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Setting Aside Arbitral Awards for Contradicting Public Policy According to the Turkish International Arbitration Act

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Abstract: This study analyses the setting aside of arbitral awards for contradicting public policy according to the Turkish International Arbitration Act. In a setting aside action, the arbitral award is not scrutinized on its merits; rather, only certain grounds are taken into consideration. One ground that judges evaluate on their own motion is being against public policy. We believe that a more international public policy understanding that is in harmony with the needs and requirements of international arbitration should be adopted.

Keywords: arbitration, public policy, setting aside, transnational public policy, Turkish International Arbitration Act

1 Introduction

Arbitration has become the preferred way to settle international commercial disputes due to its objectivity, rapidness, and specialization. Turkish law has also followed this trend, with arbitration being increasingly chosen for dispute settlements of arbitrable subjects, such as commercial or contractual disputes. In this regard, rules developed by arbitration institutions, such as the Istanbul Arbitration Centre (ISTAC), the Arbitration Centre of the Union of Chambers and Commodity Exchanges of Turkey (TOBB), and the Istanbul Chamber of Commerce Arbitration and Mediation Centre (ITOTAM), are applied in arbitral proceedings.

Turkey is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1991.[1] However, two reservations have been brought up by Turkey to the application of the Convention by using the option in Art. 1(3) of the Convention: First, the Convention is only applicable to the

1 As approved by the Law No. 3731 of 8 May 1991, published in O.J. No. 21002 of 25 Sept. 1991.

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recognition or enforcement of arbitral awards that have been rendered in another member country. Second, it has been accepted that the Convention might only be applicable to disputes that have a commercial nature in pursuant to Turkish law. Therefore, for instance, if the arbitral award concerned a dispute on matrimonial property or rights *in rem* about an immovable property in Turkey, the recognition and/or enforcement of that award in Turkey would not be possible.

Concerning recognition and enforcement of foreign arbitral awards, Turkish Law on Private International and Procedural Law (TLPIL[2]) also stands out and articles 60–64 of the TLPIL includes provisions on this subject. Therefore, it can be confusing as to which provisions should be consulted while demanding the recognition and/or enforcement of a foreign arbitral award in Turkey. Although there are different approaches in the doctrine, we agree with the general understanding (Akıncı 2013; Şit 2005) that the New York Convention has the status of *lex specialis* compared to TLPIL, since the TLPIL also regulates many other provisions, for example the conflict of laws rules, international procedural rules etc. As a result, since *lex specialis derogat legi general*, New York Convention should be applicable where possible. In this regard, recognition and enforcement of an arbitral award may become possible under TLPIL only where there is an award within the reservation of Turkey to the Convention. For instance, where there is an arbitral award that has been rendered in a non-member state to the Convention, enforcement of that award can be demanded in Turkey according to the provisions of TLPIL.

In practice, considering court judgments, it might be said that the latest decisions are generally based on the provisions of New York Convention in enforcement of arbitral awards where it is applicable. For instance in a judgment of the Court of Cassation,[3] it is stated that "… *Since the application of New York Convention has priority where possible, the awards that can be considered according to TLPIL is very rare. If an award is rendered in a country which is not a party to the New York Convention, its recognition and/or enforcement is within the scope of TLPIL* …". Another important aspect of the application of New York Convention by Turkish courts[4] is that the general idea of the New York Convention on the recognition and enforcement of foreign arbitral awards is followed and emphasized: The award subject to the enforcement is not reviewed on the merits (*révision au fond*) and only

2 Turkish Law on Private International Law and Procedural Law Number: 5718, Date: 27.11.2007, O.J. 12.12.2007-26728.

3 Court of Cassation, 19th Civil Chamber, E. 2018/3644, K. 2020/253, T. 04.02.2020: www.legalbank.net.

4 Court of Cassation, 11th Civil Chamber, E. 2002/13265, K. 2003/5759, T. 02.06.2003: www.legalbank.net.

some certain grounds that are mentioned in the art. 5 of the Convention such as "public policy, arbitrability, incapacity, invalidity of the arbitration agreement …" are considered. If it is concluded that there is no ground of refusal according to the art. 5 of the New York Convention, then the award is recognized and/or enforced in Turkey.

Under Turkish law, domestic arbitration is regulated under the rules of the Turkish Civil Procedural Code[5] (TCPC), which stipulates the rules applicable to disputes with no foreign element, whereas the Turkish International Arbitration Act[6] (IAA) applies if a dispute has a foreign element and the place of arbitration is determined to be in Turkey, or where the arbitrating parties, sole arbitrator or arbitral tribunal have agreed to choose the IAA. The foreign element's involvement can take different forms; under such circumstances, arbitration is considered as international, as stipulated in IAA Art. 2. For instance, there is a foreign element if the parties to the arbitration agreement have their domiciles, habitual residences or places of business in different states.

