CHAPTER 7
Challenges to Arbitral Awards

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§7.01 IN GENERAL

The most significant innovation of the IAL has been the preclusion from the appellate procedure the legal remedies available against arbitral awards. Parties who are not entirely satisfied with and who are not willing to comply with an award no longer possess the opportunity to submit the award for revision by the courts. Review of the merits of an arbitral award by the Turkish courts is no longer possible under the IAL. It is therefore no longer possible for an award to be reviewed by the courts as to whether or not the award rendered is accurate. At the time of enactment of the IAL, Law No. 1086 was in force and remained effective until 1 October 2011. The review of merits of an award was permitted by Law No. 1086 until it was repealed by the CCP. The system foreseen under the CCP is identical to that of the IAL and, thus, the appeal procedure is no longer available for awards rendered in domestic arbitration proceedings. According to Article 439 of the CCP, the only remedy available against a domestic arbitral award is to file a request to set aside the award. Consequently, the only legal avenue available against an arbitral award both under the IAL and the CCP is to have the award set aside on grounds identified under these laws.

Since the IAL has the status of *lex specialis* regarding disputes which it qualifies as having a foreign element,[1] disputes that fall within its scope of application will be settled according to the IAL. The CCP is applicable only to domestic arbitrations: arbitrations that are seated in Turkey and which do not contain a foreign element (Article 407, CCP). It should be noted that awards rendered in Turkey, whether

1. See, Chapter 1 for definition of foreign element (Article 2).

domestic or international, are national (Turkish) awards and therefore are not subject to any enforcement proceedings.[2]

Legal remedies available against arbitral awards are regulated in Article 15. Upon examination of the systematic structure of Article 15, regulating setting aside actions against and the execution of arbitral awards, it appears that a setting aside action is the only legal remedy available against awards under the IAL. This is made express by Article 15A(1) which provides that only a setting aside action can be filed against an arbitral award. Thus, an attempt to appeal against the award or have the award revised by the courts must be dismissed.[3]

It is important to point out that the term 'legal remedies' (*kanun yolu* in Turkish) is commonly used to refer to legal remedies available against judicial decisions. Thus, the usage of the said term to refer to the supervision of arbitral awards might cause complications. This was not the case under Law No. 1086 as the said law had permitted appeals against arbitral awards. Since the CCP has eliminated the possibility of appeal against domestic arbitral awards, the meaning to be afforded when reference to the term 'legal remedies' is made must now be clearly identified. It is obvious that a setting aside action filed against an arbitral award as a legal remedy is clearly different when compared with an appeal request. Since the two functions of the appeal procedure (the prevention of the finalization of the award and the transfer of the case to the superior court for review) are non-applicable with regards to setting aside actions, these actions should therefore not be classified and interpreted as appeal requests in the narrow sense.[4] However, setting aside actions can be classified as a legal remedy that can be resorted to in the event one of the particular setting aside grounds identified exist.[5] Thus, the term legal remedy under Article 15 will be interpreted in a broad sense and setting aside of arbitral awards will be approached within that scope.

Although the appeal procedure is not available as against arbitral awards, it is possible to appeal against judgments of the first instance court to which an application

2. E. Nomer, *Milletlerarası Usul Hukuku* (*International Procedural Law*) (Istanbul: Beta Publishing, 2009), 214.
3. The 11th Civil Division of the Court of Appeal has declared that 'According to the IAL, only a setting aside action can be brought against arbitral awards. In light of the fact that the Law does not provide the entitlement to appeal against an award, the parties' appeal request requires dismissal.' (Date: 24 February 2006, File No.: 3953, Decision No.: 1858 (*Terazi Law Journal* 3 (2007): 190-192)) [translated by the chapter authors].
4. Where a claim for the setting aside of an award is granted, the award is partially or wholly revoked. Since the file cannot be sent to the arbitrators for retrial, setting aside actions can properly be considered as legal remedies available against arbitral awards as opposed to appeals: Z. Akıncı, *Milletlerarası Tahkim* (*International Arbitration*) (Istanbul: Vedat Publishing, 2013), 250, fn. 448; E. Şensöz, *Milletlerarası Tahkim Kanununda Hakem Kararlarına Karşı Başvurulacak Kanun Yolları 'Hakem Kararlarının İptali'* (*Rights of Recourse Against Arbitral Awards under the International Arbitration Law 'Setting Aside of Arbitral Awards'*), (Unpublished LL.M. Thesis, 2004), 64-65; H. Sarıtaş, '4686 Sayılı Milletlerarası Tahkim Kanununa Göre Hakem Kararlarına Karşı Kanun Yolları' ('Rights of Recourse Against Arbitral Awards Under the International Arbitration Law Numbered 4686') (http://www.sayistay.gov.tr/yayin/dergi/icerik/der59m7.pdf, August 2014, 142).
5. B. Şit, *Kurumsal Tahkim ve Hakem Kararlarının Tanınması ve Tenfizi* (*Institutional Arbitration and the Recognition and Enforcement of Arbitral Awards*) (Ankara: İmaj Publishing, 2005), 84-86.

is made to set aside the arbitral award (Article 15A(7)).[6] Although retrial has not been expressly provided for under Article 15, it is possible in accordance with Article 443 of the CCP.[7]

The IAL drafting committee considered the approach adopted in model legislations[8] and the approach adopted by States that serve as the centre of international commercial arbitration, which ultimately aim to minimize legal avenues available against arbitral awards by making the setting aside action mechanism the only available mechanism for recourse against arbitral awards, and drafted the IAL accordingly.[9]

§7.02 COMPETENCE AND JURISDICTION OF THE COURT IN AN ACTION TO SET ASIDE

Article 15A(1) provides that the competent court for a setting aside action is the civil court of first instance with jurisdiction (*yetkili asliye hukuk mahkemesi* in Turkish). In areas where commercial courts of first instance are located and where the dispute is of a commercial nature, the competent court is the commercial court of first instance.[10]

Article 15 does not expressly stipulate the court that possesses jurisdiction; it also does not refer to Article 3 which stipulates competence and jurisdiction. However, the rules laid down in Article 3 should be applied: the court with jurisdiction is the court of first instance located at the place of domicile or habitual residence or place of business of the respondent. In the event the respondent does not have a place of domicile, habitual residence or place of business within Turkey, the competent court is the Istanbul Court of First Instance.

6. The right to appeal exists also with regards to domestic arbitrations: see, Article 439(7), CCP.
7. Before the IAL entered into force, appeal and retrial procedures against domestic arbitral awards was permitted under Law No. 1086, but revision was not under Article 440(3)(4) of Law No. 1086.
8. Mainly, the 1985 UNCITRAL Model Law and the international arbitration section of the Swiss Federal Law on Private International Law (CPIL), (available at: http://www.hse.ru/data/2012/06/08/1252692468/SwissPIL%20B%20ред.%202007%20(англ.). pdf, August 2014) dated 18 December 1987 (see, C. Şanlı, *Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları* (*The Drafting of International Commercial Contracts and Mechanisms for the Resolution of Disputes*) (Istanbul: Beta Publishing, 2011), 243; K. Dayınlarlı, *Uncitral Kurallarına Göre Uzlaşma ve Tahkim* (*Conciliation and Arbitration Under the UNCITRAL Rules*) (Ankara: Dayınyarlı Publishing, 2007), 11). The ICC Rules of Arbitration has also been considered and taken into account when drafting (see, T. Kalpsüz, *Milletlerarası Tahkim Kanunu'nda ICC Tahkim Kaideleri ile IPL'den Esinlenen Hükümler – Milletlerarası Tahkim Semineri* (*International Arbitration Law Provisions Influenced by Principles Contained in the ICC Arbitration Rules and in the CPIL – International Arbitration Seminar*), (2003) ICC Turkey National Committee Publication, 34).
9. Akıncı, *supra* n. 4, 249.
10. Şanlı, *supra* n. 8, 251.

§7.03 TIME PERIOD TO FILE A SETTING ASIDE ACTION

The time period to file a setting aside action against an arbitral award is thirty days (Article 15A(4)). The period commences from the date the parties are notified of the award or the decision relating to the correction, interpretation or completion. Therefore, where a request is not made by the parties for the correction, interpretation or completion of the award pursuant to Article 14, the term to file a setting aside action starts to run from the date of notification of the award.Although the time period for a setting aside action under the UNCITRAL Model Law is three months, it was decided that having a shorter period would ensure a speedy resolution of the issue.[11]

Since the usual procedure is for the notification of the award to the parties by the arbitrator or the arbitral tribunal, the time period expires after the expiry of thirty days following notification. However, pursuant to Article 14A(4), parties may request the notification of the arbitral award by the competent court. In such a case, the thirty day period commences as of the date parties are notified of the award by the court. If one of the parties, having paid all the necessary expenses, requests the notification of the award by the court following the notification of the award by the arbitrator or the arbitral tribunal, the commencement date for the 30 day period will not alter. The time period will start on the date the arbitrator or the arbitral tribunal notifies the award to the parties. Moreover, notification by the court will not prevent the consequences of the previously notified arbitral award. The criterion that should be regarded is the status of the parties in finding out the setting aside ground(s) as a result of notification, irrespective of the method of notification.[12]

§7.04 SETTING ASIDE CLAIMS AND THE APPLICABLE PROCEDURE

The IAL aims the conclusion of setting aside actions within the shortest period of time possible. It is therefore to be afforded priority by the court (Article 15A(1)). The request to set aside is to be evaluated by the court upon examination of the documents alone without the holding of a hearing, unless the court determines otherwise. Furthermore, the IAL points out that the action to set aside the award can be considered only in cases where the request falls within the scope of a ground identified.

