CHAPTER 5: ARBITRATION PROCEDURE

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§5.01. LAW APPLICABLE TO THE ARBITRAL PROCEEDINGS

[A] In General

At present, there are no transnational rules relating to arbitral proceedings.[1] Institutional or ad hoc arbitration rules generally lay out the framework with regards to the various stages of arbitral proceedings. The contents of this framework are to then be filled out and agreed upon by the parties, the arbitral tribunal or by the parties and the arbitral tribunal. This ensures the flexibility of the arbitration procedure, which is one of the reasons why parties resort to arbitration.[2]

In determining the law applicable to the arbitration procedure, the consideration of two 'connecting factors' is suggested: party autonomy and place of arbitration.[3] It is generally accepted in modern legal systems that the law applicable to the arbitral proceedings can be determined by the parties and the arbitral tribunal, subject to the mandatory provisions of the place of arbitration.[4] This principle, which has been accepted in Articles 18 and 19 of the UNCITRAL Model Law, is almost universally accepted by all other legal systems.[5] Further, Articles 20-27 accept that the parties may determine the applicable law in relation to certain procedural matters. The provisions relating to the place (seat) of arbitration (Article 20) and the language of arbitration (Article 22) may be shown as such examples.[6]

In institutional arbitration rules relating to international arbitration, the rules do not generally cover all stages of the arbitration procedure. In international commercial arbitration, many matters regarding arbitration procedure have yet to be determined, even where the parties have agreed upon the application of the rules of arbitration of an arbitral institution. This is primarily because of the fact that an arbitration procedure cannot be conducted from its commencement to its conclusion solely by reference to such rules.[7] In particular, institutional rules generally contain a limited number of provisions with regards to evidence.[8] This is also the case with regards to domestic laws regulating international arbitration, since the UNCITRAL Model Law contains a very limited number of provisions regarding evidence.[9]

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[1] J.D.M. Lew 'Fusion of Common Law and Civil Law Traditions in International Arbitration', in *The Practice of Arbitration Essays in Honour of Hans van Houtte*, ed. P. Wautelet, T. Kruger & G. Coppens (Oxford: Hart Publishing, 2012), 1.

[2] Nigel Blackaby, et al., *Redfern and Hunter on International Arbitration* (New York: Oxford University Press, 2009), 363.

[3] G. Kaufmann-Kohler, 'Identifying and Applying the Law Governing the Arbitration Procedure – The Role of the Law of the Place of Arbitration', in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* - ICCA Congress Series Vol. 9 (1998), ed. A. van den BERG (The Hague: Kluwer Law International, 1999), 337.

[4] G.R. Elgueta, 'Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Minds of Parties and Arbitrators', *Harvard Negotiation Law Review* 16 (2011): 167.

[5] O. Glossner & H. Raeschke-Kessler, 'The Preamble of the IBA Rules of Evidence – An Agenda for Modern Proceedings in International Commercial Arbitration', in *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren*, ed. J.A.R. Nafziger & S. Symeonides (New York: Transnational Publishers, 2002), 503; M.E. Schneider, 'An Introduction to and a Commentary on Article 176-194 of the Swiss Private International Law Statute', in *International Arbitration in Switzerland*, ed. S.V. Berti, (The Hague: Kluwer Law International, 2000), 397.

[6] Glossner, *supra* no 5, 503.

[7] Lew, *supra* no 1, 1; J.J. Sentner, 'Arbitrator Discretion: Should It Be Restricted by Party Stipulation of Governing Procedural Rules', in *AAA/ICDR Handbook on International Arbitration Practice* (New York: American Arbitration Association, 2010), 159.

[8] Sentner, *supra* no 7, 159.

[9] Lew, *supra* no 1, 1.