According to the Preamble of the IAA, it has been explicitly mentioned that UNCITRAL Model Law on International Commercial Arbitration[7] has been taken as a basis together with recent understandings, developments and principles in modern international arbitration.[8] When closely looked at the provisions of IAA, it is observed that the general spirit and the principles of the Model Law have been followed in general. Both of the legal sources emphasize party autonomy in many areas, such as the composition of the arbitral tribunal, law applicable to procedure (Model Law art. 19, IAA art. 8) etc. It is also accepted by the Model Law and by the IAA that court intervention should be limited (IAA art. 3 and Model Law art. 5). Also, both the IAA (art. 15) and the UNCITRAL Model Law (art. 34) have similar philosophies for the recourse against an award. Only the setting aside of the arbitral awards on certain grounds have been accepted and there is no possibility of the revision of the arbitral award on the merits by the state courts. Despite these similarities, there are, of course, some disparities among the two sources; while the Model Law includes a special chapter for the recognition and enforcement of arbitral awards, this subject has not been regulated within the scope of IAA in Turkish Law. There are also some other differences concerning individual provisions. For example, while the Model Law (art. 1/3/c) enables parties to expressly

5 Code on Civil Procedural Law, Number: 6100, Date: 12/1/2011 O.J.: 4/2/2011-27836.

6 International Arbitration Act, Number: 4686, Date: 21/6/2001 O.J.: 5/7/2001-24453.

7 The 2006 version of the Law can be found at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

8 Draft of Turkish International Arbitration Act and Commission Reports (1/874) Term: 21 Year: 3 T.B.M.M. (S. Sayısı: 712): https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d21/c067/tbmm21067122ss0712.pdf (date of access: 19.05.2021).

agree that the subject matter of the arbitration agreement relates to more than one country, the IAA does not include such a possibility. Also, for instance, while the IAA (art. 10/E) regulates issuing of the terms of reference by the arbitrators, the Model Law does not include such a provision.

In a setting aside action of an award subject to the IAA, the award is not scrutinized on its merits; rather, it is reviewed on the specific grounds of setting aside as regulated in IAA Art. 15. In this study, we comprehensively analyse one of these grounds, namely "award being against public policy", based on doctrinal views and preeminent court judgments under Turkish law. In many legal orders, an award's incompatibility with public policy is accepted as a ground for setting it aside. In Switzerland, for instance, Art. 190 of the Federal Statute on Private International Law[9] enables annulment if the award is incompatible with public policy. The exceptional character of public policy intervention is also considered in practice (Redfern et al. 2004). Art. 68/2/g of the United Kingdom's Arbitration Act[10] of 1996 also stipulates that an award can be challenged if it is contrary to public policy as does Art. 1502/5 (with the reference to Art. 1504/1) of the French Civil Procedural Code,[11] which also deals with an award's incompatibility with international public policy. When setting aside claims of international arbitral awards, French courts consider international public policy rather than a domestic understanding of public policy (Mantilla-Serrano 2004).

This article focuses on how Turkish law approaches the annulment of arbitral awards that are against public policy. Since judges take into consideration award's incompatibility with public policy on their own motion, there is no need for the parties' allegations. Our analysis questions the standard that should be adopted while analysing public policy intervention, and we propose an international or even transnational public policy understanding beyond the limited scope of national public policy.

2 Important Points of a Setting Aside Action

There are two main grounds of setting aside: "the grounds that can be considered by the judges on their own motion" and "the grounds that should be alleged by the parties". Arbitrability and an award's compatibility with public policy should be

9 https://www.unine.ch/files/live/sites/florence.guillaume/files/shared/publications/pil_act_1987_as_from_1_1_2017.pdf (accessed 26.02.2021).

10 https://www.legislation.gov.uk/ukpga/1996/23/section/68 (accessed 26.02.2021).

11 https://www.jus.uio.no/lm/en/pdf/france.arbitration.code.of.civil.procedure.1981.landscape.pdf (accessed 26.02.2021).

considered by the judges on their own motion whereas the grounds that should be alleged by the parties are as follows: *a) a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under Turkish law; b) the composition of the arbitral tribunal is not in accordance with the parties' agreement, or, failing such agreement with this Law; c) the arbitral award is not rendered within the terms of arbitration; d) the arbitral tribunal unlawfully found itself competent or incompetent; e) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; f) the arbitral proceedings are not in compliance with the parties' agreement as to the procedure, or, failing such agreement, with this Law provided that such non-compliance affected the substance of the award; g) the parties are not equally treated*.