The IAL does not expressly regulate the applicable procedure for a setting aside action. However, according to Article 316(1)(b) of the CCP, the basic trial procedure is applicable where the court is provided the discretion to decide upon examination of documents submitted without the holding of a hearing. Thus, since Article 15 grants the judge such discretion, setting aside actions must be conducted in accordance with the provisions regarding the basic trial procedure. According to Articles 317-322 of the CCP, in accordance with the basic trial procedure, the claim is commenced by the claimant and responded to by the respondent through the submission of written statements. The time period for the submission of the statement of defence is two

11. Akıncı, *supra* n. 4, 251.
12. *Ibid.*, 252.

weeks as of the date the claim is notified to the respondent. This period may be extended once by the court for a maximum period of two weeks upon application by the respondent within the initial two week period, provided that the court determines that the submission of the statement of defence within the initial two week period would be difficult or impossible having regard to the circumstances of the case. Statements cannot be submitted after the submission of the statement of defence (i.e., statement of reply and statement of answer to reply). All evidence must be submitted together with the statement of claim and statement of defence. Where the existence of evidence is known but cannot be submitted together with the statement, information that would enable the discovery of such evidence should be stated. The claim cannot be extended or amended after the commencement of the claim. Similarly, the defence contained in the statement of defence cannot be extended or amended after the submission of the statement of defence.

Under the basic trial procedure, the court should determine the dispute upon examination of the documents alone where possible (Article 320(1), CCP). The proceedings must be concluded in three hearings, inclusive of the first hearing where certain procedural aspects such as conditions for lawsuit and time limitations are heard and all disputed points are identified (Article 320(2)-(3), CCP). The third hearing must be held within a month of the second hearing, the latest. However, the period between hearings may be more than a month and/or there may be more than two hearings where expert determination takes a longer period of time or where certain matters require the assistance of courts located elsewhere. The court will notify its decision to the party representatives in person upon conclusion of the inquiry phase (Article 321(1), CCP). The decision will include the reasoning behind the decision (Article 321(2), CCP). However, the court may deliver the summary decision and inform the parties of the decision containing the reasoning behind the decision within a maximum of one month period, where it is deemed necessary. The judge may either grant or dismiss the request to set aside the award. The judge may also partly set aside the award. An appeal against the decision of the first instance court is possible (Article 15A(7)).

Although foreign representatives (real or legal persons) are allowed to represent a party during arbitral proceedings, only attorneys who are admitted to practice in Turkey are entitled to appear before national courts in Turkey (Article 8B; Articles 3 and 35, Attorneyship Law).

§7.05 WAIVER OF THE RIGHT TO FILE A SETTING ASIDE ACTION

One of the important innovations of the IAL is the inclusion of the waiver right, whereby the parties are entitled to waive their right to file a setting aside action.[13] Article 15A(5) stipulates that the parties may fully or partially waive their right to file

13. The UNCITRAL Model Law does not include the waiver right; the provision on waiver in the IAL is almost identical with Article 192 of the CPIL: Kalpsüz, *supra* n. 8, 31-33.

a setting aside action.[14] Full waiver of the right to file a setting aside action means that parties can no longer file a setting aside action on any of the grounds expressed, with the exception of grounds relating to public policy and arbitrability. To the contrary, where the right is partially waived with respect to certain grounds, a party can only file a setting aside action based on the grounds that are outside the scope of the waiver agreement. According to this article, parties having their place of domicile or habitual residence outside Turkey are permitted to waive their rights to file a setting aside action by an explicit declaration in the arbitration agreement or by a subsequent written declaration or waive their right only with respect to one or more grounds stipulated in Article 15A(2).[15] Thus, two conditions must be fulfilled in order for the waiver to be valid and effective; the first condition concerns the identity of the parties whereas the second condition concerns the form of the waiver.

In order for the parties to be able to waive their right to file a setting aside action, their place of domicile or habitual residence must be outside Turkey. Article 15 does refer to the parties' place of business; however, since the legislature's aim is that the parties should not have any connection with Turkey in terms of location, in the event the place of business of one of the parties is located in Turkey, the waiver should not be possible.[16] Considering the fact that a waiver agreement can be made at the time of the conclusion of arbitration agreement or even after the arbitral award has been rendered, this condition should be fulfilled as of the time the parties reach an agreement as to waiver.[17]

As regards to the form of the waiver, it should be pointed out that the waiver declaration must be both written and must be expressed in clear terms. The requirements as to clear and unambiguous declaration of waiver should be deemed satisfied where the declaration does not require any further clarification or interpretation to ascertain the parties' real intent. Therefore, provisions in an arbitration clause/ agreement containing the expressions 'the arbitral award shall be final and binding upon the parties' or 'the parties will act in accordance with the arbitral award' shall not be considered as clear declarations of waiver.[18] For a valid waiver, expressions such as the following should exist: 'the arbitral award is final and binding and the parties agree that the setting aside of the award cannot be requested from the court' or 'parties hereby waive their right to commence a setting aside action against the arbitral award rendered'. Uncertainties may, however, arise where one of the parties does not object to the existence of a written waiver agreement upon a proposal for such waiver or where reference is made to documents that include clear expressions as to waiver and the other party fails to clearly express its disagreement with the waiver of the right to request setting aside.

The second paragraph of Article 4, whereby form requirements as to the arbitration agreements are contained, should be taken into consideration when

14. This entitlements does not exist for domestic awards rendered pursuant to the CCP.
15. See, §7.06 below.
16. Şensöz, *supra* n. 4, 151.
17. *Ibid.*, 152.
18. Şanlı, *supra* n. 8, 266.

determining what one should understand from a written waiver.[19] The conditions identified in Article 15A(5) should be satisfied for a written declaration as to waiver to be valid. For example, the condition is satisfied where the waiver agreement is included in a written document signed by the parties, is in an electronic form or is in an agreement that can be observed from the exchange of letters, telex, telegram, fax or other means of telecommunication between the parties.

The waiver of the right to file a setting aside action can be agreed upon when drafting the arbitration agreement or after the execution of the arbitration agreement through the execution of an additional agreement. Since pursuant to Article 15A(4) the filing of a setting aside action prevents the enforcement of the award *ex officio*, parties have been provided with the entitlement to waive their right to request setting aside before the commencement of a setting aside action so as to prevent the setting aside action being used as a strategic tool to delay execution of the award.[20] If a waiver is agreed upon, the arbitral award becomes enforceable as of the date it is rendered.

Parties cannot waive their right to file a setting aside action on grounds concerning public policy and arbitrability, grounds taken into consideration by the court *ex officio*. Parties are only entitled to waive their right to request setting aside with respect to grounds that are not considered by the court *ex officio* (see, Article 15A(2)(1)). Hence, waiver as to grounds considered by the court *ex officio* will be disregarded by the court where an application to set aside is made and the court will examine whether the dispute is arbitrable under Turkish law and whether the arbitral award is in accordance with Turkish public policy.[21]

It should be noted that a waiver by only one of the parties is not permissible. Such an agreement would contravene the principle of equal treatment and would not accord to the will of the legislature. This interpretation is supported by the fact that Article 15 refers to the 'parties' right to waive as opposed to 'one of the parties' right to waive its right to request setting aside.[22]

The commencement of a setting aside action against an arbitral award does not affect the binding nature of an arbitral award. Moreover, in respect of an application for the recognition or enforcement of an award, Article V(e) of the New York Convention deems the award being binding as adequate and does not require the finalization of the award. Therefore, where the parties have fully waived their right to file a setting aside action and the parties have not applied to the court for the issuance of a certificate to the effect that the award may be executed, the court would not in such a case be able to analyse whether or not the setting aside grounds considered *ex officio* by the courts are present. Such an award may therefore be enforced in a foreign country according

19. The arbitration agreement should be in written form. For more information on this requirement, see Chapter 3.
20. Akıncı, *supra* n. 4, 257.
21. Article 15B provides that, in relation to a request for the issuance of a certificate by the court expressing that the award may be executed in Turkey, the grounds specified in Article 15A(2)(2) will be considered by the court on its own motion where the time period prescribed for the filing of a setting aside action has expired or where the parties have waived their right to file a setting aside action.
22. Akıncı, *supra* n. 4, 257.

to the New York Convention[23] unless a ground for setting aside under the New York Convention exists. For instance, if the procedure stipulated under the arbitration agreement for the appointment of the arbitrators has been violated and the award has become final and binding due to the existence of a waiver agreement, enforcement of such an award in another country might be refused according Article V(1)(d) of the New York Convention.

