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CEM VEZİROĞLU

Istanbul University, Ph.D. Candidate in Corporate Law
Koç University Law School, Research and Teaching Assistant

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GRF is grateful to all members who participated in the evaluation commission for their invaluable insights and informed guidance, as well as for the time and effort they dedicated to the program.

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Arbitration of Corporate Law Disputes in Joint Stock Companies under Turkish Law: A Comparative Analysis

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Abstract

This study addresses both the arbitrability of corporate law disputes and the validity of arbitration clauses stipulated in the articles of association (AoA) of joint stock companies under Turkish law. While corporate law disputes are, in principle, considered arbitrable, disputes concerning the invalidity of corporate decisions and actions for dissolution are heavily debated. It is argued in this paper that both types of disputes are arbitrable, albeit judicial dissolution requests accommodate practical hurdles. It is also argued that arbitral awards should be granted *erga omnes* effect, as long as the interested third parties are provided with the necessary procedural protection. Considering the expanding liberal views in the doctrine - in parallel with many other jurisdictions - it would not be surprising if a more flexible approach is eventually adopted in case law. In order to avoid contradicting judgments in parallel proceedings, it is necessary to provide arbitration clauses in the AoA, rather than in shareholders' agreements. There is no rule in Turkish corporate law that prevents insertion of arbitration clauses in the AoA of privately held joint stock companies. Therefore, an arbitration clause can be provided either in the original AoA or by way of an amendment thereof (with a unanimous vote). However, the duality of 'corporative' and 'formal' provisions of the AoA - depending on their binding effect - requires to identify the legal nature of the arbitration clause in question. Addressing this issue, the paper suggests to adopt a two-step test. Applying the test, if the arbitration clause in question is deemed corporative in nature, then the company, the board members (optional), and the new and current shareholders are bound by the clause. If the clause is considered a formal provision, it may only remain effective among the signatories. In any case, the arbitration process must comply with the minimum procedural standards offered by Turkish Commercial Code No. 6102, and arbitrators should be appointed collectively, unless selected by an impartial body. In order to clear up doubts, it is suggested that Turkish legislators provide a legal basis for arbitration clauses in the AoA. Finally, it is recommended that the leading arbitration institutions publish a set of rules for corporate law disputes, as well as a model arbitration clause referring to such rules. A model clause drafted in the paper is hoped to serve as inspiration for these arbitration institutions.

1. Introduction

The resolution of disputes by arbitration rather than litigation in national courts has been frequently preferred due to several advantages. These include the ability to select arbitrators who have expertise in the subject matter of the dispute; the flexibility, pace, and confidentiality of the proceedings; the impartiality and finality of the award; and the near global reach of enforcement by virtue of the 1958 New York Convention (Convention). Considering its increasing importance in the international arena and its potential for generating income, many jurisdictions have been adapting their legislation to be in conformity with arbitration, hence encouraging its widespread employment. As a contracting state to the Convention, Turkey has enacted pro-arbitration legislation and established its intent to become a regional arbitration venue by founding the Istanbul Arbitration Center on January 1, 2015. Within this context, International Arbitration Code No. 4684 (IAC) was enacted in accordance with the UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration, as was the Code Regarding Private International and Civil Procedure Law No. 5718, and the Civil Procedure Code No. 6100 (CPC).[1]

The availability of arbitration in corporate law disputes is significant not only for making Turkey a regional arbitration center, but also for incentivizing national and foreign investments, as it decreases potential risks for investors. Accordingly, whether such disputes can be settled by arbitration appears to be a factor influencing investment decisions. However, arbitrating corporate law disputes in joint stock companies entails a series of legal challenges. The present enquiry therefore tries to shed light upon the position of Turkish law in this regard, to identify the problems, and to suggest practicable solutions. The paper addresses both domestic and international arbitral proceedings governed by the CPC and IAC, respectively.

Section II explains the key concepts referred to throughout the paper and the distinctive characteristics of corporate law disputes. Section III deals with the arbitrability of corporate law disputes, while the place of the arbitration clause and the validity of arbitration clauses provided in the articles of association (AoA) of joint stock companies are tackled in sections IV and V. A comparative analysis with a functional perspective is conducted throughout the paper, while the last section surveys significant legislative developments in various jurisdictions.

2. Setting the Scene

2.1 Contractual and Corporate Law Disputes

Corporate disputes, in a broad sense, are split into two categories: contractual and statutory (also referred to as "institutional", "intra-corporate" or "*korporativ*") disputes. While both categories concern the rights of shareholders, directors and other stakeholders with respect to each other and the company, they diverge in terms of the *legal basis of the claim* to be asserted. And while contractual disputes originate from agreements, such as shareholders' agreements (SHA), joint-venture agreements and share purchase agreements, statutory disputes arise from rights

[1] For the general framework of international commercial arbitration in Turkey, see Tarman, 245-250.

granted by law, the AoA of the company and corporate decisions. It follows that the claims peculiar to corporate law, such as annulment of general assembly resolutions, actions for corporate dissolution and liability of directors or the parent company, give rise to statutory disputes, which are referred to as "corporate law disputes" throughout this paper.

2.2 Distinctive Characteristics of Corporate Law Disputes

Contractual disputes concerning joint stock companies do not feature any legal challenges with respect to this research. These are considered arbitrable[2] and tackled like any other commercial agreements under Turkish law.[3] However, although there is strong commercial interest in arbitrating corporate law disputes, the issue is unsurprisingly debated due to certain characteristics of the joint stock company as a legal entity.

Firstly, corporate law disputes do not involve only the interests of the parties to a contract, but also those of shareholders, directors, employees, creditors, auditors and even the public. The fact that a *broader spectrum of interests* are affected in corporate law disputes can be seen as incompatible with the contractual nature of arbitration.[4] For instance, general assembly resolutions bind all shareholders, even those who were actually opposed to the resolution in question, and those who enter the company thereafter. Accordingly, a decision regarding the invalidity of a general assembly resolution also binds the parties who are not involved in the dispute. Again, the winding-up of a company may be an obvious example of effects exceeding the parties to the dispute (*erga omnes* effects), as suppliers, creditors and employees are affected as well as shareholders and directors of the company in question. However, arbitration is private in essence. Indeed, an arbitral award may, in principle, be enforced only between the parties to a dispute (the *inter partes* effect).[5] However, this problem can be solved by granting an *erga omnes* effect to arbitral awards, while requiring certain safeguards to protect the interests of third parties affected by these proceedings.

Secondly, specific procedural rules pertaining to corporate law disputes are prescribed as mandatory legal provisions in order to protect the interests of third parties. For example, in actions for the annulment of general assembly resolutions, the case is not heard until the term of litigation expires, so as to consolidate all the claims filed by shareholders; and the court may ask the claimant to provide collateral for potential damages of the respondent company. Furthermore, certain statutory provisions may explicitly confer *exclusive jurisdiction* to a specific local court in order to protect economically weaker groups, such as tenants, consumers, and employees. Although the exclusive jurisdiction of a local court and the non-arbitrability of a dispute are distinct legal questions, they are closely linked in terms of legal

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[2] In this study, the term "arbitrability" indicates the question of whether the subject matter of the dispute is capable of being settled by arbitration, which is referred to in literature as "objective arbitrability." For the distinction between subjective and objective arbitrability see Lew/Mistelis/Kröll, para. 9-35 et seq.

[3] For SHAs see Huysal, 294; Ayoğlu, 226. For share purchase agreements see ibid, 289; Turkish Court of Appeals 11th Civil Division 4 May 2010, Case No. 2010/1129, Decision No. 2010/4904.

[4] Brekoulakis, Mistelis/Brekoulakis, para. 2-46–2-52.

[5] The *prima facie* incompatibility of *erga omnes* effects of a dispute with the contractual nature of arbitration is also observed within the context of claims pertaining to the validity of industrial property rights. See Kalafatoğlu, para. 339-383.

policy.[6] Indeed, the Turkish Court of Appeals (TCA) tends to reject the arbitrability of certain disputes concerning rental, consumer, and employment agreements, with a view to protecting the weaker party.[7] Correspondingly, since minority shareholders and creditors are generally deemed weaker vis-à-vis the controlling shareholders and/or the board of directors, their right of action cannot be restricted. Yet asserting a claim before an arbitral tribunal, rather than a local court, would not necessarily restrict their right of action.

Last but not least, according to the traditional – and nearly abandoned – approach, the notion of "public order" (*ordre public sociétaire*)[8] may appear to be a barrier to parties submitting their dispute to arbitration, because the issues governed by mandatory legal norms fall outside the scope of arbitration.[9] Considering that Turkish corporate law mainly involves mandatory norms, unlike the law of obligations which is based primarily on contractual freedom, *ordre public sociétaire* can be seen as an impediment to arbitration. Nonetheless, the existence of mandatory norms cannot be a reason for non-arbitrability *per se*, because arbitral tribunals may – and should – apply these norms, just as local courts do.

2.3 Distinction between the Issues of Arbitrability and Contractual Freedom within the AoA

The arbitrability of corporate law disputes is often confused with contractual freedom within the AoA of a joint stock company; these are two distinct issues. It is one matter to address whether providing an arbitration clause in an AoA concerning certain types of disputes is permissible under corporate law. The arbitrability of such disputes, however, is to be dealt with separately.

The non-arbitrability of a corporate law dispute concerns the enforceability of an arbitration clause as applied to such a dispute, whereas the general validity or enforceability of said arbitration clause is not affected.[10] Therefore, an arbitration clause stipulated in the AoA of a joint stock company can only be enforced in respect of arbitrable disputes. In contrast, if a particular corporate law dispute is non-arbitrable, the arbitration clause is not enforceable, regardless of whether it was stipulated in the AoA or SHA. Yet there may be cases where an arbitration clause cannot be included in the AoA, as the relevant rules of corporate law applicable to the AoA in question do not permit it, although the dispute is in fact arbitrable.

Since a debate regarding the validity of an arbitration clause provided in the AoA makes sense with respect to arbitrable disputes, an analysis should follow these

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[6] The exclusive competence of a local court in relation to foreign national courts does not necessarily exclude arbitration. For French law see Racine, 48-51; for Belgian law see Caprasse, 123 et seq. For Swiss law see Mabillard/Briner, BaslerKomm-IPRG, Art. 177 para. 12; for Turkish law see Huysal, 257-258.