It should be noted that the awards rendered in pursuant to the IAA are domestic arbitral awards according to Turkish law although there is a foreign element in the dispute. Therefore, enforcement of these awards is not subject to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Nomer 2015). So, only an annulment action can be filed against these awards according to IAA Art. 15. Waiving the right to file a setting aside action is possible only under certain circumstances. A party whose domicile or habitual residence is not in Turkey may completely waive the right to file a setting aside in an express clause in the arbitration agreement or, after concluding the agreement, they may agree a waiver with a written agreement. Alternatively, the parties may waive the right to file a setting aside suit based on certain grounds of setting aside the award (IAA Art. 15/A/2).

Partial annulment of the arbitral award is also possible under certain circumstances. According to IAA Art. 15, if the sole arbitrator or the arbitral tribunal has rendered an award that is beyond the scope of the arbitration agreement, the parts that are within the scope of the arbitration agreement may not be annulled. To reach such a conclusion, it should be possible to separate subjects within the scope of the arbitration agreement from those that are not. It is also a pre-condition that the parties have a valid arbitration agreement, which, according to IAA Art. 4/2, should be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication that provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another.

In this regard, there should be a valid arbitration agreement between the parties. In practice, the language of the agreement is an interesting factor in arbitration agreements between the Turkish and foreign companies in that its

validity is debatable if it includes any language other than Turkish. The general approach of the Court of Cassation[12] is based on the Act on Obligatory Usage of Turkish in Business Enterprises[13] of 1926, which stipulates that such arbitration agreements are invalid under Turkish law. However, a District Law Court[14] rendered a different decision in 2020, ruling that arbitration agreements concluded in a language other than Turkish are valid. We believe that the IAA needs to be amended to make it compatible with today's requirements to ensure the validity of arbitral agreements written in languages other than Turkish. Alternatively, judgments should be unified to create consistency across courts. Either way would eliminate all concerns and doubts regarding the discussion.

An award can also be partially annulled if it is possible to separate arbitrable from non-arbitrable subjects (Akıncı 2013). However, if this is not possible, then a decision on the partial setting aside of the award cannot be made. According to the Court of Cassation, when a partial setting aside of the arbitral award is determined, the rules on the acquired rights apply to those parts of the award that have not been set aside.[15]

3 Definition of the Concept of Public Policy in Terms of Setting Aside Actions

There is no provision in the IAA defining public policy. However, in the doctrine, the concept can be defined according to various criteria depending on their relationship to the arbitration. These include "the understanding and principles at the core of constitutional fundamental rights and laws (Ökçün 1997), the basic principles of law, the provisions of private law norms based on the rules of honesty (Demir Gökyayla 2001), the understanding of morality prevailing in society (Ruhi and Kaplan 2002), having relevance to the public interest and the public conscience" etc. (Ökçün 1997).

In practice, a similar point of view stands out. For example, in the Decision for the Unification of the Judgments of the Court of Cassation Grand Assembly for the Unification of the Judgments dated 10.02.2012, 2010/1 Docket, 2012/1 Decision, the

12 For instance, the Court of Cassation 11th Civil Chamber., E. 2016/5836, K. 2017/4720, K. 26.9.2017: www.kazanci.com.

13 Law Number 805, O.J. 22.04.1926.

14 İstanbul Civil District Court, 12th Civil Chamber., E. 2020/19, K. 2020/184, T. 13.02.2020: www.lexpera.com.

15 Court of Cassation, 15th Civil Chamber., E. 2007/3708; K. 2007/7216, T.15.11.2007: www.lexpera.com.

framework for the violation of public policy is defined as "contradiction of the basic values of Turkish law, the Turkish general understanding of manners and morality, the basic understanding of justice on which Turkish laws are based, the general policy on which Turkish laws are based, the basic rights and freedoms contained in the Constitution, the rules based on the common principle and the principle of goodwill of private law applicable in the international field, the principles of morality and the principles of law that are the expression of the understanding of justice that are jointly adopted by civilized communities, the level of civilization and political and economic regime of society, human rights and freedoms". Similarly, according to a judgment by the Court of Cassation General Civil Assembly,[16] the indispensable basic principles of a state concern public policy, so public policy intervention occurs if the mandatory provisions for protecting public interest, general ethical principles or basic human rights and freedoms are violated. This judgment shows that the court considers values and principles from a more extensive point of view that is not limited only to Turkish law.