§7.06 GROUNDS FOR SETTING ASIDE

The main principle of setting aside actions is that the court is not entitled to review the merits of arbitral awards. For that reason, upon examination of the grounds listed in the IAL, it is concluded that they are indeed formal and procedural grounds.[24] Since arbitral awards can only be set aside where the setting aside reasons contained in Article 15 exist, parties cannot agree to additional grounds for setting aside. Therefore, a request for setting aside that is based on a ground not listed under Article 15 should be dismissed. Moreover, the courts are not permitted to consider whether the arbitrators have correctly applied the substantive legal rules. Grounds for setting aside can be divided into two categories: grounds that require proof by the party filing the setting aside action and grounds that must be considered by the court on its own motion.[25]

[A] Grounds That Require Proof by the Party Filing the Setting Aside Action

Where the setting aside action is brought under one of the grounds contained in Article 15A(1), the burden of proof lies on the party requesting the setting aside of the arbitral award, that is to say, the claimant in the setting aside action. The following are the grounds that require proof by the party requesting setting aside:

(1) Legal incapacity of one of the parties or the invalidity of the arbitration agreement pursuant to the applicable law as determined by parties or, in the absence of such a determination, pursuant to Turkish law (Article 15A(1)(a))
  (a) Incapacity

Although the legal incapacity of one of the parties has been set forth as a setting aside ground under the IAL, the IAL does not express according to which law the capacity should be determined. Therefore, the court hearing the setting aside action should first determine the applicable law for the determination of capacity. Since the setting aside action has been taken into account in accordance with the IAL where the suit is filed in

23. *Ibid.*, 258.
24. E. Yılmaz, 'Hakem Kararlarının Temyizi ve İptali – Milletlerarası Tahkim Semineri' ('Appeal and Setting Aside of Arbitral Awards – International Arbitration Seminar'), *ICC Türkiye Milli Komitesi Yayını* (*ICC Turkey National Committee Publication*) (2009): 127-128.
25. See also, A. Yeşilırmak, 'The Turkish International Arbitration Law of 2001', *Journal of International Arbitration* 19/2 (2002): 176-177.

Turkey, the applicable law as to capacity should be determined pursuant to the Turkish conflict of laws provisions (Article 9, TPIL). Consequently, the setting aside court applies the national law for real persons and the law of the administrative centre for legal persons and determines the incapacity according to that law.

(b) Invalidity of the arbitration agreement

An arbitration agreement is independent from the underlying agreement and remains valid regardless of the invalidity of the latter. The principle of separability, a principle that is almost universally accepted and can be found in many national arbitration legislations and institutional international arbitration rules, provides that where a claim concerning the invalidity of the underlying agreement is accepted, that does not necessarily mean the invalidity of the arbitration agreement. This point has been made express in Article 4(4).[26]

When determining the validity of an arbitration agreement, the applicable law as determined by the parties is to be applied; Turkish law will be applied where the parties have not agreed upon the applicable law, irrespective of the conflict of laws rules (Article 4(3)). This provision relates to the substantive validity of the arbitration agreement and differs from the UNCITRAL Model Law.[27] The award will, upon application, be set aside where the arbitration agreement is invalid in terms of its substance or its form.

(2) Appointment of the arbitrator(s) being contrary to the procedure agreed upon by the parties or set forth in the IAL (Article 15A(1)(b))

Pursuant to Article 7, parties are provided with the freedom to appoint arbitrators before or after the execution of the arbitration agreement.[28] The agreement of the parties as to the appointment of arbitrators must be respected if it has been included in the arbitration agreement or agreed upon at a later date and such agreement is recorded in another written agreement. Where such agreement is reached and the appointment of the arbitrator(s) is contrary to the procedure agreed upon, the setting aside of the arbitral award may be requested. The same is valid for cases where the appointment contravenes the mandatory provisions of the IAL or the provisions of the IAL on matters where parties have not agreed otherwise.

(3) Rendering of the award outside the prescribed time limit (Article 15A(1)(c))

Although the IAL is primarily based on the UNCITRAL Model Law regarding the setting aside procedure, there are a few differences between the two with respect to the

26. The provision reads as follows: 'An objection cannot be raised against an arbitration agreement on the ground that the original contract is invalid or that the arbitration agreement concerns a dispute that has not yet arisen.' [translated by the chapter authors].
27. The legislature has been inspired by Article 178(2) of the CPIL in this regard: see, Kalpsüz, *supra* n. 8, 24.
28. See, Chapter 3 for more information.

grounds for setting aside. One of these differences is that the Model Law does not stipulate any time period for the arbitration proceedings; thus, the Model Law, contrary to the IAL, does not include the lapse of time as a ground for setting aside.[29] The powers of the arbitrators originate from the arbitration agreement and the agreement determines the boundaries of the arbitrators' powers. If the parties have determined a certain period of time for the settlement of the dispute by the arbitrators, that agreement must be adhered to by the arbitral tribunal. Therefore, the rendering of the award outside the prescribed time limit may cause the setting aside of the award on the ground that the arbitrators have exceeded their powers.[30]

Unless otherwise agreed, the arbitral tribunal must render its award as to the substance of the dispute within one year of the appointment of the sole arbitrator or within one year as of the date the arbitral tribunal's first meeting record is drafted, where the dispute is not determined by a sole arbitrator (Article 10B(1)). The arbitration period may be extended by agreement or court order (Article 10B(2)). The court's decision with regards to the extension is final; that is to say not subject to appeal.

Since it is possible to set aside an award that is rendered outside the time applicable period, the commencement and termination of the time limits are of crucial important. Parties are free to determine the time period for arbitration and when this period is to start. The time period may be increased or decreased from one year by mutual agreement of the parties. In that regard, agreement of the parties is taken into consideration for the determination of the time limit. If the parties have agreed as to when the arbitration period is to start, their will is taken into consideration in ascertaining the commencement of the time period. If the parties have not determined when the time period starts, the time period commences with the appointment of the arbitrator for sole arbitrator cases. However, in the event the name of the sole arbitrator has been indicated in the arbitration agreement, a literal interpretation of the provision, stating that 'the term for arbitration starts with the appointment of the sole arbitrator', would not be logical. To adopt such an interpretation would mean the acceptance of the expiration of the time period within one year of execution of the arbitration agreement. In such cases, since the arbitrator is informed of the commencement of his duty together with the claimant's written request for arbitration, the arbitration period commences as of the date of the request for arbitration.[31]

As noted above, where the arbitral tribunal consists of more than one arbitrator, the arbitration period expires within one year as of the date the arbitral tribunal's first meeting record is drafted. The time period for arbitration commences as of the date the first document is drafted, regardless of whether or not the arbitrators meet in person. Where such a document is not drafted, the time period for arbitration commences as of the date the arbitrators fulfil their first task as the arbitral tribunal.

29. Kalpsüz, *supra* n. 8, 23-24.
30. For details about time limits, see also Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 638-639.
31. Akıncı, *supra* n. 4, 176.

If the arbitrator or the arbitral tribunal fails to render an award within one year, the parties may agree to extend the time period. In case of disagreement, one of the parties may apply to the competent court for extension; the application must be made before the expiration of the time period. If the application is not made on time, the arbitration agreement/clause will become ineffective. Awards given after the expiration of the applicable time period (where an extension has not been obtained) may be set aside upon application.

Upon application to the court for time extension, the court scrutinizes the file and provides the other party the opportunity to represent it case. The court then analyses whether the request has been made in a timely manner, whether it is based on reasonable grounds and determines how much time would be needed for the settlement of the dispute in order to make its decision. In order to grant an extension of time, reasonable grounds should exist. If the court rejects the request, arbitration proceedings come to an end. The judgment of the court about the time extension is final and it cannot be appealed.[32] It is obvious that awards rendered after the request for time extension is denied may be subject to setting aside.

If the arbitration agreement states that the time period may only be extended by party agreement and the right to apply to the court to request an extension has been deliberately avoided, an application cannot be made to the court for time extension by either party; a request made under such circumstances should be dismissed by the court. Otherwise, the arbitral award may be set aside on the ground that it has not been rendered within the applicable time period.

The date of the arbitral award is the date that should be taken into account to determine whether the arbitral award has been rendered within the prescribed time period. If the arbitral award has been drafted after the expiration of the prescribed time period and if it can be proven by material evidence that an earlier date has been inserted into the award so as to make it seem as if the award was rendered within the applicable time period, it will be accepted that the award was not been issued timely and may therefore be set aside.