[7] For rental agreements, see TCA 3rd Civil Division 2 December 2004, Case No. 2004/13018, Decision No. 2004/13409. However, the TCA confirmed the arbitrability of a dispute regarding action for evacuation, where both parties were merchants (19th Civil Division 16 December 2004, Case No. 2004/5413, Decision No. 2004/12656). For consumer agreements, see: TCA 13th Civil Division 25 September 2006, Case No. 2006/7789, Decision No. 2006/12275. For employment agreements, see: TCA 9th Civil Division 26 May 2008, Case No. 2008/10997, Decision No. 2008/12660. Also, see Şanlı/Esen/Ataman-Figenmeşe, 646-647; Akıncı, 74; Huysal, 128-143.

[8] In the context of joint stock company law, the term "public order" implies the mandatory rules and principles applicable to joint stock companies regardless of whether these norms originate from statutes or case law.

[9] See the authors mentioned in Viscasillas, Mistelis/Brekoulakis, para. 14-18.

[10] Born, 836; Brekoulakis, Mistelis/Brekoulakis, para. 2-63–2-64.

steps: (i) whether the dispute in question is arbitrable; (ii) whether the arbitration clause in question can be validly inserted into the AoA under corporate law; (iii) whether the parties to the dispute are bound by the arbitration clause. Accordingly, this paper primarily addresses the arbitrability problem, and then discusses the validity and the binding effect of arbitration clauses in the AoA of joint stock companies incorporated in Turkey.

3. Arbitrability of Corporate Law Disputes in Turkish Law

There is no statutory rule in Turkish Commercial Code No. 6102 (TCC) as to which corporate law disputes are arbitrable. It follows that general rules of arbitrability apply to these kinds of disputes. In Turkish law, the issue of arbitrability is regulated in the same way for both international and domestic arbitration proceedings.[11] Accordingly, disputes relating to "rights *in rem* over an immovable property in Turkey" and those arising from issues "not subject to parties' consent" are non-arbitrable. It is almost unanimously held that an issue being subject to parties' consent means that parties may freely dispose of the matter in dispute by way of settlement.[12] This civil law notion of "free disposition" can either be explicitly precluded by a statutory provision or impliedly barred by public policy considerations embedded in the relevant jurisdiction's private law foundations. Considering the lack of an explicit statutory norm with respect to the arbitrability of corporate disputes under Turkish law, the views adopted in doctrine and principles developed in case law may offer valuable guidance for this study.

3.1 Doctrine

During the period of the former Turkish Commercial Code No. 6762 (Former TCC), the vast majority of the doctrine accepted that corporate law disputes were, in principle, arbitrable.[13] This view holds good for the TCC that entered into force on 1 July 2012.[14] It is, however, argued by certain authors that disputes relating to the validity of corporate decisions and to corporate dissolution are non-arbitrable for the reasons that will be further discussed below.

Before dealing with these controversial types of disputes, it must be noted that while conducting a comparative analysis one must pay the utmost attention to the arbitrability criteria adopted in relevant jurisdictions. Despite the fact that Turkish company law is under the influence of Swiss and German law, arbitrability criteria adopted in Turkish law differs from both. For instance, it is argued that disputes relating to economic interests, such as refund of unjust profit distribution, financial rights of board members, request for default interest, and penalty due to capital subscription, are arbitrable, whereas disputes relating to the validity of

[11] Respectively in IAC Art. 1/4 and CPC Art. 408 (see also Convention Articles II/1 and IV/2.(a)).

[12] Şanlı/Esen/Ataman-Figenmeşe, 645-646; Alangoya/Yıldırım/Deren-Yıldırım, 601; Kuru/Arslan/Yılmaz, 783; Pekcanıtez/Yeşilırmak, 2636. For impacts of the notion "public order" upon "arbitrability" see Brekoulakis, Mistelis/Brekoulakis, para. 20-22; Kalafatoğlu, para. 243-244.

[13] Domaniç, 230; Poroy/Tekinalp/Çamoğlu, 2009, para. 731; Kaya, 331-332; Bahtiyar, Anasözleşme, 209-211; Helvacı, 190; Huysal, 292-310.

[14] Yıldırım, 29-39; Karasu, 173-174; Şahin, 373; Ayoğlu, 80-97.

corporate decisions, insolvency, and dissolution are non-arbitrable.[15] Basing the distinction on whether the dispute in question relates to economic interests seems to be inspired by Swiss law, which applies the "economic interests" criterion to international arbitration proceedings.[16] However, Turkish law refers to the notion of "free disposition" while determining the arbitrability of a dispute, unless it relates to rights *in rem* over an immovable property in Turkey. Therefore, the sole criterion to be considered for corporate law disputes in Turkish law is free disposition of the matter in dispute. Furthermore, even annulment of a general assembly resolution for capital increase may result in return of the payment for capital and decrease of the company's capital, which clearly concerns economic interests. Likewise, dissolution or insolvency of the company may lead to distribution of corporate assets. Therefore, it may be misleading to classify the disputes concerning the validity of corporate decisions, insolvency, and dissolution into the group of disputes that do not relate to economic interests.[17]

3.1.1 Validity of General Assembly Resolutions

The debate on the arbitrability of corporate law disputes is mostly observed within the context of challenging the validity of general assembly resolutions. Yet there is an apparent trend in Turkish legal doctrine, in harmony with the expanding scope of arbitration in various jurisdictions, towards accepting these disputes as arbitrable. As the pioneer of the conservative wing of the doctrine, Moroğlu[18] regards such disputes as non-arbitrable for the following reasons: (i) specific procedural rules, such as pending of the case until the term of litigation expires and consolidation of all the actions filed before the court, prevent arbitration; (ii) jurisdiction of the court in the place of the company's registered office is exclusive; (iii) the dispute cannot be settled among the parties and is, hence, not freely disposable; and finally, (iv) an arbitral award cannot be granted an *erga omnes* effect.[19]

Certain authors suggest that a distinction should be made based on the content of the general assembly resolution.[20] According to this approach, the dispute is deemed arbitrable if the resolution in question pertains to a matter subject to the parties' consent. For instance, annulment of a general assembly resolution that puts the company into liquidation cannot be submitted to arbitration, while a decision for dividend distribution can be arbitrated.

Another view adopts a distinction based on the type of the remedy claimed, regardless of the content of the resolution in question. This view distinguishes the "actions of annulment" from "declaratory actions for nullity/inexistence."[21]

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[15] Bahtiyar, Anasözleşme, 211; Karasu, 173; Pekcanıtez/Yeşilırmak, 2637.

[16] Article 177 of the Swiss Federal Code on Private International Law ('Swiss PIL').

[17] In German and Swiss law, the distinction between claims involving pecuniary and non-pecuniary interests has lost significance for corporate law disputes, since "pecuniary interests" cover almost all disputes. For Swiss law see Monti, 98-99; Bersheda, 710-715; Bärtsch, 113. For German law see Duve/Wimalasena, 931; Westermann, 42; Rieder/Kreindler (Wolff/Rieder), para. 2.59.

[18] Moroğlu, Genel Kurul, 305-306.

[19] Pulaşlı reaches the same conclusion, as the subject matter of the dispute is not freely disposable and the action for annulment of general assembly resolutions is an irrevocable right (Pulaşlı, Şerh, 864-865).

[20] Taş, 51-54; Yıldırım, 60.

[21] Huysal, 320-322.

It is therefore suggested that the claim to annul a general assembly resolution is arbitrable, whereas the action for declaratory judgment for the nullity/inexistence of such a resolution is non-arbitrable. According to this view, the request for declaratory judgment for nullity/inexistence is not compatible with arbitration, since such an action can be filed by any interested party, and thus, third parties can intervene in the case.

A more liberal interpretation of the doctrine affirms that both the claim for annulment and the declaratory judgment for the nullity/inexistence of general assembly resolutions are subject to parties' consent, and hence arbitrable.[22] Kırca states that interested third parties, such as creditors, bondholders and regulatory authorities, are not bound by the arbitration clause found in the AoA or SHA, while leaving the door open to the debate on the extension of arbitration agreements to such persons. Ayoğlu, on the other hand, distinguishes the arbitrability issue from problems connected with specific procedural rules and the impact of arbitration upon third parties. He suggests that statutory provisions concerning procedural rules pertaining to the validity of general assembly resolutions should apply to arbitral proceedings *qua* "directly applicable rules" of Turkish corporate law. Moreover, Ayoğlu indicates that the statutory rule found in TCC Article 450 granting an *erga omnes* effect upon local court decisions for the invalidity of general assembly resolutions should apply *mutatis mutandis* (with the necessary changes having been made) to arbitral awards.[23]

In my view, disputes concerning the invalidity of general assembly resolutions are subject to parties' consent, and thus arbitrable. First, the claimant and the respondent may freely conclude the case by way of settlement[24] or acceptance of the claim, provided that the general assembly confers upon the board such authorization.[25] Secondly, jurisdiction of the court in the place of the company's registered office does not exclude arbitration, but only establishes the exclusive competence in relation to foreign national courts.[26] Third, mandatory procedural rules regarding a certain type of dispute do not prevent submitting such dispute to arbitration. Relevant procedural rules are to be applied by arbitral tribunals as "directly applicable rules" of Turkish corporate law. In order to avoid such a problem, parties can stipulate their procedural rules as equivalent to the TCC in their arbitration clause, or they can incorporate by reference the procedural rules set out in the TCC, as well as the

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[22] Kırca (Şehirali-Çelik/Manavgat), 2016, 229-233 and 277; Ayoğlu, 108-118.

[23] Ayoğlu, 110-112. The author alternatively suggests that the arbitration clause may be formulated so as to implement the mandatory procedural rules by either incorporating or referring to them. Helvacı opines that claims to annul general assembly resolutions are subject to parties' consent, and hence arbitrable, but also suggests that the mandatory procedural rules applied to this type of action effectively prevent arbitration, unless the arbitration clause complies with these rules (Helvacı, 200-202).

[24] For annulment of general assembly resolutions, see Helvacı, 200.

