particular, an analysis of the concept of 'public order' should be carefully conducted in light of Turkish legal principles and laws and, more importantly, in accordance with the current approach of the Court of Appeal.

In case an arbitration agreement/clause is to be signed by a representative, such representative should have a special authorization to arbitrate in accordance with the requirement of special authorization to arbitrate under Turkish law. This requirement may often be overlooked at the time of signing of arbitration agreements/clauses and may thus give rise to significant consequences once a dispute has arisen.

An imperfectly or imprecisely drafted arbitration agreement/clause will not only lead the parties to chaos at the beginning of the arbitration proceedings, it may also result in the refusal to enforce the award in Turkey.

53. According to the case law, it is noted that parties may prefer to file lawsuits before courts to object to the arbitrability of a dispute during an ongoing arbitration process, which is not possible according to the clear wording of 15(2)(a) of the IAL as explained above.
54. 15th Civil Division of the Court of Appeal (Date: 17 April 2012, File No: 2012/8426, Decision No: 2012/10349).