(4) Unlawful determination by the arbitral tribunal as to its jurisdiction (Article 15A(1)(d))

According to Article 7H, arbitrators are competent to rule upon both the validity of the arbitration agreement and their own competency: the principle of competence-competence (also known as the principle of *Kompetenz-Kompetenz*).[33] For instance, in one of its decisions the Court of Appeal held that the arbitral tribunal unlawfully concluded that it lacked jurisdiction and set aside the arbitral tribunal's award that it

32. In cases where the court denies extending the time period, arbitration comes to an end and it will no longer be possible to appoint a new arbitrator or new arbitrators to settle the dispute. Therefore, for such cases, it is not possible to argue that the appeal procedure has not been enabled due to 'settling the dispute by arbitration in a rapid way'. As a result, the appeal procedure should have been enabled for cases where the request is denied for the extension of the time period: Şensöz, *supra* n. 4, 184-185; Akıncı, *supra* n. 4, 182, fn. 324.
33. Lew, *supra* n. 30, 331.

lacked jurisdiction.[34] A claim relating to the lack of competence of an arbitrator or the arbitral tribunal must be asserted in the statement of answer by the latest.[35] Challenges regarding the competence or incompetence of the arbitrator or the arbitral tribunal must be raised immediately to be considered as validly made (Article 7(H(3)). Where one of the parties allege the incompetency of an arbitrator or the arbitral tribunal and this allegation is raised immediately, the award may be set aside if the arbitral tribunal rendered the award without taking into consideration the challenge despite their incompetency. Similarly, the award may be set aside where the arbitral tribunal unlawfully determines that it is not competent when in fact it is competent and the other party raises an immediate objection arguing the tribunal's competence. Despite the absence of a clear provision in the IAL regarding the immediate raising of an objection as to competence, the parties may not demand the setting aside of an award based on this ground where the objection as to competence or incompetence has not been asserted in an immediate manner.

(5) Excessive use of power, *ultra petita* or *infra petita* (Article 15A(1)(e))

Although three situations are envisaged as grounds for setting aside of an award in this provision, there are in fact two situations; the rendering of an award beyond the scope of the arbitration agreement is one of the aspects of excessive use of power. Therefore, this ground will be analysed in two parts: (a) excessive use of power by the arbitral tribunal; and (b) the rendering of an award *infra petita*.

(a) Excessive use of power by the arbitral tribunal

While parties authorize arbitrators for the settlement of the dispute, they also determine the limits of their powers. The following may be given as examples of limitations to arbitrators' powers: determination of matters that fall within the scope of the arbitration agreement; the specifying of contracts are subject to arbitration in the event of the existence of several connected contracts; or agreement as to the applicable law (both substantial and procedural). Therefore, arbitrators may exceed their powers in various ways. Where the parties agree that certain disputes shall be settled by arbitration, it would be an excessive use of power for the arbitrators to make decisions that exceed these disputes. For example, should the parties agree that the arbitrators are not competent to determine default interest, the determination of claims relating to default interest would constitute excessive use of power and is a ground for partial setting aside. The rendering of an award as if a counterclaim was asserted by the respondent despite the absence of a counterclaim would also constitute the excessive use of power. Further, if there are two connected contracts between the parties and if only one of the contracts contain an arbitration clause, the sole arbitrator or the arbitral tribunal should render an award only with regard to disputes arising from the contract

34. 11th Civil Division of the Court of Appeal, Date: 16 July 2009, File No.: 2007/13799, Decision No.: 2009/8820.
35. Article 7H(2).

containing the arbitration clause. For instance, in one of its decisions the Court of Appeal set aside the part of an award where the arbitral tribunal had awarded interest in favour of the defendant where in fact a claim was not made by the defendant for the payment of interest. The Court emphasized that the arbitral tribunal is bound by the claims advanced by the parties and that therefore cannot render an award that is beyond what was claimed.[36]

The excessive use of power may relate to the failure of or incorrect application of the applicable legal rules. Where parties have determined the applicable procedural rules and/or substantive legal principles in the arbitration agreement, the arbitral tribunal must act in accordance with the parties' choice. For instance, despite parties' agreement as to the applicable law in the arbitration agreement, the tribunal may apply *lex arbitri* or the provisions of an international convention; this would constitute excessive use of power and may cause the setting aside of the arbitral award. Further, if the award is rendered by a majority decision despite the parties' agreement that the award should be rendered by a unanimous decision, such a non-compliance may be accepted as excessive use of power.[37]

Pursuant to Article 15A(3), in relation to a setting aside actions commenced on the ground that the arbitrator or the tribunal adjudicated on a matter that does not fall within the arbitration clause (*ultra petita*), only the part of the arbitral award that is beyond the arbitration agreement is to be set aside, provided that it is possible to separate the matters that are within the scope of the arbitration agreement from those that are beyond the scope of the agreement.

(b) If the award has been issued *infra petita*

The arbitrator or the arbitral tribunal must make a determination for each and every claim asserted by the claimant and each and every counterclaim asserted by the respondent. Either party may, within 30 days of being notified of the award, request a complementary decision from the arbitral tribunal under Article 14B(4) where a claim or counterclaim raised has not been resolved in the award. However, since in such a case there is no provision that prevents the setting aside of an arbitral award on the ground of *infra petita*, the award may be set aside as a result of the tribunal failing to decide upon all claims raised. Where all claims raised by the parties have not been determined, it is reasonable for that party to apply to another arbitral tribunal for a duly-drafted award and make a separate request for the setting aside of the previous award; the existence of a final arbitral award would prevent the reconsideration of the claim which has not been adjudicated upon.[38]

36. 15th Civil Division of the Court of Appeal, Date: 11 May 2011, File No.: 2010/7197, Decision No.: 2011/2857.
37. For the evaluation of the subject from the aspect of the Supreme Court's judgments see, Akıncı, *supra* n. 4, 289-290.
38. Akıncı, *supra* n. 4, 285.

(6) Conducting of the arbitral proceedings contrary to the applicable procedural rules agreed upon by the parties or, in the absence of an agreement, the rules contained in the IAL provided that the substance of the award is thereby affected (Article 15A(1)(f))

Two conditions require satisfaction for the setting aside of an arbitral award on the ground of procedural irregularity: the arbitral proceedings not conducted in accordance with the applicable procedural rules and the procedural irregularity having an influence on the substance of the award.

(a) Conducting of the arbitral proceedings contrary to the applicable procedural rules

Violation of the arbitral procedure means that the arbitrators conducted the arbitral proceedings in contradiction with the applicable procedural rules. The applicable rules as to the arbitral procedure may be determined by the parties in the arbitration clause/agreement. The arbitrators must conduct the arbitral proceedings in accordance with the procedure agreed upon. However, despite the autonomy granted to the parties, arbitrators and parties must comply with the main principles of due process.[39]

If the parties have not agreed upon the applicable procedural rules, it is obvious that arbitrators would conduct the proceedings according to the procedural rules of the IAL where the arbitration is governed by the IAL. In fact, most of the provisions of the IAL are not mandatory and include expressions that permit the parties to agree otherwise. However, most of these provisions are mandatory for the arbitrators.[40] Therefore, the arbitrators should comply with the procedural rules that have a mandatory character upon themselves, in the absence of an agreement to the contrary. The failure to do so may give rise to a ground for the setting aside of the arbitral award. For instance, provisions that contain the expression 'unless otherwise agreed by the parties' and therefore permit agreement to the contrary but are binding upon the arbitral tribunal are the following: Article 10A regulating the commencement of the arbitral proceedings; Article 10B regulating the one year time limit for arbitration; and Article 10E regulating the preparation of the terms of reference.

Although there is not a clear provision in the IAL and irrespective of whether the procedural law has been determined by the parties or by the IAL, if the arbitrators render an award that violates the procedural rules, the party who has suffers from such procedural irregularity should immediately object at the time it becomes aware of the irregularity to be able to demand the setting aside of the award when rendered.[41] It should be noted that there is only one provision in the IAL which states clearly that the

39. E. Hacıbekiroğlu, *Milletlerarası Tahkim Hukukunda Deliller ve Delillerin Değerlendirilmesi* (*Evidence and the Evaluation of Evidence in the Law of International Arbitration*) (Istanbul: XII Levha Yayıncılık, 2012), 36-37.
40. M. Aygül, *Milletlerarası Ticari Tahkimde Tahkim Usulüne Uygulanacak Hukuk ve Delliler* (*Law Applicable to Arbitral Procedure and Evidence in International Commercial Arbitration*) (Konya: Aybil Yayınları, 2013), 86.
41. Aygül, *supra* n. 40, 85.

objection should be made immediately; it relates to 'excessive use of power'. According to Article 7H(3), an objection that arbitrators have exceeded their powers must be made immediately in order to be valid.