[25] Kırca (Şehirali-Çelik/Manavgat), 2016, 229 fn 532, 277. Moroğlu argues that the general assembly may also revoke its previous resolution (Moroğlu, Genel Kurul, 360-364). If the general assembly can revoke its decision, it can also delegate the board to accept the case *a fortiori* and thus let the court annul its decision.

[26] "Exclusive jurisdiction" in terms of international civil procedure law does not necessarily exclude arbitration. See Huysal, 257-258; Mabillard/Briner, BaslerKomm-IPRG, Art. 177 para. 12. Pursuant to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 ("Regulation") Art. 24/2, the court of the seat has exclusive jurisdiction with regard to disputes concerning the validity of constitution and corporate decisions, as well as the nullity or the dissolution of companies. However, the Regulation does not exclude arbitration (see the Preamble of the Regulaton, para. 12; Viscasillas, Mistelis/Brekoulakis, para. 14-23).

set of rules for corporate law disputes published by an arbitration institute.[27] And, finally, arbitral awards regarding disputes over the invalidity of general assembly resolutions should benefit from the *erga omnes* effect granted to national courts by TCC Article 450, provided that the third parties[28] are protected.[29]

3.1.2 Corporate Dissolution

Arbitrability of disputes concerning corporate dissolution is another controversial area. Different views can be grouped into three categories. While one view completely rejects the arbitrability of requests for corporate dissolution on the grounds that these are not subject to the parties' consent and are closely linked with the law of persons[30], the opposing view affirms their arbitrability without exception.[31] Another view distinguishes between the cases of voluntary and involuntary dissolutions, and argues that only the former type of dispute is arbitrable.[32]

The issue is particularly contested within the context of the right to request corporate dissolution for just causes stipulated in TCC Article 531. This is a remedy provided for oppressed minority shareholders in joint stock companies. Certain authors argue that this type of action cannot be adjudicated by arbitrators, because (i) action for dissolution relates to public policy, (ii) the local court designated by TCC has exclusive jurisdiction, and (iii) the dispute is not subject to parties' consent.[33] In contrast, it is suggested that the dispute can be arbitrated, provided that the claimant minority has the option to apply to either a local court or to arbitration.[34] Still, it must be noted that optional/asymmetrical arbitration clauses are considered invalid under Turkish law, because the parties' intent to arbitrate must be explicitly stated and the jurisdiction of local courts must be excluded. Therefore, leaving the door open for the jurisdiction of local courts by way of an optional arbitration clause is seen as grounds for lack of consent to arbitration.[35]

In my view, disputes regarding dissolution are arbitrable, although certain types of requests may pose practical challenges. A distinction can be made with regard to the level of the national courts' remedial power granted by law. While the claims for declaratory judgment with respect to the *ipso jure* dissolution of a company can

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[27] Therefore, it is advisable that the prominent arbitration institutes, such as the Istanbul Arbitration Center, publish their own arbitration rules for corporate law disputes.

[28] The non-shareholder third parties are not bound by the clause in the AoA, unless they have consented to it. However, their rights to action and/or intervention in the case are confined solely to requests for declaratory judgment for nullity; hence, they cannot claim annulment of general assembly resolutions. Their right of action in the former type of disputes does not per se affect the arbitrability of the dispute. However, this may render arbitration of the dispute at hand ineffective, if an interested third party raises her claim before a local court, because the severance of cases based on the same grounds of action is not possible.

[29] This solution is already accepted in German case law, see explanations under the subsection 6.1.

[30] Ayoğlu, 145-147.

[31] Yıldırım, 64.

[32] Bahtiyar, Anasözleşme, 211; Huysal, 327. Involuntary dissolutions are comprised of *ipso jure* dissolution and judicial dissolution cases prescribed in TCC Art. 529-531. A joint stock company is dissolved *ipso jure* i) upon expiry of the period specified in the AoA, ii) if the object of the company is attained or becomes unattainable or iii) in the event of realization of any one of the causes of dissolution stipulated in the AoA (TCC Art. 529). Judicial dissolution cases are dissolution for lack of mandatory organs and dissolution for just causes, set out respectively in TCC Articles 530 and 531.

[33] Hanağası, 232-233. Tekinalp and Erdem argue for the same approach without indicating any reason or justification. See Tekinalp (Poroy/Çamoğlu), 2017, para. 1562c; Erdem, Fesih, 178.

[34] Şahin, 373.

[35] TCA 11th Civil Division 15 February 2011, Case No. 2009/3257, Decision No. 2011/1675.

be submitted to arbitration, the requests for judicial dissolution may include certain practical hurdles, such as the enforcement of interim measures[36], the appointment of a company administrator and a liquidation process.

3.2 Case Law

In 1983, the TCA upheld a decision that a dispute between a company and its shareholders over the *request for registration in the stock ledger* can be resolved by arbitration.[37] The claimants – successors of a deceased shareholder – requested that the board of directors register them in the stock ledger. However, the board refused this request. The court of first instance held that the dispute must be resolved before an arbitral tribunal, established in accordance with the arbitration clause provided in the AoA of the company in question, and the TCA approved this decision.

Similarly, in a judgment dated 2010, it was affirmed by the TCA that the *claim for company damages (derivative action)* brought by members of a limited liability company[38] against directors could be arbitrated, by virtue of the arbitration clause stipulated in the AoA.[39] The TCA, however, refused the request for arbitration on the grounds that the arbitration clause in question could not be enforced against the directors who were not members of the company, and that severance of actions was not possible. The arbitration clause provided that "disputes among members or between members and the company shall be resolved by arbitration, and Civil Procedure Code No. 1086 shall apply to the selection of arbitrators as well as other issues regarding the settling of the dispute."[40] Therefore, the TCA accepted the validity of the arbitration clause in the AoA and solely recognized its binding nature *vis-à-vis* the directors who held shares in the relevant company. The TCA also stated that the arbitration clause in the AoA would not bind the directors who were not members of the company, unless they conclude a written arbitration agreement. However, considering the wording of the arbitration clause in question, the scope of the clause merely included the disputes among shareholders and between shareholders and the company. It follows that the directors of the company were, in fact, not bound by the arbitration clause in their capacity as director even though they held shares in the company. Moreover, although the judgment concerns limited liability companies, there is neither a statutory rule nor a principle that requires reaching a different conclusion for joint stock companies.

In a subsequent judgment in 2012, the TCA ruled that arbitration is not possible for *annulment of general assembly resolutions*.[41] Although the judgment involves quite a generic statement, that "a provision regarding arbitration in the AoA or an arbitration agreement is null and void," this expression should be understood as exclusive to disputes concerning the annulment of general assembly resolutions. The reasoning of the decision clearly reveals that the TCA conducted an examination

[36] Akıncı, 134-140.

[37] TCA 11th Civil Division 7 April 1983, Case No. 1983/1595, Decision No. 1983/1780.

[38] *Private company/Société à responsabilité limitée/Gesellschaft mit beschränkter Haftung* ('GmbH').

[39] TCA 11th Civil Division 15 February 2010, Case No. 2008/9429, Decision No. 2010/1648.

[40] The phrase was translated by the author.

[41] TCA 11th Civil Division 5 December 2012, Case No. 2011/13485, Decision No. 2012/19915.

only in terms of such a remedy, since all the arguments shown in the decision solely relate to this subject. The TCA held that this matter cannot be resolved between the parties by way of settlement. Furthermore, it considered that the local court – at the registered office of the company in question – specified by law, has exclusive jurisdiction.[42] Finally, the TCA declared that the consolidation of actions conceptually conflicts with arbitration. As the above-mentioned arguments of the court and legal provisions are exclusively related to the annulment of general assembly resolutions, the TCA's approach should be understood within the limits of its purpose.

In 2014, the TCA ruled for the invalidity of an arbitration agreement concerning *corporate dissolution for lack of mandatory organs and dissolution for just causes*.[43] Although the arbitration clause in question was included in an SHA, the same conclusion can be reached for those provided in the AoA, since the judgment was justified on the non-arbitrability argument. The court held that the subject matter of the dispute could not be freely disposed by way of settlement, and that the local court designated by law had exclusive jurisdiction. Having said that, the court's statement that "an arbitration clause in an agreement or an arbitration agreement among the shareholders is null and void" should, again, be understood as exclusive to disputes regarding corporate dissolution. This is because the TCA conducted an examination only in terms of the remedies pursuant to TCC Articles 530 and 531, and confined its justifications to these claims by expressly articulating these statutory provisions.

3.3 Current Position of Turkish Law

Under Turkish law, corporate law disputes are, in principle, considered arbitrable, whereas disputes concerning the validity of corporate decisions, as well as actions for dissolution, are still debated. It seems that the TCA has so far followed the distinction adopted by the doctrine in general terms and has not yet allowed the arbitration of disputes regarding the annulment of general assembly resolutions and actions for dissolution. Yet, one cannot ignore the growing pro-arbitration tendency in Turkish legal doctrine, in parallel with many other jurisdictions.[44] In particular, the arbitrability of disputes regarding the validity of corporate decisions is increasingly supported in legal doctrine; hence, it would not be surprising if the TCA were to eventually follow this approach, as it already has for derivative claims and requests for registration in the stock ledger.

4. Place of the Arbitration Clause: AoA or SHA?

Due to uncertainties regarding the validity of the arbitration clauses stipulated in the AoAs of joint stock companies, it is frequently observed in practice that a separate agreement is concluded amongst shareholders, and an arbitration clause is incorporated therein. Yet, instead of offering a solution, this further complicates the problem. This is so because only contractual claims can be raised in arbitral proceedings carried out in accordance with SHAs, whereas it is typically not possible to prevent claims peculiar to corporate law from being asserted in national courts.

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[42] In the Former TCC Art. 382/1 (currently TCC Art. 445).

[43] TCA 11th Civil Division 9 April 2014, Case No. 2014/141, Decision No. 2014/6951.

[44] Born, 1028-1031; Viscasillas, Mistelis/Brekoulakis, para. 14-18–14-33. For various examples of legislative reforms towards expanding the scope of arbitration, see section 6.