Given this, in evaluating setting aside actions under the IAA in cases contradicting public policy, Turkish courts have an understanding that is closer to the public policy understanding of those countries belonging to continental Europe's legal system. This is because, in continental Europe's legal system, public policy is considered within a broader context than in the Common Law system (Mantilla Serrano 2004) and is perceived to cover both substantive and procedural public policies (Burger 2012; Mantilla Serrano 2004). For example, it is based on criteria like *pacta sunt servanda*, the prohibition of abuse of the right and the basis of good faith. In addition, significant violations of the right to be legally heard and the principles of equality of parties in the trial may also require public policy intervention. A very serious violation of these principles can lead to public policy intervention on the ground that the trial was unfair.

4 Characteristics of Public Policy Intervention

One of the key features of public policy intervention is its connection with the country of the judge of the setting aside action. If the relationship between the dispute and its connection with Turkey is not too strong, then the public policy intervention should also be limited (Akıncı 2013).

Attention should be paid to the exceptional nature of a public policy intervention (Kalpsüz 2007) and that this exception should be applied with caution. Thus, a conclusion, such as examining the arbitral award on merits on ground of

16 Court of Cassation General Civil Assembly, E. 2013/13-1847, K. 2015/2020, 30.09.2015.

contradicting public policy, should not be drawn. Determining a contradiction with public policy should not be considered as checking whether or not the arbitrators have reached the correct decision (Akıncı 2013). Neither is it possible to suggest that substantive events have falsely been identified or that clear violations of the law will absolutely result in a public policy intervention.

5 Scope of the Examination of a Contradiction with Public Policy

In a setting aside action, the issue of a contradiction with public policy may arise as different possibilities in practice. As mentioned above, when examining the contradiction with public policy in the setting aside action, this examination should not be interpreted in such a way as to make a revision on merits possible (Akıncı 2013). Also, examination of compliance with the law should not be carried out in such a way as to result in revision on merits. It is very important to make this distinction, otherwise the examination of the state judiciary will take the form of an appellate examination. For example, as correctly stated in a decision[17] of the Court of Cassation, the fact that a provision of the law, whether imperative or not, has not been applied or has been misapplied is not sufficient alone for a public policy intervention. There should be a result contrary to the basic values of society, general morality and manners, or the fundamental rights and freedoms adopted in the Constitution. This point has been emphasized by stating that for an award to be considered contrary to public policy, it must exceed the contractual obligations of the parties, have a social dimension, be unacceptable by the society, hurt the social conscience, or create social unrest.

Regarding procedural considerations, the fact that a number of procedural deficiencies arise during the arbitral proceedings does not require direct public policy intervention. For example, the Court of Cassation correctly decided public policy was not contradicted when no expert report was obtained after performing an on-site examination, the translation of the contract between the parties was not made by a sworn translator, and the terms of reference were not issued.[18] The Court also stated that these issues were related to the collection of evidence, so there was no case of public concern. As part of this interpretation, although IAA Art. 10/E stipulates that arbitrators should prepare terms of reference after the exchange of

17 Court of Cassation 15th. Law Chamber., E. 2019/2474, K. 2019/3640, D. 26.9.2019.

18 Court of Cassation 15th. Law Chamber., E. 2019/2474, K. 2019/3640, D. 26.9.2019.

petitions, the lack of such a document is not a ground for setting aside the award. Thus, the Court ruled that this did not contradict public policy.

Although not every procedural violation requires a public policy intervention, awards delivered in such a way as to eliminate the right of defense, even if in accordance with the rules applied to the arbitration procedure, may contradict public policy (Akıncı 2013). In addition, depending on its impact, creating inequality between the parties can also prevent a fair trial. It can even reach the extent that it constitutes a contradiction of public policy. In such a case, because the judge may review the situation on his/her own motion, an allegation by the interested party is not required in the setting aside action.

Another procedurally important issue relates to the capacity to be a party in the case. The Court of Cassation[19] held that the capacity to be a party in the case results from the right to enjoy civil rights, and that the examination and determination of the capacity to be a party in the case is related to public policy. The court therefore concluded that the arbitrators should review this matter on their own motion (*ex officio*) and that they should wait for any criminal investigation that may result in the absence of capacity to be a party to be finalized. The parties went to arbitration to settle a contractual dispute. While the arbitral proceedings were pending, a criminal investigation commenced concerning the public bid process, based on allegations of certain procedural irregularities and fake documents. After the arbitration proceedings ended and the setting aside action that had been filed was rejected, a criminal case was filed. An appeal was filed with the Court of Cassation against the court's decision rejecting the setting aside of the arbitral award. Since the nature of the claims subject to criminal proceedings also affected whether the joint venture contractor has the right to stand as a party, the Court of Cassation decided that this issue should be reviewed by the arbitrators on their own motion. The fact that the arbitrators delivered an award without waiting for criminal investigation to be finalized was contrary to public policy, so the decision of the court of first instance was overturned. In its decision, the Court of Cassation also noted that the fact that one of the parties had no right to stand as a party was a reason for setting aside the arbitral award in accordance with IAA Art. 15/A/1/a.