When an action to set aside is brought on the ground of procedural irregularity, the important point to bear in mind is that the breach must relate to a procedural rule or principle. The inaccurate application of substantial legal rules is not a procedural mistake and therefore it cannot be the subject of an action for setting aside.[42]

If the parties reach an agreement as to the law applicable to procedure after the commencement of the arbitral proceedings, they may agree that the agreed upon procedural rules are to be retroactively applied. Although this is permissible because of the superiority of party autonomy, it may later cause the setting aside of the arbitral award. In order to prevent this, it is recommended that proceedings which are incomplete or which have never been performed should be completed or renewed.[43]

Since most of the procedural provisions of the IAL are not mandatory (for the parties), it is a low likelihood for the procedural rules agreed upon by the parties to contradict with the mandatory rules of the IAL. However, where the rule accepted by the parties infringes a mandatory provision of the IAL, the arbitrators should apply the provision of the IAL instead of the procedural rule determined by the parties. For instance, if the parties have empowered the arbitrators to grant an extension of time in cases where they cannot reach an agreement – despite the compulsory provision contained in Article 10B requiring application to the competent court – and the arbitrators have granted the extension requested, it would constitute a violation of a compulsory rule of the IAL and the award may be set aside.

If the procedural rules chosen by the parties violate the compulsory rules of *lex arbitri*, application of the procedural rules by the arbitral tribunal may cause the setting aside of the award. Application of the mandatory rules of *lex arbitri* instead of the procedural rules chosen by the parties may prevent the setting aside of the award. However, in such a position, according to Article IV(d) of the New York Convention, the refusal to enforce the arbitral award may occur since the arbitrators would not be applying the procedural rules as agreed by the parties. The arbitral tribunal should consider the possibility that the award would in the future be set aside or not enforced in another country.[44] Thus, the arbitrators should first consider the sanction of the place of arbitration in case of infringement of the compulsory rules. Despite the compulsory rules of *lex arbitri*, if the sanction of the arbitrators' non-consideration of the parties' agreement is not the setting aside of the award, it would be more reasonable for the arbitrators to apply the rules chosen by the parties. This is because ultimately one of the most important duties of the arbitrators is to render a valid and enforceable award at the end of the arbitral proceedings.[45]

42. Y. Kaplan, *Milletlerarası Tahkimde Usule Aykırılık* (*Violation of Procedural Rules in International Arbitration*) (Ankara: Seçkin Publishing, 2002), 32; Nomer, *supra* n. 2, 218.
43. Kaplan, *supra* n. 42, 44.
44. *Ibid.*, 48.
45. *Ibid.*, 48; Akıncı, *supra* n. 4, 226.

The appointment of and challenge to arbitrators may be regarded as procedural irregularities; however, they should not be assessed in accordance with Article 15A(1)(f) as these matters are specifically regulated by Article 15A(1)(b).

Violation of the arbitral procedure might sometimes cause the arbitral award to contradict with public policy.[46] The court may conclude that public policy reasons exist thus necessitating the dismissal of a request for a certificate of execution even where no request is made for the setting aside on the grounds of a procedural irregularity. In some instances, public policy intervention or intervention on another ground for setting aside may become necessary despite the absence of a procedural irregularity. For instance, if the time limit granted according to the applicable procedural rules for the submission of the statement of defence is too short, application of that rule may not infringe the procedure may constitute violation of public policy. Similarly, if the time periods that have been granted to the claimant and the respondent are different, setting aside of the award may be possible for violation of the principle of equal treatment.

(b) Violation as to procedure effecting the outcome of the award regarding its substance

If the procedural rule that has been violated is not significant in performing the procedural guarantees, meaning that it does not have any impact on the substance of the award, it should not be deemed as a ground for the setting aside of the arbitral award. In this regard, a proper causal link should exist between the procedural irregularity and the consequence of the arbitral award that has been rendered.[47] Article 15A(1)(f) states that in order to be alleged as a ground for setting aside, the procedural irregularity should have effected the substance of the award; therefore one must first determine what role the procedural irregularity had. Such a determination should be made considering the circumstances of each individual case.[48] To be able to affect the substance of the case, it is not a requirement that the procedural rule which has been violated have a mandatory character. A matter that usually has an impact on the substance of the award is notification. Improper notification may prevent the proper implementation of defence rights and may have an effect on the substance of the award rendered as a result of arbitral proceedings. Where the arbitrators have not applied the method of notification determined by the parties, it may constitute a procedural irregularity and thus lead to the setting aside of the award if it affects the substance of the award. A party who has not been fully informed due to the incomplete notification would not be able to use its defence rights properly.

Even where it is accepted that the incomplete notification affects the substance of the award,[49] a setting aside request based on incomplete notification should not succeed where the party concerned has de facto been informed of the contents of the

46. If a procedural irregularity is also incompatible with public policy, it will be deemed as a serious procedural irregularity without the need to search for any further criteria: Kaplan, *supra* n. 42, 59.
47. Kaplan, *supra* n. 42, 176.
48. *Ibid.*, 55.
49. *Ibid.*, 89.

notification. Where the language of the notification is not the language agreed upon and the addressee does not possess the knowledge to understand and respond in that language, it is again a procedural irregularity that has an impact on the substance of the award and it is a reason that may justify the setting aside of the award. If the party does not object to improper notification during the arbitral proceedings and continues with the substance of the proceedings, the said party may lose the right to object and request the setting aside of the award on that ground.[50]

Another procedural irregularity that impacts the substance of an arbitral award relates to the submission of evidence. Success in an arbitration depends highly on the evidence submitted. In fact, a lot depends on the proper presentation and demonstration of facts that are the basis of the defences and claims asserted. Therefore, grave procedural irregularities relating to the submission of evidence and examination of witnesses might have an impact on the substance of the award.[51] For instance, where a party's witness has not been heard in defiance of the applicable procedure and that party fails to prove its allegation as a result of that grave procedural irregularity, such irregularity would be accepted as having an impact on the substance of the award and it is a ground for setting aside. It should be stated that proper evaluation and control of the evidence submitted by the parties is a requirement of the obligation for the respecting of defence rights.

If the arbitral proceedings have not been held in a language determined by the parties and if one of the parties' defence right has been violated because that party did not have adequate knowledge of that language, such a procedural irregularity would effect the substance of the award. It is also obvious that such a result is against the principle of equal treatment of the parties.[52]

Article 14(2) provides that an arbitral award should contain a reasoning. Where the arbitrators render an award without a reasoning, it may be deemed as a procedural irregularity that has an effect on the substance of the award therefore justifying setting aside. An award without a reasoning makes it impossible to analyse and determine whether the significant points with regard to claims and defences raised by the parties have been taken into consideration by the arbitrators. Moreover, in order for the competent court to understand whether the grounds for setting aside are present, the award should include a reasoning.[53]

If a procedural irregularity that occurred during the arbitral proceedings is corrected at a later stage, it should not in principle constitute a ground for setting aside; such a breach would no longer have any effect on the substance of the arbitral award. For instance, the respondent might have received a notification after the time period for

50. *Ibid.*, 95.
51. Aygül, *supra* n. 40, 101.
52. Kaplan, *supra* n. 42, 137.
53. However, in its decision dated 10.02.2012 (File No.: 2010/1, Decision No.: 2012/1), the Court of Appeal's Grand Chamber for the Unification of Judgments has determined unanimously that a judgment without a reasoning does not prevent enforcement and that such a position is not against public policy. Therefore, in Turkish law, a judgment without a reasoning no longer prevents recognition and enforcement of foreign court judgments. For the decision see, Official Gazette dated 20 September 2012 and numbered 28417.

response has expired due to the fact that the notification has been made to an address other than the one declared. Although such an outcome is in contradiction with the procedure, if a new period of time has been granted to the respondent by the arbitral tribunal, a setting aside action cannot be brought on such a ground. Therefore, in order to accept that the procedural irregularities are cured, the measures taken are required to eliminate the negative consequences of the irregularity.[54]

A party who has brought a setting aside action on the ground of a procedural irregularity should prove the irregularity and that such irregularity had an impact on the substance of the arbitral award. If a party who has suffered from such a procedural irregularity initially consents to such an outcome but then brings a setting aside action on the basis of procedural irregularity, the claim should be dismissed for contravening the principle of good faith.[55]

(7) Violation of the principle of equal treatment (Article 15A(1)(g))

The arbitrators are under an obligation to comply with the main principles relating to the conducting of a fair trial, regardless of the applicable procedure. These main principles originate from due process of law. Due process of law is not limited to any adjudication procedure and is a principle that encompasses all proceedings.[56] In terms of arbitration, due process of law includes a fair trial by independent and impartial arbitrators and equal treatment of the parties with regard to their right to be heard in adversarial procedure.[57] The fact that Article 15 solely regulates the breach of the principle of equal treatment, which is only a part of due process, does not mean that infringement of the parties' right to be heard has not been accepted as a ground for setting aside. Equal treatment of the parties does not have any meaning where the right to be heard is not protected. Although it has not been expressly stated in Article 15A(1)(g), the right to be heard has been regulated together with the right of equal treatment in Article 8B.