Thus, contradicting judgments may be given in these parallel proceedings.[45]

Furthermore, the binding effect of the provisions of AoAs differs from that of the arrangements provided in SHAs. The AoA binds (organs of) the company, its board members, and all its shareholders, regardless of whether they have actually consented or not. Meanwhile, the SHA is not binding *vis-à-vis* third parties, namely, non-signatory shareholders, directors or the company. In turn, this would lead to a fragmentation of claims, in that the arbitral tribunal would deal with the claims amongst the parties to the SHA, whereas the remaining stakeholders' claims would have to be addressed by the local courts.

In order to avoid these problems and to enable the agreed mechanisms on the corporate level as well, it is necessary to provide an arbitration clause in the AoAs of companies. In fact, trade registries are responsible for examining whether an AoA includes any provision contrary to the mandatory legal norms of the TCC.[46] The registry has the authority to reject a request for registration, in the event that a provision of the (draft) AoA violates the TCC. However, in practice, this administrative inspection cannot be conducted effectively, and the validity of an arbitration clause stipulated in an AoA that has been registered and published remains uncertain until a court decision or arbitral award is rendered as to this question. Unlike in German law, registration at the trade registry has no remedial effect in Turkish law, and thus, registration of the AoA does not validate its provisions which contravene the TCC.[47] Clarifying the standpoint of Turkish law with regard to the validity of an arbitration clause stipulated in the AoA of joint stock companies would therefore contribute to legal predictability.

5. Validity of Arbitration Clause Provided in the AoA

Pursuant to IAC Article 4/3,[48] Turkish law applies to the validity of an arbitration agreement, unless otherwise agreed upon by the parties. An arbitration agreement may be concluded as a separate agreement, or the parties may insert an arbitration clause in their actual agreement. Therefore, an arbitration agreement is based on the parties' consent to arbitration. Moreover, an arbitration agreement is only valid if concluded in writing.[49] Hence, following the arbitrability issue, the validity of an arbitration clause stipulated in an AoA should be examined in terms of "consent to arbitration" and the "written form requirement."

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[45] Bloch, 371-372.

[46] TCC Art. 32/2.

[47] For German law, see German Stock Corporation Act section 242.

[48] *"The validity of the arbitration agreement is subject to the law chosen by the parties or, in the absence of such choice, according to Turkish Law."* The phrase was translated by the author.

[49] For domestic and international arbitration, respectively, in CPC Art. 412/3 and IAC Art. 4/2.

5.1 Consent to Arbitration

5.1.1 Legal Nature of the AoA

An analysis of "consent to arbitration" with respect to arbitration clauses provided in the AoA accommodates certain particularities, compared to arbitration agreements or arbitration clauses in commercial agreements based on the law of obligations. This is because the AoAs of joint stock companies exhibit characteristics distinct from agreements, such as sale, loan or share purchase agreements. While ordinary agreements are subject to a wide contractual freedom, formed by the mutual expression of intent, and deemed binding only among the parties, the AoA differs in respect to these points. Hence, the study discusses the concerns related to the below-mentioned characteristics of the AoA.

Firstly, agreements based on the law of obligations only bind the parties to the relevant agreement, and are thus subject to the rule of *privity of contract*.[50] Likewise, an AoA entails contractual rights and obligations only among the founders of a company, until its registration at the relevant trade registry.[51] As of registration, however, it attains the features of a statutory norm, thus acquiring an extended binding effect like that of objective legal norms. It follows that the AoA becomes binding over the company, its board members and those who enter the company by share acquisition, as well as the company's founders.[52] The AoA is, therefore, referred to as the "constitution" of a company (*Organisationsverfassung*)[53] or its "social pact" (*pacte social*).[54] Yet the contractual nature of the AoA does not disappear with the registration of the company, but only fades into the background with the emergence of statutory features. Indeed, the AoA is considered a contract of adhesion (*contrat d'adhésion*).[55] Therefore, the AoA has a dual nature as of registration: statutory (like objective legal norms) and contractual (like ordinary agreements).[56]

Secondly, all shareholders are bound by the amendments of the AoA, even if they did not vote in favour of the amendment in question in the relevant general assembly meeting.[57] Accordingly, the majority rule applicable in corporate law allows the insertion of provisions in the AoA without a unanimous vote, unless otherwise specified in the AoA, and replaces the "mutual expression of intent" sought in ordinary contract formation.

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[50] The rule of privity of contract provides that a contract cannot impose obligations upon any person who is not a party to the contract.

[51] A company is deemed incorporated with the registration of the AoA (TCC Art. 355/1).

[52] Moroğlu, Anasözleşme, 515; Bahtiyar, Anasözleşme, 30-31. The provisions listed in paras. (a)-(h) of TCC Art. 354 benefit from the positive effect of registration at the trade registry and, consequently, even bind third parties.

[53] Arnold, KK-AktG, § 23 Rdn 8. Moreover, it is described as an "organizational agreement" (*Organisationsvertrag*) or "foundation agreement" (*Gründungsvertrag*) in order to emphasize its difference from ordinary reciprocal contracts, in that a legal personality apart from the parties appears as a result of the conclusion of the AoA (Röhricht/Schall, Großkomm AktG, § 23 Rdn 63).

[54] For French law, see Cohen, 67. For a detailed analysis of case law regarding the discussion of the AoA's legal nature in English law, see Worthington, 261-271. The AoA is referred to as an "agreement *inter socios*" in *Eley v The Positive Government Security Life Assurance Co Ltd (1876) 1 Ex. D. 88 (CA)*, 90.

[55] Moroğlu, Anasözleşme, 515. "Contract of adhesion," also called "standard form contract", is a contract drafted by one party, who generally has stronger bargaining power, and signed by another party with weaker bargaining power. Therefore, these types of contracts are sometimes referred to as "take-it-or-leave-it" contracts.

[56] Röhricht/Schall, Großkomm AktG, § 23 Rdn 11; Pentz, MünchKomm AktG, § 23 Rdn 10; Arnold, KK-AktG, § 23 Rdn 9.

[57] TCC Art. 423.

Finally, while ordinary agreements are mainly regulated by the default rules of the law of obligations, and are hence subject to the principle of contractual freedom, the AoA is largely governed by mandatory norms. Furthermore, the TCC adopted the principle of mandatory norms, the so-called *Satzungsstrenge*, which further curtailed the already limited freedom within the AoAs of joint stock companies.[58]

5.1.2 Distinction between the Corporative and Formal Provisions of the AoA

The peculiar legal nature, and particularly the extended binding effect conferred upon the provisions of AoAs, play a pivotal role in the assessment of consent to arbitration in regard to an arbitration clause stipulated in the AoA. Yet, although the whole text of the AoA is registered at the trade registry, not all its provisions acquire such an extended binding effect. This is because certain provisions elude the control mechanism conducted by trade registries, even though they are, in fact, either not allowed by corporate law or do not relate to intra-corporate issues. These are referred to as "formal" (contractual, *nichtkorporativ*) provisions of the AoA and are devoid of the extended binding effect, albeit provided in the text of the AoA. Therefore, these are deemed purely contractual in nature and can only be enforced among the parties in just the same way as the provisions of an SHA.[59]

On the other hand, "corporative" (substantial, *korporativ*) provisions relate to intra-corporate issues and comply with corporate law. Therefore, corporative provisions of the AoA are endowed with the extended binding effect. For example, provisions establishing the right to buy/sell shares among shareholders (call/put options) are deemed "formal" in nature, since the AoA cannot incur any further obligations upon shareholders other than their capital commitment.[60] But these undertakings can be enforced among the parties as purely contractual provisions. Another example is voting agreements between shareholders: it is undisputed that while shareholders can undertake to vote in a certain direction at general meetings, such commitments stipulated in an AoA are not enforceable at the corporate level. In the event that a shareholder violates her commitment, the counterparties cannot invalidate her vote. On the contrary, the required quorums at general meetings for significant resolutions may be increased in the AoA, as long as doing so is permitted by the relevant corporate law rules.[61] These quorum requirements are considered to be "corporative," and hence any resolution purportedly passed at an inquorate meeting is deemed null.

Accordingly, the question of whether the parties to a dispute are bound by the arbitration clause in the AoA primarily depends on the *legal nature* of the provision in question.[62] As further discussed below in subsection 5.1.4, if the arbitration clause in the AoA is considered corporative in nature, then it binds the company, its board members, those shareholders who acquired their shares after the insertion of an arbitration clause into the AoA (new shareholders), and the current shareholders as well. In contrast, if the arbitration clause in the AoA is deemed a formal provision,

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[58] For a detailed explanation of the principle of mandatory norms *(Satzungsstrenge)*, see section 5.1.3.b.

[59] For Turkish law, see Moroğlu, Anasözleşme, 525; Bahtiyar, Anasözleşme, 235-238; Okutan Nilsson, 98-101. For German law, see Röhricht/Schall, § 23 Rdn 15; Pentz, MünchKomm AktG, § 23 Rdn 39-42; Koch, Hüffer/Koch AktG, § 23 Rdn 3-4.

[60] TCC Art. 480.

[61] General assembly quorum requirements are mainly regulated in TCC Articles 418 and 421.

[62] Büchler/von der Crone, 261.

then only the parties who have actually consented to that provision are bound by it. This duality of corporative and formal provisions requires the identification of the legal nature of the arbitration clause stipulated in the AoA. However, this is a significantly complicated task, since there is no statutory rule in the TCC as to whether the AoA may include an arbitration clause or not.[63] Although several criteria are suggested to qualify corporative and formal provisions, none of them are generally accepted.[64]

In my view, a two-step test should be applied so as to distinguish corporative provisions from formal ones. In the first stage, the arbitration clause in the AoA should be analyzed to understand whether it is intended to bind the company, the board members (optional), and new shareholders, as well as the current shareholders. If the scope of the provision includes such a broad circle of stakeholders, it means the provision is intended to operate on the corporate level. Otherwise, the provision in question would be deemed a formal one, and there would be no need to proceed with the second step of the test. However, even if the provision passes the first step, it does not necessarily mean that the provision acquires a corporative nature. It must still be examined, in the second stage, to determine whether the rules of corporate law applicable to the company in question allow for an arbitration clause in the AoA. While the first question relates to the interpretation of the arbitration clause in the AoA, the second question requires determining the scope of contractual freedom within the AoA of joint stock companies in Turkish corporate law.