Another example[20] where the arbitral award was annulled for contradicting public policy developed as follows. An arbitral award rendered upon a dispute

19 Court of Cassation 15th. Civil Chamber., E. 2011/4691, K. 2012/1757, 20.03.2012, http://legalbank.net/belge/y-15-hd-e-2011-4691-k-2012-1757-t-20-03-2012-hakem-kararinin-milletlerarasi-tahkim-kanunu-uyarinca-i/1388665.

20 Court of Cassation 13th. Civil Chamber., **E. 2015/16140 K. 2017/3322 T. 16.3.2017**: www.lexpera.com.

arising from a contract to which one of the parties is a public entity resulted in a "reduction of public revenue". The court of first instance, where the case was heard, requested an expert report to determine whether the case met the conditions requiring the setting aside listed in IAA Art. 15. The expert concluded that "the question of whether the award is contrary to public policy should be evaluated by the court on its own motion, but a reduction in the income that the public entity will receive under a contract to which it is a party will not be considered contrary to public policy alone." Therefore, the court decided to reject the setting aside action because there was no reason for setting aside in accordance with IAA Art. 15. However, in a dispute arising from the concession agreement, the Court of Cassation ruled that the result of the reduction of the state's treasury share would upset budgetary and economic balances. Consequently, it concluded that a situation contrary to public policy would clearly arise and that the lower court had ruled through an incomplete review because it was necessary to determine whether the arbitral award reduced public revenues. According to the Court of Cassation, "arbitral awards that reduce the revenues of the state of the Republic of Turkey or prevent the increase of the revenues of the State are contrary to public policy."

This approach of the Court of Cassation is strongly criticized in the doctrine (Şanlı, Esen, and Ataman Figanmeşe 2019). In accordance with this approach of the Court, a measure of contradicting public policy was developed based on the state's revenues. This conclusion cannot be justified from a legal perspective; rather, it is based solely on the idea of protecting the state (Şanlı, Esen, and Ataman Figanmeşe 2019). We would also argue that this decision was taken from a perspective that does not coincide with the essence of international arbitration. The fact that only the state's income is reduced is not sufficient to reject the arbitrator's decision on the grounds that it is contrary to public policy. Arbitrability in connection with the dispute and conducting a review in this regard is a separate topic of discussion.

There was another interesting finding in the decision: Since the arbitration agreement stated that the dispute would be resolved on the basis of "Turkish legal rules", there is no doubt that the public policy concept of the Turkish law, which was the applicable law, should be taken as the basis for determining any contradiction with public policy.[21] In our opinion, when evaluating this issue in the setting aside action to annul the arbitral award, it is necessary to act within the

21 For similar reasoning, see "since the parties have chosen Turkish law as the applicable law public policy of Turkish law should be taken into consideration while determining public policy intervention": Court of Cassation 13th Civil Chamber, E. 2012/8426, K. 2012/10349, T. 17.04.2012: www.kazanci.com.

framework of an international or even transnational understanding of public policy, beyond the public policy understanding of the law to be applied on merits. The law to be applied on merits in arbitration proceedings should be applied by the arbitrators as a whole, taking into account its understanding of public policy. However, in the setting aside action, the understanding of public policy must be addressed from also a transnational point of view, in accordance with the requirements of international arbitration, beyond a particular law's understanding of public policy. In addition, whether the law to be applied on merits is Turkish or foreign law should make no difference in the review of public policy from an international or even transnational perspective in the setting aside action.

Another issue related to the contradiction of public policy may arise in relation to the reasoning of the arbitral award. Whether an arbitral award should be required to include its reasoning is regulated in different ways in different legal orders. Arbitral awards are usually required to have a reasoning part in countries belonging to continental Europe's legal system, so the arbitral award may be set aside if this is lacking (Rubino Sammartano 2001; Süral 2015). According to the general approach of jurisdictions that strictly require a reasoning, only depending on the existence of a satisfactory reasoning enables the parties to see how their claims and defenses relate to the result (Tanrıver 1997–1998). On the other hand, although it is easier to determine whether the principles of a fair trial were observed if the arbitrators included a reasoning in their awards, lack of a reasoning should not be the sole reason for setting aside the arbitral award (Akıncı 1996; Gaillard and Savage 2002).

In contrast to continental Europe, some Common law countries place less emphasis including a reasoning with the award. For example, in English domestic arbitration law, arbitrators are not required to specify the rationales for their decisions while the same understanding is adopted in American domestic arbitration law (Rubino Sammartano 2001). However, unlike this flexible understanding in domestic arbitration, there is a growing trend in legal orders of the Common law system to include a reasoning in the arbitral award to prevent another court from setting it aside or refusing to recognize or enforce it (Rubino Sammartona 2001).