Due process of law means equal treatment of the parties; to grant the parties equal procedural rights and burdens and to provide them equal opportunities to present their claims and defences. It also requires the arbitrators to abstain from all non-objective acts and places a burden upon arbitrators to ensure their impartiality. It is a condition of equal treatment that arbitrators should apply the same procedural rules to each party. Therefore, if the arbitrators deny a right to a party while granting that right to the other party, that would most probably qualify as a breach of equal treatment.[58]

54. Kaplan, *supra* n. 42, 177.
55. *Ibid.*, 195.
56. S. Tanrıver, *Hukuk Yargısı (Medeni Yargı) Bağlamında Adil Yargılanma Hakkı Makalelerim I (1985-2005)* (*The Right to Fair Trial in the Context of Civil Justice – My Articles I (1985-2005)*) (2005), 213.
57. Hacıbekiroğlu, *supra* n. 39, 37. Matti Kurkela & Hannes Snellman, *Due Process in International Commercial Arbitration* (New York: Oceana Publications, 2005), 186-187.
58. Aygül, *supra* n. 40, 91-92; Hacıbekiroğlu, *supra* n. 39, 47.

The most significant element of the right to be heard is the notification to the other party of the commencement of the arbitral proceedings. This is because a respondent could only be able to use its right to be heard upon such a notification. Notification should not be limited to information regarding the commencement of the case but should include information on all claims, evidence and legal grounds concerning the case.[59] The right to be heard also includes granting the parties the right to explain its case. In this framework, the right to be heard includes the provision of adequate time for the preparation and submission of a defence, the ability to present the particular facts that is the basis of the defences/claims raised and the notification of the arbitral tribunal about the facts and legal grounds. Right to be heard also includes evaluation by the arbitral tribunal of the legal grounds and evidence that has been submitted by the parties. Therefore, if the arbitral tribunal completely ignores evidence or a fact as a result of an obvious mistake, a breach of the right to be heard may arise.

The violation of the principle of equal treatment and the right to be heard is a ground for the setting aside of the arbitral award, irrespective of the impact of the breach on the substance. In many instances, the breach of these principles would at the same time contradict with public policy. Even where the parties declare that they would not file a setting aside action based on the 'unequal treatment' of the parties thereby waiving their right to apply for the setting aside of an award on the said ground, if the breach violates public policy it would be considered by the court on its own motion before the certificate of execution is issued by the court.

In conclusion, each arbitrator should comply with the principle of equal treatment of the parties and take extra caution when dealing with objections relating thereto. In the arbitral process, the presiding arbitrator should regard both the equal treatment of the parties and of the arbitrators. Therefore, considering their internal meetings, negotiations and correspondence, equality among the arbitrators should also be ensured.[60]

[B] Grounds for Setting Aside That are Determined by the Court Ex Officio

[1] Dispute That Is the Subject-Matter of the Arbitral Award Not Being Arbitrable under Turkish Law (Article 15A(2)(a))

One of the main principles of the arbitral proceedings is that the subject-matter of the dispute should be arbitrable.[61] The problem of whether the dispute is arbitrable may come up during the arbitral process or afterwards. Arbitrability is to be determined by the arbitral tribunal during the arbitral proceedings in accordance with the principle of competence-competence. In fact, the arbitrability of the dispute might arise at the setting aside or enforcement phase. Hence, Article 15 provides that if the arbitral award

59. Aygül, *supra* n. 40, 95.
60. Akıncı, *supra* n. 4, 298.
61. Emmanuel Gaillard & John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 312.

concerns disputes that are not arbitrable under Turkish law, the award shall be set aside by the court of its own motion. The review of whether the dispute is arbitrable pursuant to a foreign law (for instance, the law chosen by the parties to be applicable to the arbitration agreement) would only be undertaken in the event one of the parties makes such a request to the court.[62] In such a case the setting aside ground would be based on Article 15A(1)(d). For instance, if the arbitrators determine that the dispute is not arbitrable according to the law applicable to the arbitration agreement, the party claiming that such an incompetence decision is contrary to the laws will be entitled to file a setting aside action provided that the said party's timely objection was not taken into consideration.

In the event the arbitrators render an award relating to a dispute that is not arbitrable according to Turkish law but is arbitrable under the provisions of the foreign law that is applicable to the arbitration agreement, the court should set aside the award considering the circumstances of the particular case. If the particular case does not have any connection with Turkey except the place of arbitration and if the award would not be enforced in Turkey, the court may abstain from setting aside the award.[63]

Article 1(4) has specified two types of disputes that are not arbitrable under Turkish law: (a) disputes arising from real rights (rights in rem) concerning immovable property and (b) disputes that are not subject to the free will of the parties.

[a] Disputes Arising from Real Rights (Rights In Rem) Concerning Immovable Property

The reasoning for the restriction relating to the settlement of disputes arising from real rights (rights in rem) concerning immovable property through arbitration is that the Turkish courts enjoy exclusive jurisdiction for such disputes. However, even if the immovable property is located in Turkey, if the dispute does not arise from a real right relating to the immoveable property, it cannot be alleged that the dispute is not arbitrable.

For disputes arising from real rights (rights in rem) concerning immovable property located in foreign countries, even where the dispute is not arbitrable according to *lex rei sitae*, it is not possible to allege that the dispute is not arbitrable under Article 1. However, in light of the fact that in many countries the courts enjoy exclusive jurisdiction for disputes relating to real rights concerning immovable property, the dispute would most likely be non-arbitrable and the arbitration agreement would therefore become inoperative. An award concerning such dispute would most likely not be enforced in that country.[64] According to Article II(3) of the New York Convention, if the arbitration agreement or clause becomes ineffective, the award becomes unenforceable and the dispute can no longer be settled by way of arbitration.

62. B. Huysal, *Milletlerarası Ticari Tahkimde Tahkime Elverişlilik* (*Arbitrability in International Commercial Arbitration*) (Istanbul: Vedat Publishing: 2010), 336.
63. *Ibid.*, 413.
64. M. Erkan, *Milletlerarası Tahkimde Yetki Sorunları* (*Jurisdictional Issues in International Arbitration*) (Ankara: Yetkin Publishing, 2013), 76.

[b] Disputes That Are Not Subject to the Free Will of the Parties

The principle that parties can go to arbitration for disputes that are subject to their free will and which can be freely disposed of by themselves was a principle that existed under Turkish law before the entry into force of the IAL (Article 518, Law No. 1086). Disputes relating to criminal law, family law, foundations and associations, bankruptcy law, ex parte proceedings, bribery, taxation, labour law and consumer law may be regarded as non-arbitrable disputes.[65] Further, in principle, matters that are within the scope of the Law on Procedure of Administrative Trials[66] are not arbitrable. However, Law No. 4501 permits the choice of arbitration for the settlement of disputes that arise from subjects within its scope. Moreover, Article 1(5) states that disputes arising from concession contracts and clauses relating to public services that include a foreign element are to be settled by way of arbitration pursuant to the IAL. Disputes arising from competition law matters should be regarded as arbitrable if they do not fall within the exclusive competence of the Turkish Competition Authority even where they are subject to compulsory rules.[67]

[2] Award Being in Violation of Turkish Public Policy (Article 15A(2)(b))

It is a setting aside ground if the arbitral award is in contradiction with public policy.[68] Reviewing the arbitral award on the ground of public policy does not mean the review of the accuracy of the arbitral award. Since public policy has an exceptional character in private international law, it has to be reviewed by the judge on a case-by-case basis. For the setting aside of international arbitral awards, public policy intervention should be assessed considering the needs of international arbitration, irrespective of national values and tendencies. In this framework, a situation which violates national public policy might not violate international public policy considering international disputes.[69] Since it would not be possible beforehand to determine which subjects

65. Huysal, *supra* n. 62, 15-16; A. Yeşilırmak, *Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi için Uyuşmazlıkların Etkin Çözümünde Doğrudan Görüşme, Arabuluculuk ve Tahkim: Sorunlar ve Çözüm Önerileri* (*For the Effective Resolution of Disputes through Negotiation, Mediation and Arbitration for the Improvement of Commercial Life and the Investment Environment in Turkey: Problems and Suggestions for Resolution*) (Istanbul: XII Levha Publishing, 2011).
66. Law on Procedure of Administrative Trials, Law No. 2577 of 6 January 1982, published in the Official Gazette Numbered 17580 and dated 20 January 1982.
67. See also Huysal, *supra* n. 62, 122.
68. Even though the subjects related to public policy have been regulated by compulsory legal rules, it is not possible to claim that violating a compulsory rule does not necessarily conflict with public policy: S. Tanrıver, 'Yabancı Hakem Kararlarının Türkiye'de Tenfizi Bağlamında Kamu Düzeninin Etkisi (The Effect of Public Policy in the Enforcement of Foreign Arbitral Awards in Turkey)', in *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni – Prof. Dr. Yılmaz Altuğ'a Armağan* (*International Law and International Private Law Bulletin – In Honour of Prof. Dr. Yılmaz Altuğ*) 17-18/1-2 (1997-1998): 479.
69. Şit, *supra* n. 5, 169; Huysal, *supra* n. 62, 179.

contravene public policy, it should be reviewed whether the consequence of the arbitral award clearly violates public policy.