5.1.3 Contractual Freedom within the AoA

5.1.3.a The Principle of Sole Liability

Contractual freedom in joint stock company law is much more restricted, compared to agreements based on the law of obligations. The principle of sole liability of shareholders *vis-à-vis* the company (*la responsabilité limité interne/beschränkte Haftung des Aktionärs nach innen*), which is enshrined in TCC Article 480/1, may be considered a potential barrier against stipulating an arbitration clause in the AoA.[65] According to the principle, no liabilities other than payment of the subscribed capital and share premium (if applicable) can be imposed on shareholders in joint stock companies by means of the AoA. Therefore, if the requirement of referring to arbitration is seen as a "liability" in terms of the TCC Article 480/1, then providing an arbitration clause in the AoA cannot be permitted and, thus, can only be considered a formal provision.

Swiss law, which includes the same provision in the Swiss Code of Obligations (SCO) Article 680/1, does not consider the principle a barrier because being obliged to refer to arbitration is not seen as an additional liability.[66] This is so because being referred to arbitration does not affect the substantive rights and obligations

[63] The preamble of TCC Art. 561, which designates the competent court for derivative actions for a company's loss, explicitly indicates that an arbitration agreement may be concluded for such claims. However, the preamble of the relevant article is not binding when applying and interpreting the article.

[64] For the criteria suggested in doctrine see Okutan Nilsson, 84-87 and the authors mentioned therein.

[65] The principle is distinguished from the limited liability of shareholders against corporate creditors *(la responsabilité limité externe/beschränkte Haftung des Aktionärs nach außen)*, see Meyer, 58; Naegeli, 23.

[66] See the explanations under subsection 6.2.

of shareholders. This view is accepted with similar reasons in French law.[67] In my view, there is no reason inherent in Turkish law that would require a deviation from the approach adopted in Swiss and French law, since the arbitration clause in the AoA does not impose an additional liability upon shareholders within the meaning of TCC Article 480/1.

5.1.3.b The Principle of Mandatory Norms (*Satzungsstrenge*)

With the enactment of the TCC in 2012, the principle of mandatory norms (*Satzungsstrenge*) enshrined in TCC Article 340 was introduced into the Turkish legal system from section 23/5 of the German Stock Corporation Act. TCC Article 340 reads as: "The articles of association may diverge from the provisions of this Code relevant to joint stock companies only if expressly allowed in this Code. The supplementary provisions of articles of association allowed to be stipulated by other codes shall be effective specifically for the relevant code."[68] The principle further narrowed down the limits of contractual freedom within the AoA of joint stock companies, as it allows the AoA to deviate from the law only in cases where it is explicitly permitted by the TCC to do so. This means that the provisions of the TCC concerning joint stock companies are, in principle, mandatory.

The principle's scope of application differs greatly depending upon the way TCC Article 340 is interpreted. On the one hand, the liberal approach advocates that an "explicit permission" is sought only in terms of the issues already regulated by the TCC. This view focuses on the term "deviate from" and argues that in the absence of a statutory norm, there is no rule to "deviate from." This means that the AoA may freely prescribe provisions on matters not regulated by the TCC. On the other hand, if the principle is interpreted in a strict way, a provision in an AoA on any issue that is not regulated by the TCC would constitute a deviation from the law. Furthermore, the strict view seeks "explicit permission" in the wording of the relevant statutory rule.[69] Therefore, one cannot stipulate a provision in the AoA, unless the TCC explicitly permits doing so with expressions such as "unless otherwise provided in the AoA," "the AoA may provide differently," etc. However, the permissive approach argues that the *ratio legis* (legislative purpose) of the relevant provision must also be considered while determining whether the TCC explicitly permits the AoA to deviate from the law.[70]

Since there is no provision in the TCC with respect to the inclusion of an arbitration clause in the AoA of joint stock companies, or with respect to arbitration in general, an arbitration clause cannot be provided in the AoA if the strict approach is to be followed. For instance, an arbitration clause concerning disputes related to the controlling company's right to purchase minority shares pursuant to TCC Article 208 would not be permitted, although the dispute is in fact arbitrable.

In 2015, the TCA delivered a judgment with respect to the interpretation of *Satzungsstrenge*, where it stated that an AoA may introduce the requirement of holding shares in the company as an eligibility criterion to be elected a member

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[67] Cohen, 191.

[68] The phrase was translated by the author.

[69] Şehirali-Çelik (Kırca/Manavgat), 2013, 160-161; Bahtiyar, Ortaklıklar, 128.

[70] Karasu, 50-52; Şener, 298; Bilgili/Demirkapı, 233-234; Pulaşlı, Esaslar, 285; Ayoğlu, 28.

of the board of directors.[71] The TCA stated in said decision that TCC Article 359, which regulates the eligibility requirements of board members, is not "conclusive," and hence "complementary" provisions may be stipulated in the AoA. However, the decision does not pertain to a "deviation" from law, but to the "completion" thereof. Besides, the TCA has not yet addressed the issue of whether stipulating a provision in the AoA on a subject that is not regulated by the TCC would constitute a deviation from the law. Therefore, the question of whether an arbitration clause provided in the AoA violates the principle of mandatory norms has not yet been resolved.

In my view, however, the principle of mandatory norms should not be interpreted so as to undermine the development of joint stock company law. Since the TCC cannot prescribe a rule for every kind of mechanism that shareholders may establish, an AoA should be able to comprise provisions on subjects that are not covered by the TCC. Moreover, there are three types of provisions in the TCC; (i) provisions that explicitly forbid the AoA to deviate from the law, (ii) provisions that explicitly permit stipulating otherwise in the AoA and (iii) provisions that are silent on whether the AoA may regulate a subject different than the TCC.[72] The wording of the statutory rules in the third group neither permits nor forbids the stipulation of a provision in the AoA in a manner different from the TCC. Hence, the *ratio legis* of these provisions should also be taken into consideration while determining whether the TCC "explicitly permits" the AoA to deviate from the law. Furthermore, the preamble of TCC Article 340 clearly supports this view. The relevant part of the preamble reads:

> The expression 'if expressly allowed in this code' also includes the assumptions where a 'deviation' can be justified by an interpretation that is fit for the purpose, not contrary to the methodology doctrine, based on convincing reasons, having fair consequences and paying regard to the balance of interests, in the event that the possibility to 'deviate' is not expressly understood from the wording of the relevant provision.[73]

While this approach can be adopted for privately held joint stock companies, the principle may be interpreted in a stricter way for publicly traded companies. This is because it would be more challenging to force small investors in capital markets, who are already devoid of contractual freedom to negotiate the AoA, to refer to arbitration.[74]

5.1.4 Binding Effect of Arbitration Clauses Provided in the AoA

In light of the above observations, it is concluded that there is no rule or principle in Turkish corporate law that restricts *contractual freedom* within the AoA of privately held joint stock companies so as to restrain arbitration clauses.[75] Neither the principle of sole liability nor the principle of mandatory norms prevents the insertion of an

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[71] TCA 11th Civil Division 7 July 2015, Case No. 2014/15813, Decision No. 2015/8851.

[72] For (i), see TCC Art. 531; for (ii), see TCC Articles 348 and 416/2; for (iii), see TCC Art. 531.

[73] Translated by the author. The preamble can be found at www2.tbmm.gov.tr/d22/1/1-1138.pdf, accessed 10 August 2018.

[74] Towards a more liberal interpretation of Satzungsstrenge in privately held companies, see Bayer, 126-129; Hopt, 144; Hommelhoff, 271. Arbitration clauses are not prevented by Satzungsstrenge in privately held companies, see fn 98. For more liberal views asserted in English and Swiss laws, see Geisinger/Mermer, 52-55.

[75] It must be reiterated here that the arbitrability of a dispute and the validity of an arbitration clause are different questions.

arbitration clause in an AoA.[76] This finding plays a key role in the second step of the test suggested by this study for the identification of corporative provisions. Therefore, unless the arbitration clause in question is intended only to bind the current shareholders at the time of incorporation or the related amendment, it is deemed a corporative provision of the AoA.

An arbitration clause can therefore be provided either in the original AoA, or by way of an amendment thereof. Since the original AoA is signed by each founder, there is not a problem of consent at the outset. In the event that such a provision is inserted in the AoA via an amendment, a unanimous vote must be sought.[77] This is because the jurisdiction of an arbitral tribunal is justified by the consent of the parties to arbitration. Therefore, requiring a quorum less than unanimity would lead to forcing the opposing shareholders to refer to arbitration.

Once inserted in the AoA, *the company,*[78] *the board members,*[79] *the new shareholders*, and *the current shareholders* are bound by the corporative arbitration clause.[80] At this point, one may argue that shareholders who enter a company after the insertion of an arbitration agreement might not have consented to the arbitration clause in the AoA. Due to the extended binding effect conferred upon the terms of the AoA, there is no need for an additional inquiry for actual consent to arbitration. In fact, corporative provisions of the AoA bind shareholders in their capacity as shareholder because rights and obligations arising from the AoA are attached to the status of shareholder, rather than to the shareholders in person.[81] The corporative nature of the arbitration clause does not conflict with the fact that arbitration is based upon consent. Shareholders' intent to establish or join into a company constitutes the contractual basis underlying the binding effect of corporative terms.[82] This means that, although the extended binding nature of the AoA is conferred by the TCC, it takes its source from the shareholders' consent to establish the company or to acquire its shares. Moreover, the trade registry is public and accessible to everyone. The share acquirer is available to inspect the content of the AoA of the company she is willing to join.[83] Furthermore, the dual nature (contractual and statutory) of the AoA also supports this view. Since the AoA is considered an adhesion contract, a person who enters a company by acquiring its shares becomes a party to the AoA, and thus to the arbitration clause provided therein.

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[76] Karasu, 173; Ayoğlu, 30-35.

[77] Poroy (Tekinalp/Çamoğlu), 2009, para. 731; Kaya, 2001, 332; Ayoğlu, 45-46.

[78] The company's consent to arbitration is expressed in the original version of the AoA or the general assembly resolution regarding the amendment thereof.

[79] In the event that the scope *ratione personae* of the arbitration clause in question includes the board members, they are to be bound by the arbitration clause, provided that they consent to being appointed a member of the board after the stipulation of such a clause in the AoA. Unlike shareholders, they do not have voting rights in the general assembly meetings so as to veto the proposed amendment of the AoA.