In Turkish law, IAA (Article 14/A/2) states that, among other issues to include, the award should provide the legal reasons it is based on.[22] Therefore, the arbitral

22 Enforcement of foreign court judgments without a reasoning is possible according to the Court of Cassation's Grand Chamber for the Unification of Judgments E. 2010/1, K. 2012/1,10.02. 2012:http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2012/09/20120920.htm&main=http://www.resmigazete.gov.tr/eskiler/2012/09/20120920.htm (Date of access: 22.12.2020).

award should be drafted with a reasoning. However, it is not regulated that the lack of a reasoning in the arbitral award is a ground for setting it aside. In such a case public policy intervention or procedural irregularities, for example, might be discussed.

If it is accepted that arbitral awards should include a reasoning to prevent them from being setting aside, this raises the question of what the reasoning should be. Generally, the following criterion can be used: "arbitrators do not have to evaluate every claim of the parties and may tacitly reject some claims. But in particular, a reasoning evaluating all significant claims together with rejected claims should be included" (Lalive 2008). In our opinion, a satisfactory reasoning should include the main claims and defenses of the parties in order to comply with the parties' right to be heard and thus the principles of a fair trial (Bayata Canyaş 2016). This will eliminate the possibility of contradicting public policy.

In an exemplary case related to reasoning, the Court of Cassation upheld the decision of the court of first instance, which held that there was no contradiction between the reasoning and the conclusion of the award.[23] That is, the Court of Cassation evaluated the point that there should be no discrepancy between the reasoning and conclusion parts of the award. So, it can be concluded that public policy intervention might occur when there is contradiction between the reasoning and conclusion.

Finally, in an effective arbitration regime, the parties are expected to follow principles of honesty. If these principles are violated, it is likely in certain cases that an evaluation is made within the framework of contradicting public policy. For example, it is inconceivable that an arbitral award would be considered valid if it resulted from the retention of an important document of value that may affect the arbitrator's judgement in such a way as to be based on a forged document or perjury (Abedian 2011). A state court should be able to set aside an arbitral award obtained in this way.

The IAA does not regulate a specific ground for setting aside that the arbitral award that was given as a result of fraud. In this case, the court may consider an evaluation within the scope of a contradiction with public policy because enforcing an arbitral award based on fraud contradicts public policy (Tiryakioğlu and Bayata Canyaş 2015). For a trial to be fair, it must be conducted honestly and in a way that reveals the truth (Akıncı 2013).

23 Court of Cassation 11th Civil Chamber, **E. 2018/89 K. 2019/5321 T. 12.9.2019**: www.lexpera.com.

6 Relevance to Arbitrability

So far, we discussed how the grounds for setting aside an award that contradicts public policy under the IAA may arise in practice and the theoretical approach in this regard. Now, its relevance to arbitrability should also be determined. Arbitrability mainly concerns whether a dispute can be brought before arbitrators or whether it should solely be resolved by state courts (Redfern et al. 2004). Criminal cases, a great number of bankruptcy cases, trade sanctions, certain competition claims are non-arbitrable according to the many jurisdictions (Born 2021). According to one opinion, disputes that have public importance and that requires protective measures by courts due to such an importance are not arbitrable (Born 2014). Also, some disputes, such as employment disputes, where the idea of protecting a weaker party is of central importance, are not accepted as arbitrable by some jurisdictions (Born 2014). Existence of claims involving an economical interest is seen to be a criterion in some legal orders such as Swedish (Federal Statute on PIL art. 177/1) and German laws (German Procedural Law art. 1030/1). In this regard, it is alleged that under the Swedish law, a dispute might arise from civil law, administrative law or international law, but what matters is that it should concern a financial interest (Baron and Liniger 2003). In a broad sense, most of the commercial disputes are arbitrable in many legal orders (Redfern et al. 2004). Moreover, many jurisdictions accept arbitrability as a subject that also concerns public policy (Redfern et al. 2004).

In the IAA, contradiction with public policy and arbitrability are different grounds for setting aside. The objective meaning of arbitrability means whether the dispute subject to the arbitral award is suitable for settlement by arbitration (Huysal 2010). IAA Art. 1/4 states that the law does not apply in disputes related to rights *in rem* concerning real estate in Turkey or in the disputes that are not subject to the autonomy of the two parties. From this perspective, no regulation has been introduced regarding arbitrability. The provision only specifies cases where the IAA cannot be applied. For example, since only real estate located in Turkey is mentioned, the rights *in rem* regarding real estate in a foreign country cannot be considered within the scope of this provision. Contracts, in particular, stand out as issues left to the autonomy of both parties. In Turkish law, it is generally believed that disputes arising from consumer agreements, rent determination cases, disputes related to condominium law, and eviction cases are not arbitrable to protect the weaker party (Nomer 2015; Yeşilırmak 2011), neither are disputes arising from family law (Kalpsüz 2007; Nomer 2015; Yeşilırmak 2011).