In a dispute between a Turkish authority and a mobile phone operating company in relation to a concession agreement regarding the granting of license concerning the establishment and operation of a GSM Pan-European mobile telephone system, the Court of Appeal defined public policy as '...the complete set of rules which protect the fundamental interests of society and designates the fundamental structure of society, within a specific period of time, from political, social, economic, moral and legal perspectives.'[70] The Court further noted that '...due to the fact that customs regulations and tax laws concern matters of public policy, an award which orders the payment of a receivable in contravention of the tax laws will cause public policy intervention for conflicting with fundamental principles deemed essential by Turkish law.' What is important about this decision is that the Court thought it necessary to distinguish between domestic public policy and international public policy, accepting they may differ in cases and that a contravention of domestic public policy may not necessarily mean the breach of international public policy. The Court noted as follows:

> With regards to domestic law, public policy is the complete set of rules protecting the fundamental structure and fundamental interests of the Turkish society. Regardless of whether such rules arise from public or private law, they must be complied with by the parties. International public policy, however, is much more narrower and restricted when compared with domestic public policy. Accordingly, a circumstance that may be considered to be a violation of public policy in domestic law may not necessarily be considered a violation of public policy from an international law perspective.

In that case, it was held that leaving matters as to the payment of treasury shares and other related contributions in the GSM operator's discretion would contravene public policy as it would be against public interest, the mandatory rules of law and the purpose of the State ensuring permanent income. The award, which held that the GSM operator was lawfully granted such a right, was therefore set aside.

The concept of international public policy enables interventions with regard to both substantive and procedural law. In the setting aside of arbitral awards, the grounds that cause public policy intervention might be related to the arbitration proceedings or they may be connected to the substance of the dispute. However, instances that cause public policy intervention regarding the substance of a dispute are rarely encountered in international arbitration practice. In this framework, being against the principles of *pacta sund servanda* or good faith, or contradictory provisions of the arbitral tribunal in their award might cause public policy intervention with regard to the substance of the dispute and might cause the setting aside of the award as a result. For instance, the performance of the contract despite the determination of the invalidity of the contract is an example of the arbitral tribunal's contradictory act and may cause setting aside due to public policy intervention. Similarly, although not

70. 13th Civil Division of the Court of Appeal, Date: 17 April 2012, File No.: 2012/8426, Decision No.: 2012/10349.

encountered very often, awards that are based on religion or racial discrimination may also result in public policy intervention.

Although some procedural irregularities have been listed as individual setting aside grounds pursuant to the IAL (Article 15A(1)(b) and (f)) if the arbitral award partly or totally restricts defence rights, public policy intervention may arise even though the such restrictions are compatible with the law applicable to procedure. In this regard, public policy intervention is considered by the court on its own motion and, as a result, the arbitral award may be set aside. Also, misguidance of the arbitral tribunal by incorrect declarations, making an arbitral award as a result of one of the parties' fraud or in consequence of violating the principle of independence of the arbitrators might also cause the setting aside of the award on the ground of public policy. Existence of two enforceable arbitral awards (res judicata) at the same time is also a reason for the setting aside of an arbitral award on the ground of public policy intervention.

Upon a public policy intervention by the competent court, the award will be set aside by the court on its own motion.

§7.07 EFFECT OF A SET ASIDE ACTION ON THE ENFORCEMENT OF AN AWARD

As a rule, arbitral awards have a binding effect on the parties; they are to be executed like court judgments. However, execution of an arbitral award is suspended with the filing of a setting aside action.[71] Therefore, the execution of the award becomes possible only upon the finalization of the decision dismissing the request. The reasoning behind the provision that setting aside action suspends execution of the award is to prevent the irreversible damages that may be caused through the execution of an award which is later set aside.

The competent court will issue to the claimant a certificate to the effect that the award may be executed, upon the request for setting aside being dismissed and the dismissal decision becoming final and conclusive. Where the time period for the filing of a setting aside action has expired or the right to file a setting aside action has been waived, the arbitral award will become final and the competent court may issue to the claimant the certificate which expresses that the award has become enforceable (Article 15B(2)). If the right to file a setting aside action has been partially waived, the court should consider whether the setting aside action has been filed on a ground that has been waived. If so, the request should be dismissed since it would not be possible to file a setting aside action on such a ground despite the waiver. However, where the time period for the filing of a setting aside action has expired or the right to file a setting aside action has been waived, the court is nevertheless required to consider whether

71. The filing of an action for the setting aside of an award does not suspend the execution of the arbitral award in domestic arbitration. Execution may be suspended upon request of one of the parties after the posting of a guarantee equivalent to the amount of the money or the value of the good that is determined upon: Article 439(4), CCP.

the award concerns a dispute that is arbitrable and is in accordance with Turkish public policy. The issuance of the certificate is free of charge.

§7.08 LEGAL REMEDIES REGARDING DECISIONS GIVEN AS A RESULT OF SETTING ASIDE ACTIONS

A claim for setting aside of an arbitral award may be granted in whole or in part or dismissed in its entirety. Where the application is granted, the award is set aside and will not bind the parties. The request to set aside an award is partially granted in cases where the claim is based on the ground that the arbitrator or the arbitral tribunal rendered an award that is beyond the scope of the arbitration agreement and where it is possible to differentiate matters that are within the scope of the arbitration agreement from those that are beyond the scope of the agreement, whereby only the part(s) of the award that are beyond the scope will be set aside (Article 15A(3)). For instance, in one of its decisions, the Court of Appeal accepted the set aside claim in part and held that the remaining part of the award should be deemed as a procedural acquired right and should be protected through enforcement.[72]

If the award is set aside and the court's decision becomes final, the award will not be implemented in the country where it is set aside. The award may also not be enforced in States that are signatories to the New York Convention.[73] or in countries who have adopted the UNCITRAL Model Law.[74] Where the request to set aside is dismissed in whole, the effect of the decision is that none of the grounds specified in the IAL exist so as to deem the award ineffective and the parties are therefore under an obligation to comply with the terms of the award or risk execution proceedings.

The decision of the court can be appealed by either party; however, the revision of the first instance court's decision is not possible. The appeal is afforded priority and urgency and will be limited to the grounds listed in Article 15 (Article 15A(7)). It should be noted that since the decision given as a result of the application to set aside is a court judgment, retrial, as an extraordinary legal remedy, is possible against the judgment on limited grounds listed in Article 443 of the CCP.

§7.09 APPOINTMENT OF ARBITRATORS AND DETERMINATION OF THE TIME PERIOD FOR ARBITRATION IN CASE OF SETTING ASIDE

The acceptance of the request to set aside on various grounds has special importance attached to them. To express more clearly, as a result of the existence of certain

72. 15th Civil Division of the Court of Appeal, Date: 15 November 2007, File No.: 2007/3708, Decision No.: 2007/7216.
73. Article V(1)(e) of the New York Convention provides that if the award has been set aside by a competent authority of the country in which, or under the law of which it was made, its enforcement may be refused.
74. See, A. Redfern et al., *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 2004), 445.

grounds for setting aside, it would not be possible to resort to arbitration again for the settlement of the dispute; whereas the setting aside of the award on other grounds does not abolish the parties' entitlement to commence arbitration for the settlement of the dispute.[75] Arbitration proceedings may therefore not be recommenced where the issue is the inarbitrability of the dispute under Turkish law, the incapacity of one of the parties to execute the arbitration agreement, the invalidity of the arbitration agreement in accordance with the applicable law and the rendering of the award outside the prescribed time period. In such cases the parties would be required to file a lawsuit before the competent court.

§7.10 RECOGNITION AND ENFORCEMENT OF SET ASIDE AWARDS IN TURKEY

An arbitral award may be set aside by a court of *lex arbitri* or by the court of the country under the law of which the award was made. The issue that arises in such a case is whether it would be possible to have the award recognized and/or enforced in Turkey? When the recognition and enforcement of arbitral awards are analysed from the perspective of Turkish law, four main legal sources come into prominence: the New York Convention, the European Convention on International Commercial Arbitration of 1961,[76] bilateral civil and commercial treaties[77] signed between Turkey and other States, and the TPIL, which include provisions relating to the subject. In this regard, one should determine which source to rely upon when making an enforcement request. This conflict of norms problem may be resolved through the implementation of the principle of *lex specialis*.