[80] For German law see Duve/Wimalasena, 936. For Swiss law see Büchler/von der Crone, 261; Kaufman-Kohler/Rigozzi, para. 3.90. For Turkish law see Helvacı, 190; Bahtiyar, Anasözleşme, 211; Huysal, 296; cf. Ayoğlu, 69-70 and fn 86.

[81] In parallel with English law, as accepted in *Hickman v Kent or Romney Marsh Sheep-Breeders' Association [1915] 1 Ch 881 (Cd)*.

[82] Legal relationships based on share ownership within companies having legal personality differ from ownership of rights arising directly from the law, see Barlas, 59-60. Hence, transfer of rights and obligations attached to joint stock company shares derives from contractual freedom. Shareholders' intent to form or join into a joint stock company, a legal entity based upon the majority rule, originates from the shareholder's free will within the freedom of choosing a legal form.

[83] Trade Registry Regulation No. 2012/4093 Art. 15/1.

In the event that the arbitration clause in question is deemed a formal provision of the AoA, it may still remain effective under the law of obligations and enforceable among the parties as a purely contractual term. The shareholders' consent to arbitration should be sought according to a variety of possibilities. It is obvious that, having signed the AoA, the founders are bound by the arbitration clause until the shareholding structure changes. The assumption that the founders are still bound by the arbitration clause, while the new shareholders are not, would be incompatible with corporate law. As to the new shareholders, this is a typical case of *successio singularis*: if the buyer has no explicit consent to arbitration, her implied intent should be sought at the processes of due diligence and negotiation, prior to share acquisition.[84] In case a "formal" arbitration clause is provided by way of an amendment of the AoA, even the shareholders who voted for the amendment are not bound by the clause, unless the amendment is accepted with unanimity.[85] Yet the company and the board members are not bound *per se* by such an arbitration clause because the provision would operate as a purely contractual term and not be a part of the "constitution" of the company.[86]

5.2 Written Form Requirement

An arbitration agreement is only valid if concluded in writing.[87] However, an AoA is only signed by the founders prior to registration. The question is: should the written form requirement be satisfied by persons apart from the founders? In German and Swiss law, it is only sought while concluding the arbitration agreement at the outset.[88] The scope *ratione personae* (the scope in terms of person) of an existing arbitration clause is, therefore, a matter of consent, which should be addressed under the law that would govern the substantive validity of the arbitration agreement.[89] This view is rightfully adopted in Turkish law as well.[90] Since we are analyzing arbitration clauses provided in the AoA of joint stock companies incorporated in Turkey, the law applicable to the substantive validity of the arbitration clause is Turkish law, unless otherwise agreed upon by the parties.[91]

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[84] *Esen* suggests, regardless of the legal nature of the arbitration clause, that the share acquirer should have an express or implied intent towards the arbitration clause, see Esen, 136 and 173. *Huysal*, on the other hand, argues that the arbitration clause in the AoA carries the positive effect of registration at the trade registry, and thus even binds the new shareholders, see Huysal, 297. Firstly, only the provisions listed in paras. (a)-(h) of the TCC Art. 354 benefit from the positive effect of registration, but the arbitration clause is not included therein. Secondly, these contrasting approaches ignore the distinction between the corporative and formal provisions of the AoA. Indeed, the question of whether the new shareholders are bound by formal arbitration clauses should be addressed within the frame of *successio singularis*, whereas the extended binding effect is to be considered in terms of arbitration clauses corporative in nature.

[85] The general assembly resolution that has purportedly amended the AoA would be deemed "non-existent," so there will be no legal act that can be considered a "formal" provision among the parties. In addition, shareholders, having voted for the proposed amendment of the AoA, declare their consent to arbitration assuming in principle that such an arbitration clause can be enforced against all shareholders and the company. In contrast, the fact that some shareholders are bound by the arbitration clause while others are not – for the same grounds of action – would be incompatible with corporate law. But cf. Ayoğlu, 69-70, who holds that the shareholders who voted for the insertion of the arbitration clause are bound by the clause.

[86] Ayoğlu argues that the company is bound by the arbitration clause in the AoA (Ayoğlu, 38 and 61), but notes that it can only be deemed a "formal" provision (Ibid., 69).

[87] CPC Art. 412/3, IAC Art. 4/2, see also Convention Art. II/1.

[88] Esen, 54-55.

[89] Steingruber, para. 6.51; Kaufmann-Kohler/Rigozzi, 3.71.

[90] Erdem, Tahkim, 244-251; Ayoğlu, 27.

[91] IAC Art. 4/3.

In the event that the arbitration clause in question is of a corporative nature, the written form requirement is deemed to have been fulfilled when the AoA is signed at the formation of the company or when the AoA is amended by a general assembly resolution. Therefore, there is no need for an additional signing of the AoA by the company or its new shareholders. However, if the written form requirement is sought even after the conclusion of the arbitration clause at the outset, the clause could not be enforced against the company or the persons who enter the company by share acquisition after the insertion of the arbitration clause. This is because neither the company nor the new shareholders actually signed the AoA. On the other hand, if the arbitration clause in question is of a formal nature, then only the founders who signed the original AoA will be deemed to have satisfied the written form requirement.

6. From a Comparative Perspective

Various jurisdictions have adopted specific legal provisions that allow arbitrating corporate disputes and/or providing an arbitration clause in the AoA or by-laws of joint stock companies. Since Turkish corporate law is heavily influenced by Swiss and German law, the principles developed in the case law and legislation of these jurisdictions are to be attached particular importance. Still, other jurisdictions may also set an example and provide practical solutions in this regard.

6.1 German Law

Corporate law disputes are generally considered arbitrable in German law, whereas the discussion in the doctrine and case law centers on disputes regarding the validity of general assembly resolutions.[92] Although certain authors consider the principle of *Satzungsstrenge* an impediment to stipulating an arbitration clause in the AoA of joint stock companies,[93] the arbitrability and validity problems have been resolved in case law with respect to partnerships, limited partnerships and limited liability companies.

In 1996, the German Federal Court of Justice held that disputes regarding the validity of general assembly resolutions are arbitrable. The Federal Court stated that both claims for annulment and declaratory judgment for the nullity of general assembly resolutions were subject to parties' consent, as the general assembly may revoke a previous decision with a new decision.[94] Furthermore, the Federal Court clarified that the exclusive jurisdiction of the local court designated by law does not exclude arbitration, and that the shareholders' irrevocable right of action does not hinder arbitration, provided that the arbitral procedure offers protection mechanisms equivalent to those of legal provisions. Moreover, it was also held that a company is bound by the arbitration clause stipulated in its own AoA, even if it did not participate in the conclusion of the AoA as a party. However, the Federal Court

[92] For the general acceptance of the arbitrability of corporate law disputes, see Born/Ghassemi-Tabar/Gehle, § 146 Rdn 1-4. For the discussion about the arbitration of the invalidity of general assembly decisions, see Borris, 481-482.

[93] Schmidt, 282; Koch, Hüffer/Koch AktG, § 246 Rdn 18-19; Spindler/Stilz/Dörr, § 246 Rn. 10; Hüffer/Schäfer, MünchKomm AktG, § 246, Rdn 33; cf. authors mentioned in fn 98.

[94] At the time of the dispute, section 1025 of the former German Code of Civil Procedure adopted the "free disposition" criterion for arbitrability, which was applied in the case.

concluded that the dispute at hand could not be arbitrated because the arbitral award would not have had an *erga omnes* effect, as each shareholder's right to be heard would not have been respected in an arbitration proceeding based on the arbitration clause in question.[95]

In 2009, the Federal Court held that the arbitration clause in the AoA of a *GmbH* concerning the validity of general assembly resolutions is valid, provided that the protections and the opportunity of shareholders to participate in the proceedings comparable to those in national court proceedings are respected. Moreover, the Federal Court renounced its standpoint with regard to the *inter partes* effect of arbitral awards and applied section 248/1 of the German Stock Corporation Act, which establishes an *erga omnes* effect of national court decisions *mutatis mutandis* to the arbitral award. The Federal Court specified the prerequisites and minimum standards of an arbitration clause to be stipulated in an AoA in order for an arbitral award to have an *erga omnes* effect: (i) a unanimous vote is required for inclusion of such a clause in the AoA; (ii) all shareholders should be provided with an opportunity to participate in the arbitral proceedings; (iii) participating shareholders should be granted a say in the appointment of arbitrators, unless selected by an impartial body; and (iv) consolidation of actions must be ensured in order to prevent contradictory judgments.[96] In 2017, the Federal Court confirmed these requirements relating to partnerships and limited partnerships.[97]

As regards joint stock companies, the Federal Court has not yet delivered a judgment on the arbitrability of corporate law disputes. However, the discussion in the doctrine focuses on contractual freedom within the AoA, and it is widely accepted that the *Satzungsstrenge* does not prohibit the incorporation of an arbitration clause into the AoA of privately held joint stock companies.[98] Following the Federal Court's judgment in 2009, "DIS-Supplementary Rules for Corporate Law Disputes 09" and "DIS-Model Clause for Corporate Law Disputes 09" were published by the German Arbitration Institution [*Deutsche Institution für Schiedsgerichtsbarkeit e.V ('DIS')*] and entered into effect as of September 15, 2009. The rules and the model clause are drafted in accordance with the Federal Court's 2009 decision. Between 2010 and 2018, a total of 40 arbitration proceedings relating to corporate law disputes have been filed before the DIS, being subject to these rules (www.disarb.org).

6.2 Swiss Law

Considering that Switzerland has been one of the leading arbitration venues worldwide, Swiss scholars show a highly positive attitude towards the arbitrability of corporate law disputes.[99] The debate over disputes concerning challenging corporate decisions and actions for dissolution concentrates on the principle of sole liability in joint stock companies.[100] Based on the fact that the Swiss Federal Court

[95] BGH 29 March 1996, II ZR 124/95.

[96] BGH 6 April 2009, II ZR 255/08.

[97] BGH 6 April 2017, I ZB 23/16.

