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When Arbitration Clauses Go Wrong: Pathological Arbitration Clauses

Inside Arbitration | Vardar Şanlı



Ambiguous, incomplete or contradictory provisions in arbitration clauses may make it difficult for the parties to give effect to their intention to resolve disputes through arbitration. Such provisions, commonly referred to as "pathological arbitration clauses" in international arbitration practice, may give rise to significant issues concerning the validity and enforceability of arbitration agreements. In particular, where the parties' intention to arbitrate is not sufficiently clear, an arbitral institution is incorrectly designated or impracticable conditions are imposed on the appointment of arbitrators, disputes may arise between the parties concerning the validity and enforceability of the arbitration agreement before the merits of the underlying dispute are addressed. Nevertheless, the mere presence of ambiguities or omissions in an arbitration clause does not necessarily render the arbitration agreement invalid.

What Are Pathological Arbitration Clauses?

Pathological arbitration clauses are provisions that, due to deficiencies in the essential elements of an arbitration agreement or the presence of ambiguous or contradictory terms, make it difficult to determine the parties' intention to resolve their disputes through arbitration or to conduct the arbitration proceedings effectively. Such clauses generally arise when dispute resolution provisions are not drafted with sufficient clarity or when the practical feasibility of the procedures agreed upon by the parties has not been adequately taken into account.

Pathological arbitration clauses may take various forms, depending on whether the underlying issues concern the clarity of the parties' intention to arbitrate, the designation of the arbitral institution and the applicable arbitration rules or the provisions governing the appointment and powers of arbitrators. In practice, these issues may arise where an arbitration clause does not clearly establish whether recourse to arbitration is mandatory, refers to a non-existent or incorrectly designated arbitral institution, confers conflicting jurisdiction on arbitrators and state courts in relation to the same disputeor contains inconsistent references to the rules of different arbitral institutions. In addition, pathological arbitration clauses may arise where the person or institution designated to appoint the arbitrators does not exist or where the qualifications required of arbitrators are defined in an excessively restrictive manner. Such provisions may create practical difficulties in constituting the arbitral tribunal and, as a result, lead to delays in the conduct of the arbitration proceedings.

Are Pathological Arbitration Clauses Always Invalid?

The presence of a pathological arbitration clause does not automatically render an arbitration agreement invalid. The nature of the deficiency or ambiguity, the clarity of the parties' intention to arbitrate and the practicability of the arbitration mechanism must be assessed in light of the circumstances of each case. Under Turkish law, Article 412 of the Code of Civil Procedure (Law No. 6100) (the "**CCP**") and Article 4 of the International Arbitration Law (LawNo. 4686) (the "**IAL**") emphasize the importance of a clear intention to arbitrate. Accordingly, uncertainty as to whether arbitration is mandatory may raise questions concerning the validity of the agreement. Nevertheless, not every deficiency has the same legal consequences, as applicable legislation and institutional arbitration rules may address matters left undetermined by the parties. For instance, Article 415 of the CCP provides for three arbitrators where their number is not agreed upon, while the ICC, ISTAC and LCIA arbitration rules contain supplementary provisions for determining the seat or language of arbitration in the absence of party agreement.



Legal Consequences of Pathological Arbitration Clauses and the Approach of the Turkish Court of Cassation

Issues arising from pathological arbitration clauses may be raised at various stages, from proceedings before state courts to the setting aside or enforcement of arbitral awards. The validity and enforceability of an arbitration agreement are therefore relevant when courts assess objections based on an agreement to arbitrate. For example, in its decision dated October 1, 2025 (E. 2024/653, K. 2025/584), the General Assembly of Civil Chambers of the Turkish Court of Cassation examined an arbitration clause in an exclusive distributorship agreement together with a provision concerning the jurisdiction of English courts. The General Assembly found that the parties had not expressed a sufficiently clear and unequivocal intention to resolve their disputes through arbitration rather than before state courts. Accordingly, it overturned the lower court's decision upholding the arbitration objection. Similarly, in its decision dated April 15, 2026 (E. 2025/382, K. 2026/262), the General Assembly examined an arbitration clause providing for a four-member arbitral tribunal and granting jurisdiction to the Istanbul courts if the dispute could not be resolved within fifteen days. Taking into account both the inconsistency of the number of arbitrators with Article 415 of the CCP and the possibility of recourse to state courts, the General Assembly concluded that the arbitration clause was invalid.

The potential implications of ambiguities in the designation of an arbitral institution for the enforcement of arbitral awards were also addressed by the 19th Civil Chamber of the Turkish Court of Cassation in its decision dated September 15, 2009 (E. 2009/5703, K. 2009/8256). In that case, although the parties had agreed that disputes would be resolved by the International Arbitration Court in England, the claimant initiated ICC arbitration in Paris, where the dispute was heard. The Court of Cassation overturned the enforcement decision, holding that the lower court had failed to investigate whether the arbitral institution designated in the agreement actually existed.

To prevent such issues, arbitration clauses should clearly reflect the parties' intention to arbitrate, accurately identify the arbitral institution and applicable rules and ensure consistency among dispute resolution provisions. In this regard, model arbitration clauses published by institutional arbitration centres may serve as useful references. This may help prevent disputes concerning the validity of arbitration agreements and facilitate the efficient and predictable conduct of arbitration proceedings.