It is possible to conclude the result that Article 9 of the European Convention is the most special provision, since it includes particular and limited grounds for the setting aside of an arbitral award. The application of the European Convention can also come into the picture pursuant to both Article 9(2) of the European Convention[78] and

75. Article 15A(8) provides that 'In cases where the setting aside action has been approved, the parties, unless otherwise agreed, may determine the arbitrators and the time period for arbitration, where the approval decision is not appealed or it is determined that the grounds specified in Article 15A(2)(1)(b), (d), (e), (f), (g) and Article 15A(2)(2)(b) are present.' [translated by the chapter authors]. See, §7.06 above.
76. Approved by Law No. 3730 of 8 May 1991, published in the Official Gazette Numbered 21000 and dated 23 September 1991 (European Convention).
77. Recognition and enforcement may, in addition, be regulated by these treaties. Since it may be said that the setting aside of arbitral awards is not listed as a ground for the prevention of recognition and enforcement, the treaties may be deemed as more favourable in the sense of Article 7 of the New York Convention (see, N. Ekşi, *New York Konvansiyonuna Göre İptal Edilmiş Hakem Kararlarının Tenfizi* (*Enforcement of Awards Set Aside Pursuant to the New York Convention*) (Istanbul: Beta Publishing, 2009), 52-54, 140). The treaties have been left out of the scope of this study due to their limited application area.
78. Article 9(2) of the European Convention provides that 'In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.'

Article 7(1) of the New York Convention.[79] According to Article 9(1) of the European Convention, certain grounds for setting aside have been set forth and enforcement in another country can only be refused if the award has been set aside, based on one or more of these grounds. It means that only certain grounds have been prescribed for setting aside and, in terms of enforcement, the European Convention brings a more favourable understanding than the New York Convention, which does not include any limitation for the setting aside grounds. Moreover, the application of the European Convention will also be compatible with Article 1 of the TPIL prescribing that 'application of the international treaties is reserved'.[80] In this regard, while making an enforcement judgment in Turkey, if an arbitral award has been set aside in a European Convention Member State, it should first be determined whether the ground for setting aside is one of those that are listed in the European Convention. Also, considering the wording 'may be refused' of Article 9, it is possible to say that the judge will have the discretion for the enforcement even if one of the grounds for setting aside exists. Therefore, if a claim for enforcement of an award that has been set aside by a competent authority of a European Convention's Member State comes before the Turkish courts, it might be appropriate not to refer to other sources. In this regard, enforcement of the arbitral award should be determined considering only the setting aside grounds listed in the European Convention.

The European Convention only takes into consideration the setting aside of an award rendered in one of the Member States and therefore has a limited scope of application. In this regard, analysing the New York Convention and the TPIL will lead to a more general perspective. Enforcement of arbitral awards are regulated under Articles 60-63 of the TPIL. According to Article 62(1)(h), the setting aside of an arbitral award by a competent authority of the country where the award was rendered is a ground for refusing enforcement of the award. The burden of proof with respect to this ground lies on the respondent; the judge is not entitled to consider the subject *ex officio*. Moreover, it appears from the wording of the provision that it does not provide the judge a discretionary power; the request must be dismissed if the burden is discharged by the respondent.[81]

Considering the New York Convention, two competent authorities (such as the courts) have been entitled to set aside an arbitral award under Article V(1)(e). The first one is the court of *lex arbitri* and the other one is the court of the country under the law of which that award was made. In this regard, the expression 'under the law of which that award was made' needs to be clarified. The law may be the law applicable to the procedure or may be *lex causae*. However, it is generally understood as being a

79. Article 7(1) of the New York Convention provides that 'The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'
80. Ekşi, *supra* n. 77, 133.
81. Nomer, *supra* n. 2, 212.

reference to the law applicable to procedure.[82] According to the official English version of the New York Convention, the enforcement of an award that is set aside 'may' be refused; therefore the provision does not direct the refusal of the enforcement request. The provision is generally interpreted as granting the judge a discretion.[83] The Turkish version of the provision is not verbally clear with regard to the existence of the discretion.[84] However, in doctrine, it is generally accepted that the judge has a discretionary power.[85]

In this regard, a determination should be made on whether reliance should be made on the New York Convention or on the TPIL when rendering a judgment with regards to a request for the enforcement of an award that has been set aside. One can argue that the New York Convention should be applied *lex specialis*.[86] The applicability of the most favourable provision contained in Article 7 of the New York Convention should also be borne in mind. The New York Convention accepts the jurisdiction of the two courts with regards to an application to set aside an arbitral award; however, the TPIL entitles only one court. Therefore, the TPIL seems to contain a more favourable provision with regards to the enforcement of an award that has been set aside by stating only the jurisdiction of one court.[87] In this regard, the following result comes up: If the arbitral award has been set aside by the court of *lex arbitri*, basing on the more favourable provision of the New York Convention, the judge should have the power of discretion in determining the enforcement and enforcement of the set aside award should still be possible in Turkey.[88] If the arbitral award has been set aside by the court of the country under the law of which the award was rendered, the more favourable understanding of the TPIL should be assessed by referring to Article 7(1) of the New York Convention.

As of the date of drafting this chapter, we have not been able to ascertain Turkish court's decision concerning the enforcement of an award that has been set aside.[89] Therefore, the Turkish courts' approach on this matter is not known and much waits to be seen. When a determination is being made as to whether to enforce an award that has been set aside, the reasoning behind the setting aside should be considered. In this

82. Ekşi, *supra* n. 77, 57. Also see, H. Gharavi, *The International Effectiveness of the Setting Aside of an Arbitral Award* (The Hague: Kluwer Law International, 2002), 71-72.
83. Redfern, *supra* n. 74, 445.
84. İ.A. Figanmeşe, 'Milletlerarası Ticarî Hakem Kararlarının İptal ve Tenfiz Davaları Yoluyla Mahkemelerce Mükerrer Kontrole Tâbi Tutulmaları Sorunu ve Bu Sorunun Giderilmesine Yönelik İki Öneri' ('The Problem of Duplicate Reviews of International Commercial Arbitral Awards by Courts Through Setting Aside and Enforcement Proceedings and Two Solutions For the Resolution of This Problem'), in *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni* (*International Law and International Private Law Bulletin*) 31/2 (2011): 58-59.
85. Akıncı, *supra* n. 4, 377; Şit, *supra* n. 5, 156, 200-201; Ekşi, *supra* n. 77, 45.
86. Y. Kaplan, 'Yabancı Hakem Kararlarının Tenfizi Açısından Kesinleşme ve Bağlayıcılık Ölçütlerinin Değerlendirilmesi' ('The Evaluation of the Finalisation and Binding Nature of Foreign Arbitral Awards in Relation to their Enforcement'), *Atatürk University Erzincan Law Faculty Journal* 1/4 (2001): 245; Şit, *supra* n. 5, 193; A. Bayata Canyaş, 'Enforcement of Foreign Arbitral Awards in Turkey-Further Steps Towards a More Arbitration- Friendly Approach', *ASA Bulletin* 3 (2013): 539.
87. Ekşi, *supra* n. 77, 136.
88. Şit, *supra* n. 5, 216.
89. See also, Ekşi, *supra* n. 77, 138-139.

framework, we are of the opinion that setting aside decisions that concern national approaches and tendencies and which are contrary to international standards[90] should not be taken into consideration and awards that have been set aside should be enforced.

§7.11 CONCLUSION

One of the most remarkable innovations of the IAL is that it precludes the appeal procedure against international arbitral awards. Therefore, where one of the parties is not satisfied with the arbitral award and is abstaining from complying with the award voluntarily, such party is no longer entitled to request from the court that the award be revised. The IAL only provides for the commencement of a setting aside action against international arbitral awards. It has also introduced the parties' entitlement to waive their right to challenge an arbitral award under certain circumstances.

When the grounds for setting aside contained in Article 15 are analysed, one may reach the conclusion that all the grounds, to a great extent, are indeed procedural. It is not possible for the court to examine the merits of the case or to review whether *lex causae* has been applied correctly by the arbitrators. Since the grounds are limited in scope, the parties are not entitled to adopt new grounds by agreement. Certain grounds like incapacity, invalidity of the arbitration agreement and excessive use of power by the arbitrators should be alleged by the parties, whereas public policy and arbitrability are reviewed by the court on its own motion.

With respect to the enforcement of awards that have been set aside in Turkey, when related legal sources are considered, the enforcement of an award that has been set aside may be possible under certain circumstances. To this end, the reasoning behind the setting aside decision should be analysed; local concerns of the setting aside court should not be a ground for the rejection of the request to enforce.

90. For detailed information about local and international setting aside standards see, J. Paulsson, 'Enforcing Arbitral Awards Notwithstanding a Local Standard Setting Aside (LSA)', *ICC Bulletin* 14/9-1 (1998); Gharavi, *supra* n. 82, 147-151.