[98] Bayer, 108; Bechte-Horbach, 56-60; Duve/Wimalasena, 938-940; Beckmann, 86 and authors mentioned therein.

[99] Forstmoser/Meier-Hayoz/Nobel, 111; Böckli, 2302; Kaufmann-Kohler/Rigozzi, para. 3.47.

[100] SCO Art. 680/1 (equivalent to TCC Art. 480/1).

characterizes the nature of an arbitration agreement as merely procedural, rather than relating to substantive law, it is widely accepted that the principle of sole liability is not a barrier against arbitration, because arbitration clauses do not alter shareholders' substantive rights and obligations.[101]

It appears that the pro-arbitration approach in Swiss law has also been reflected in legislative activities with a view to put an end to the debate on the validity of arbitration clauses provided in the AoA. In fact, Article 697n of the Swiss Draft Code of Obligations (Draft), dated November 23, 2016, provides that an arbitration clause may be validly incorporated in the AoA of a joint stock company.[102] The Draft explicitly states that such an arbitration clause binds the company, its board members and shareholders. Furthermore, Article 704 of the Draft sets a quorum of at least two-thirds of the voting rights and an absolute majority of the nominal value of shares represented at the relevant general assembly meeting. The preamble to the Draft states that this amendment aims to clear up doubts by providing a legal basis for the insertion of arbitration clauses in AoAs. Moreover, it is confirmed, once again, that disputes on corporate dissolution, the liability of board members, and the validity of general assembly resolutions are arbitrable.[103]

Since Turkish corporate law is under the influence of Swiss and German laws, it can be assumed that eventually a more liberal approach is likely to be adopted over time. However, the issue is at the intersection of corporate law and arbitration law, and thus, differences in the arbitration rules of the relevant countries are not to be ignored. For instance, Turkish law adopts free disposition of the subject matter of dispute as the criterion of arbitrability for both domestic and international arbitration, like Swiss law does for domestic arbitration.[104] However, whether the claim relates to economic interests is the criterion adopted for international arbitration in Swiss law, and for both domestic and international arbitration in German law.[105]

6.3 Other Jurisdictions

In Italian law, the problems posed by the arbitration clauses stipulated in the AoAs of privately held companies are addressed with the enactment of the Legislative Decree of 17 January No. 5 (Decree) Articles 34-37.[106] Pursuant to the Decree, an arbitration clause in the AoA binds the company and all shareholders, as well as board members, liquidators and internal auditors. Arbitration clauses can be inserted into the AoA with at least the approval of two thirds of the voting rights represented in the general assembly meeting. Furthermore, if inserted by an amendment of the AoA, dissenting or absent shareholders have the right to exit the company within

[101] In this view, see Gränicher, BaslerKomm-IPRG, Art. 178 N 67; Monti, 86; cf. Büchler/von der Crone, 263. For the discussion regarding the question of whether the arbitration agreement is procedural or substantial in nature in Swiss law, see Monti, 67-72. In Turkish law, see Pekcanıtez/Yeşilırmak, 2596-2599.

[102] FF 2017, 625, (https://www.admin.ch/opc/fr/federal-gazette/2017/625.pdf).

[103] FF 2017, 353, 494. (https://www.admin.ch/opc/fr/federal-gazette/2017/353.pdf).

[104] For Turkish law, see IAC Art. 1/4 and CPC Art. 408. For Swiss law, see Swiss Civil Code of Procedure Art. 354.

[105] For Swiss law, see Swiss PIL Art. 177. For German law, see German Code of Civil Procedure section 1030.

[106] Corapi, 156. Pursuant to Article 34 para. 1 of the Decree, companies listed on a stock exchange cannot introduce an arbitration clause in their AoA.

90 days from the passing of the general assembly resolution amending the AoA.[107] Moreover, equal participation of the interested parties is ensured through the requirement that arbitration clauses must provide that all members of the arbitral tribunal be appointed by an impartial third party, as well as the necessary safeguards in the event that such a third party fails to do so. It is estimated that more than 70 per cent of Italian companies and cooperatives include an arbitration clause.[108]

In Brazilian law, Corporations Law No. 6.404/76 of December 15, 1976 Article 109/3 (in force since 2001) provides that an arbitration clause may be stipulated in the AoA. However, the law was not clear on whether shareholders who either expressly voted against the adoption of the arbitration clause or acquired shares thereafter would also be bound by the clause. Following the inclusion of Article 136-A in the Corporations Law in 2015, all shareholders are now bound by the arbitration clause stipulated in the AoA, and an appraisal right is granted to dissenting shareholders.

French Commercial Code Article L721-3 states that commercial disputes are arbitrable, and it is accepted that both contractual and corporate law disputes fall within this provision.[109] Furthermore, an arbitration clause provided in the AoA binds all shareholders, even those who dissented or acquired a share after the inclusion of the arbitration clause.[110]

In Spanish law, Arbitration Act No. 60/2003 of December 23, 2003 Article 11 bis. provides that in order to insert an arbitration clause into the AoA, the general assembly resolution must be taken by at least two-thirds of the capital. Moreover, the law clearly provides that it is possible to challenge registered corporate decisions by arbitral award.

In Russian law, the Federation Law on International Commercial Arbitration No. 382-FZ Article 7/8 permits the arbitration of corporate law disputes with certain exceptions. For instance, disputes concerning insolvency, right to call a general assembly meeting, squeeze-outs, etc., are expressly considered non-arbitrable.

7. Conclusion and Proposals

I. Due to the increasing tendency to favour arbitration across the globe, the scope of arbitration is expanding expeditiously. There is strong commercial interest in arbitrating corporate disputes, given its advantages: the flexibility, pace and confidentiality of the process, the expertise of the tribunal and the impartiality and finality of the award. National legislators follow this trend – and even lead the field – in order to incentivize national and foreign investments. Hence, Turkey has adopted a pro-arbitration approach and made its claim to be an international arbitration venue. However, arbitration of corporate law disputes entails a series of theoretical and practical challenges under Turkish law. Hence, clarifying the standpoint of Turkish law with regard to the arbitrability of corporate law disputes

[107] Decree Art. 36 para. 6.

[108] Viscasillas, Mistelis/Brekoulakis, para 14.13.

[109] Caprasse, 684-692.

[110] Caprasse, 696-698.

and the validity of arbitration clauses stipulated in the AoAs of joint stock companies would contribute to legal predictability and form a solid basis for recommending practicable solutions.

II. Corporate disputes are examined in two categories, depending on their legal basis. While "contractual disputes" originate from agreements such as SHAs and share purchase agreements, "corporate law disputes" arise from statutory rights granted by law, the AoA or corporate decisions. Therefore, claims peculiar to corporate law, e.g., annulment of general assembly resolutions and actions for corporate dissolution, give rise to corporate law disputes.

III. The arbitrability of corporate law disputes and the validity of arbitration clauses provided in the AoA are distinct legal problems. If a particular corporate law dispute is non-arbitrable, the arbitration clause is not enforceable, regardless of whether it is stipulated in the AoA or SHA. Yet there may be cases where an arbitration clause cannot be included in the AoA, as the rules of corporate law do not permit it, even when the dispute is in fact arbitrable.

IV. The debate relating to the arbitrability of corporate law disputes mainly focuses on the following legal challenges: (i) the broader spectrum of interests affected in corporate law disputes, (ii) the existence of specific procedural rules set out by the TCC for certain types of disputes, (iii) the exclusive jurisdiction of local courts, and (iv) the mandatory character of corporate law rules. Under Turkish law, there is no statutory norm that allows or forbids the arbitrability of corporate law disputes. Therefore, the general criterion of "free disposition" applies to such disputes.

V. While corporate law disputes are, in principle, considered arbitrable in the doctrine, the debate concentrates on disputes concerning the invalidity of corporate decisions and actions for dissolution. The expanding liberal approach justifiably holds that disputes regarding the invalidity of general assembly resolutions can be submitted to arbitration, notwithstanding that requests for corporate dissolution still seem to be a grey area. This paper argues that both types of disputes are arbitrable. However, unlike requests for declaratory judgment with respect to *ipso jure* dissolution, actions for judicial dissolution give rise to certain practical hurdles. It is argued in the paper that the disputes regarding the invalidity of general assembly resolutions and corporate dissolution are subject to parties' consent, and that the exclusive jurisdiction of the court designated by the TCC does not exclude arbitration. Moreover, it is argued that arbitral awards should be granted an *erga omnes* effect, as long as the interested third parties are provided with the necessary procedural protection. In order to avoid such a problem, parties can stipulate the TCC equivalent of their procedural rules in their arbitration clauses, or they can incorporate – by reference – the procedural rules set out in the TCC, as well as the set of rules for corporate law disputes published by an arbitration institute.

VI. It seems that the TCA has so far followed the distinction adopted by the orthodox doctrine in general terms. While claims for the company's damages brought against its directors and requests for registration in the stock ledger are considered arbitrable, disputes concerning the invalidity of corporate decisions and actions for dissolution are deemed non-arbitrable. However, considering the growing pro-arbitration tendency in Turkish legal doctrine – in parallel with many other jurisdictions – it would not be surprising if a more flexible approach is eventually adopted in Turkish case law as well.

VII. Due to uncertainties regarding the validity of arbitration clauses stipulated in the AoA, it is a frequent practice to conclude a separate agreement amongst shareholders. Yet this further complicates the problem because only contractual claims can be raised in arbitral proceedings carried out in accordance with SHAs, whereas it is typically not possible to prevent claims peculiar to corporate law from being asserted in national courts. Furthermore, AoAs bind the company, board members, and all shareholders, while SHAs are not binding vis-à-vis non-signatories. In turn, contradicting judgments may be given in parallel proceedings. Accordingly, it is necessary to provide an arbitration clause in the AoA. However, there is no positive norm in Turkish law that provides an explicit legal basis for statutory arbitration clauses found in the AoAs of joint stock companies. The validity of such an arbitration clause, thus, remains uncertain until a court decision or arbitral award is rendered as to this question. Clarifying the Turkish law's position on this issue would contribute to legal predictability.