Arbitrability and public policy can be used as having relation with each other (Lew, Mistelis, and Kröll 2003) or the concept of public policy can sometimes be

interpreted as a reasoning for arbitrability (Huysal 2010). However, it is important to be able to identify their differences, especially in terms of the impact they will have as a result of the setting aside action. In accordance with Article 15, setting aside an arbitral award on the ground of being against public policy causes different legal consequences than setting aside the award on the ground of inarbitrability of the dispute. If the arbitral award is set aside on the grounds that it is contrary to public policy, the dispute may be referred to arbitration again because the arbitrators may still be able to render an award that is not contrary to public policy. On the other hand, if the arbitral award is rejected on the grounds that the dispute subject to the award was not arbitrable, the dispute will have to be referred to the court to resolve it.

For example, a case[24] where the distinction between public policy and arbitrability was important in terms of setting aside an arbitral award under Turkish law was decided as follows. The public service concession agreement, in which one of the parties was an administration and the other was a GSM company, was intended to "establish and operate a mobile telephone system". Under the contract, the company was obliged to pay a certain percentage of its revenues from gross sales as a contribution to the Treasury. However, the company claimed that it was obliged to pay contributions on the discounts made in its wholesale sales to distributors before the sale took place and the invoice was issued. The company resorted to arbitration in accordance with the Rules of the International Chamber of Commerce. The arbitral tribunal ruled in favor of the company and decided that it was not obliged to pay contributions. The administration, on the other hand, requested the setting aside of the arbitral award for contradicting public policy and exceeding the arbitrators' powers under IAAF Art. 15. The defendant company, however, argued that authority had not been exceeded, that the limits of the law chosen by the parties were not violated, and that there was no issue contrary to public policy in the award. The Court of First Instance decided to reject the setting aside of the arbitral award, whereupon the plaintiff administration filed an appeal against the decision of the Court of First Instance at the Court of Cassation.

The Court of Cassation rendered the following judgment for setting aside the arbitral award: "In a concession agreement made by the administration for the purpose of receiving a certain, more or less, and permanent income, the fact that the obligation to pay treasury shares and contributions to public expenses, which are the most important element of this agreement, is left to the initiative of the GSM operator, is contrary to the imperative provisions of law and the public interest." We believe that contradicting public policy was an inappropriate reason for setting

24 Court of Cassation 13th Civil Chamber, E. 2012/8426, K. 2012/10349, T. 17.04.2012: www.kazanci.com.

aside of the arbitral award. Instead, the issue that could have been discussed at this point was arbitrability, given as a separate reason for setting aside within the IAA (Article 15/A/2/a). This is because GSM's contribution obligation to public expenses did not arise from the agreement between the parties but from Additional Article 36, which amended the Telephone and Telegraph Law No. 406. Disputes arising from applying this rule are subject to the exclusive jurisdiction of the tax court. Therefore, because the dispute in question was not arbitrable, the Court of Cassation should have concluded that the dispute was not arbitrable, without resorting to a reasoning that allows the award to be scrutinized on the merits depending on the ground of public policy (Bayata Canyaş 2016).

7 Proposal to Make Assessments Within a Transnational Public Policy Framework

The analysis here makes clear that a purely national point of view will not always provide guidance for setting aside actions filed under the IAA. Therefore, Turkish courts should also consider evaluating the arbitral award within the framework of international public policy or even transnational public policy, which is gradually becoming common in foreign jurisdictions (Curtin 1997; Mantilla Serrano 2004; Pryles 2007) and which overlaps with the general structure of international arbitration (Bayata Canyaş 2016). An understanding of public policy that adopts an international point of view and that has a perspective in accordance with the requirements of international commercial life should be preferred which is also in conformity with the dynamics of international arbitration (Curtin 1997). Guidance can come from the fundamental rules of natural law, principles of universal justice, *jus cogens* in public international law, general principles of morality accepted by civilised nations (Pryles 2007; Redfern et al. 2004). An award that does not invalidate a contract obtained by corruption or an award that is in contradiction with fundamental economic policies is against the public policy (Gaillard and Savage 1999).