VIII. The validity of arbitration clauses must be examined in terms of "consent to arbitration" and the "written form requirement." An analysis of "consent to arbitration" in terms of arbitration clauses provided in the AoA includes certain particularities due to its peculiar legal nature. First, unlike ordinary contracts based on the law of obligations, the AoA is granted an extended binding effect. It follows that the company, the board members, the new shareholders, and the current shareholders are bound by the AoA. However, although the whole text of the AoA is registered at the trade registry, not all its provisions acquire such an extended binding effect. While "formal" provisions of the AoA are deemed purely contractual in nature, only "corporative" provisions benefit from the extended binding effect. Therefore, in the event that the arbitration clause in question is deemed a formal provision of the AoA, only the parties who have actually consented to that provision are bound by it. This duality of corporative and formal provisions requires identifying the legal nature of the arbitration clause stipulated in the AoA. Addressing this issue, the paper suggests applying a two-step test: (i) the arbitration clause in question must be interpreted in order to determine whether it is intended to bind the company, the board members, and new shareholders, as well as the current shareholders; (ii) if the answer is positive, then it must still be examined whether relevant corporate law rules allow for an arbitration clause in the AoA. If the arbitration clause in question passes these steps, then it is deemed to be corporative.

IX. Second, the AoA is mainly regulated by mandatory rules and is thus subject to a limited contractual freedom. However, there is no rule or principle in Turkish corporate law that restricts contractual freedom within the AoA of a privately held joint stock company so as to restrain arbitration clauses. Nevertheless, the principle of mandatory norms may be interpreted in a stricter way for publicly traded companies, as it would be more challenging to force small investors in capital markets to refer to arbitration: they are already devoid of contractual freedom to negotiate the AoA.

X. Third, the majority rule allows inserting provisions in the AoA without a unanimous vote and, thus, replaces the mutual expression of intent sought in ordinary contract formation. An arbitration clause can be provided either in the original AoA or by way of an amendment thereof. Although the AoA can be amended with an absolute majority vote, unless specified otherwise in the AoA, a unanimous vote should be sought if an arbitration clause is inserted. This is because the arbitral tribunal's competence is justified by the consent of the parties to arbitration. Therefore, requiring a quorum less than unanimity would lead to forcing the opposing shareholders to refer to arbitration.

XI. Consequently, an arbitration clause duly stipulated in the AoA is deemed corporative, unless it is intended to bind solely the current shareholders. Once inserted in the AoA, the company, the board members (optional), the new shareholders, and the current shareholders are bound by the corporative arbitration clause. In the event that the arbitration clause in question is deemed a formal provision, it may still remain effective among the parties as a purely contractual term. Having signed the AoA, the founders are bound by the arbitration clause until the shareholding structure changes. However, the company, the board members and the new shareholders are not bound, unless they have consented to arbitration.

XII. Moreover, an arbitration clause is valid only if concluded in writing. The written form requirement should be deemed to have been fulfilled when the AoA is signed at the formation of the company or when the AoA is amended by a general assembly resolution. Hence, there is no need for an additional signing of the AoA by the company or its new shareholders. If the arbitration clause in question is of a formal nature, then only the signatories will be deemed to have satisfied the written form requirement.

XIII. In German and Swiss laws, almost all kinds of corporate law disputes are considered arbitrable. Although the binding nature of the arbitration clauses in AoAs is debated in Swiss law, the Draft aims to provide an explicit legal basis, as is the case in other jurisdictions, such as Italy, Brazil and Spain. In German law, the issues of arbitrability, validity and impact upon third parties of disputes concerning the validity of general assembly resolutions in partnerships, limited partnerships and limited liability companies have been resolved in case law. The discussion with respect to joint stock companies centers around the *Satzungsstrenge*, and the doctrine generally adopts a positive approach for privately held joint stock companies.

XIV. While keeping pace with the liberal views towards expanding the scope of arbitration in corporate law disputes, the foundational principles of corporate law cannot be renounced. Considering the main objectives of corporate law, namely, the minimization of transaction costs and the regulation of conflicts of interest among various stakeholders, one cannot argue for a purely permissive approach. Therefore, certain safeguards need to be established in order to protect minority shareholders, creditors, and other third parties. The views argued in this paper aim to strike a balance between contractual freedom in corporate law and the protection of weaker parties *vis-à-vis* the controlling shareholder(s) and/or the directors. Hence, *de lege ferenda* (with a view to the future law) suggestions and interpretations of positive norms are cautiously made in this regard. Certain safeguards that would serve this end are as follows: (i) a unanimous vote should be sought while inserting an arbitration clause by way of amendment, (ii) an arbitration clause can only be stipulated in the AoA of privately held companies, (iii) the arbitration process must comply with the minimum procedural standards offered by law, particularly, the pending of the case until the term of litigation expires and the consolidation of all the actions filed before the tribunal, and (iv) arbitrators should be appointed collectively, unless selected by an impartial body. The below-mentioned recommendations complete this structure.

XV. Considering international developments and regulatory competition, Turkish legislators should maintain their pro-arbitration position with an open-minded approach. The necessary steps recommended to increase the legal certainty of Turkish law with regard to the arbitration of corporate law disputes can be listed as follows:

i. The arbitrability of corporate law disputes and the validity of arbitration clauses stipulated in the AoAs of joint stock companies should be clarified in the TCC. Likewise, procedural standards to protect third parties' interests, as well as the *erga omnes* effect of arbitral awards should be regulated. Italian Legislative Decree of 17 January 2003 No. 5 Articles 34-37 and the German Federal Court of Justice's decision of 6 April 2009 offer inspiring examples in this respect.

ii. The leading arbitration institutions should draft and publish supplementary rules for corporate law disputes as annexes to their existing rules of arbitration. These rules should consider the problems peculiar to corporate law disputes. Hence, they should provide such mechanisms as (i) the pending and consolidation of actions filed before the arbitral tribunal, (ii) collective – or impartial – selection of arbitrators so as to provide the minimum procedural protection granted to minorities in TCC Articles 445-451. A comprehensive example is the German Arbitration Institution's "DIS-Supplementary Rules for Corporate Law Disputes 09".

iii. With a view to facilitating the incorporation of applicable and valid arbitration clauses into the AoA, a model arbitration clause referring to the above-mentioned supplementary rules for corporate law disputes should be published by leading arbitration institutions. A model clause may be elaborated from the below draft model, inspired by the "DIS-Model Clause for Corporate Law Disputes 09" of the German Arbitration Institution and the resolution dated 27 April 1989 of General Direction of the Registers and Notaries in Spain:[111]

> *All disputes arising between the shareholders or between the company and its shareholders in connection with corporate law, the articles of association and corporate decisions shall be finally settled according to [•][112] of [•][113] which would govern the appointment of the arbitrators.*[114]
>
> *The Arbitral Tribunal consists of [•] arbitrator(s).*[115] *The arbitral tribunal is competent and obliged to apply the procedural rules specific to the type of the dispute as well as substantive rules provided in Turkish Commercial Code No. 6102.*
>
> *The place of arbitration is [•].*
>
> *The language of the arbitral proceedings is [•].*
>
> *The effects of an arbitral award rendered in accordance with the [•]* [116] *is binding for the company and all shareholders irrespective of whether they have made use of their opportunity to join the arbitral proceedings as a party or as an intervenor.*
>
> *The corporation shall always raise the existing arbitration agreement as a defence against any claim that is filed in the ordinary courts of law and that relates to disputes in the meaning of this provision.*

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[111] Viscasillas, Mistelis/Brekoulakis, para. 14-13 fn 29. A noteworthy model clause can also be found in Ayoğlu, 169-171.

[112] The title of the supplementary rules for corporate law disputes of the relevant arbitration institution. It is assumed that the procedural protection mechanisms are regulated by the supplementary rules for corporate law disputes of the relevant arbitration institution.

[113] The name of the relevant arbitration institution.

[114] Alternatively, "sole arbitrator".

[115] The number of arbitrators maybe left to the relevant arbitration institution, which may determine the number depending on the complexity of the dispute.

[116] The title of the supplementary rules for corporate law disputes of the relevant arbitration institution.

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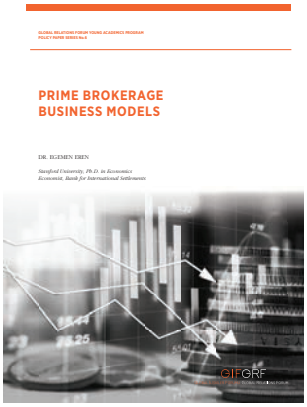

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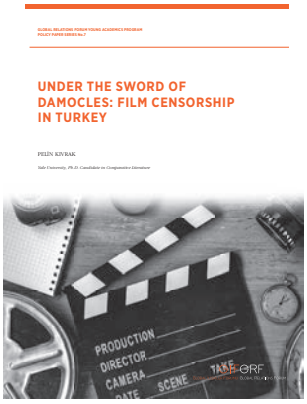

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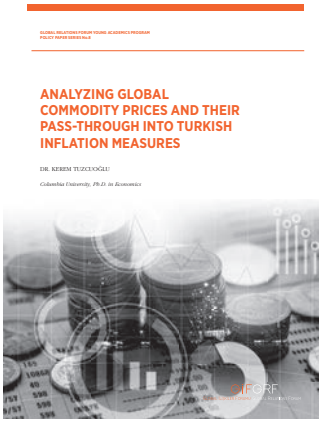

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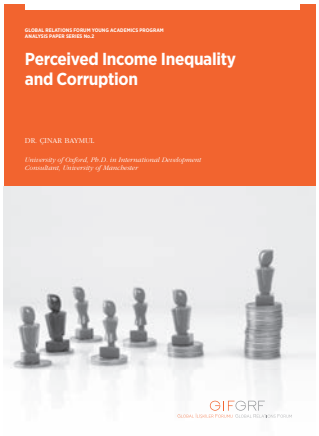

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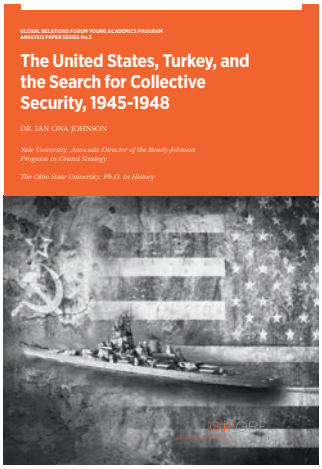

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