It may be a problem how the national courts should determine supranational public policy. There are different formulations (Born 2021): Generally, "applicable sources of public international law, such as the international conventions and also rules of customary international law and general principles of law accepted by different legal systems" might be illuminative (Born 2021). International public policy concerns a "broader public interest of honesty and fair dealing" (Redfern et al. 2004). In parallel with this understanding, a court may consider the domestic understanding of public policy only if such an understanding of public policy is

also in conformity with the vital international principles adopted in many states (Born 2021). When based on a such an understanding of public policy, an international award should not be set aside only if it is in contradiction with a domestic requirement (Redfern et al. 2004).

As seen in the judgments of many different nations, for a substantive understanding of public policy, certain types of criminal prohibitions, such as drug smuggling, slave-trading, torture, corruption and bribery, trade sanctions and export or currency controls can constitute a basis. Also, sometimes awards of punitive damages have been found to violate the public policy of the *forum*. Finally, failure by the arbitral tribunal to properly apply the principles of *pacta sunt servanda*, good faith, abuse of right, *force majeure* may lead to violations of public policy. Moreover, if one of the parties submitted fake documents and where such a fraud has been discovered after the award has been made, public policy intervention might occur (Gaillard and Savage 1999).

Some courts refer to procedural public policy when there is a very serious procedural unfairness or an irregularity such as the violation of opportunity to be heard, equal treatment of the parties and lack of an impartial tribunal (Born 2021; Gaillard and Savage 1999).The procedural examples that can be associated with the transnational understanding of public policy are "the ability to recourse to arbitration only at the request of the parties, the independence and neutrality of arbitrators, and the possibility that the arbitration procedure can be decided by the parties and arbitrators, except for some basic limitations" (Mantilla Serrano 2004). Compliance with the principle of equality and the right to be heard at arbitration proceedings can also be considered as basic international standards (Aygül 2014).

We therefore criticize the possibility of setting aside an arbitral award solely on the grounds that it is contrary to national public policy, especially if it will not be enforced in that country (Abedian 2011). One opinion here (Heiskanen 2010) is based on situations where the only connection between the arbitral award and the place of arbitration is the "place of arbitration" itself. In such a case, the arbitral award should be set aside or its enforcement should be rejected only if it does not comply with transnational public policy. Other connections can be evaluated, such as the nationality of the parties, their principal place of business, the law governing the agreement, the law of the place of performance of the agreement, the place or places where the effects of the performance of the agreement will be felt (Heiskanen 2010). If the transnational effects of the arbitration are intense due to evaluating the connections, then public policy interventions should also be evaluated from a transnational rather than domestic perspective (Heiskanen 2010). In some court judgments, national and political interests of the *forum* are referred as grounds for public policy intervention. However, such instances are criticized for not being in conformity with the international arbitral understanding

(Born 2021). It is argued that public policy should refer to the concepts of law and legal principle, not to solely foreign policies or political interests (Born 2021). In our opinion, courts can also consider such an examination regarding setting aside actions of arbitral awards due to public policy intervention in accordance with the IAA (Bayata Canyaş 2016). For example, in such a case, as mentioned above, the possibility that an arbitral award will reduce the income of the state cannot be the sole criterion because such a tendency only aims at a certain state and does not reflect a transnational point of view.

8 Conclusion

Arbitral awards are not scrutinized on the merits according to the IAA; rather, they are only reviewed in terms of specific annulment grounds listed in IAA Art. 15. One of the grounds that judges take into consideration on their own motion is the award's incompatibility with public policy, which was the main subject of this study.

There is no clear definition of public policy in the IAA. However, if the award was reached by violating fair trial principles or rendered based on fake documents or fraud, a public policy intervention might occur. Here, the exceptional character of public policy should be kept on mind and public policy should not be used as a tool to enable revision by merits. Analysis of relevant judgments of Turkey's Court of Cassation indicates that wrong application of substantial law or certain procedural irregularities do not necessarily require public policy intervention. Judges assessing a public policy intervention may prefer an international rather than transnational understanding of public policy that is compatible with the needs of international trade. However, in certain situations, judges have applied a solely national perspective. For instance, arbitral awards that reduce or prevent an increase in the Turkish State's public income are found to be against public policy. We believe that the review of an award in setting aside actions should not always be driven by a purely national public policy approach. Instead, the courts should also adopt an international or even transnational public policy understanding that does not only concentrate on national dimensions.

Especially when the dispute subject to the arbitral award lacks a strong connection with Turkey or its enforcement in Turkey is unlikely, it would be much more meaningful for courts to adopt a transnational public policy perspective led by "basic principles of natural law, international justice principles, *jus cogens* and basic ethical principles of civilized nations". Basic procedural principles could include "equality of the parties, fair trial principles, consulting arbitration only upon the parties' demand, objectivity and independency of arbitrators, choice of

arbitral procedure by the parties and/or arbitrators" etc. These fundamental principles and values could provide the foundations for interpreting transnational public policy.

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