[B] Determination of the Law Applicable to the Arbitration Procedure by the Parties

One of the most important characteristics of international commercial arbitration is that the parties are entitled to determine the law applicable to the arbitration procedure.[10] Known as the principle of party autonomy, this is seen as one of the main advantages of international commercial arbitration. The provision to the parties of the entitlement to determine the procedure applicable to the arbitral proceedings is known as the Magna Carta of modern law of international arbitration.[11] The parties are, by virtue of this principle, permitted to choose the most appropriate rules that meet their needs in the contemplated dispute or the dispute that has already arisen.[12]

In modern legal systems[13] and in regulations regarding arbitration,[14] the parties may determine the law applicable to the arbitration procedure, which may be different from the law of the place of arbitration. Such a determination by the parties also binds the arbitral tribunal. Therefore, the arbitral tribunal is under an obligation to apply the law chosen by the parties.[15] The failure to obey such determination is a ground for the annulment of the award or the dismissal of a request for enforcement.[16]

In accordance with Article 19(1) of the UNCITRAL Model Law, the procedure applicable to the arbitration is to be determined by the parties. Articles 18 and 19 are in fact regarded as the most important provisions of the Model Law. Through this provision, the principle of party autonomy has been accepted in its widest form. The purpose behind adopting such a provision was to ensure the acceptance of the principle of party autonomy with regards to the law applicable to the arbitration procedure in domestic laws. This will inevitably ensure uniformity with regards to rules relating to the determination of the law applicable to the arbitration procedure.[17]

However, the UNCITRAL Model Law has not brought a restriction that limits the importance of the principle of party autonomy by the inclusion of the phrase '[s]ubject to the provisions of this Law'.[18] This is because the Model Law contains only a few number of provisions that limit party autonomy.[19] In parallel with international laws, domestic legal systems have also accepted the principle of party autonomy with regards to the law applicable to the arbitration procedure but subject to the mandatory provisions of law.[20] The principle that the parties are entitled to choose the rules applicable to the arbitration procedure, subject to mandatory provisions, has also been accepted under Turkish law.[21] Therefore, where an arbitration is subject to the IAL, the parties are free to agree

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[10] G.B. Born, *International Commercial Arbitration - Volume II* (New York: Kluwer Law International, 2009), 1748-1749; P. Turner & R. Mohtashami, *A Guide to the LCIA Arbitration Rules* (New York: Oxford University Press, 2009), 92.

[11] P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (London: Sweet & Maxwell, 2010), 280; Simon Greenberg, Christopher Kee, & Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (New York: Cambridge University Press, 2011), 305.

[12] D.P. Roney & A.K. Müller, 'The Arbitral Procedure', in *International Arbitration in Switzerland*, ed. G. Kaufmann–Kohler & B. Stucki, (The Hague: Kluwer Law International, 2004), 50.

[13] Born, *supra* no 10, 1748-1749; Blackaby, *supra* no 2, 365.

[14] Turner, *supra* no 10, 92; Roney, *supra* no 12, 49; K-H. Böckstiegel, S. Kröll & P. Nacimiento, 'Germany as a Place for International and Domestic Arbitrations - General Overview', in *Arbitration in Germany: The Model Law in Practice*, ed. K-H. Böckstiegel, S. Kröll & P. Nacimiento (The Netherlands: Kluwer Law International, 2007), 37.

[15] Jean-François Poudret & Sébastian Besson, *Comparative Law of International Arbitration*, trans. Stephen V. Berti & Annette Ponti (London: Sweet & Maxwell, 2007), 458; C. Borris, 'The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process', in *Conflicting Legal Cultures in Commercial Arbitration*, ed. S.N. Frommel & B.A.K. Rider (The Hague: Kluwer Law International, 1999), 3; M. Rubino-Sammartano, *International Arbitration - Law and Practice* (The Hague: Kluwer Law International, 2001), 477; L. Heuman, *Arbitration Law of Sweden: Practice and Procedure* (New York: JurisNet LLC, 2003), 249-250; T. Kalpsüz, *İsviçre Hukukunda Milletlerarası Tahkim - Milletlerarası Tahkim Konusunda Yasal Bir Düzenleme Gerekir mi?* (International Arbitration in Swiss Law - Is There a Need for Statutory Regulation on International Arbitration?), Symposium-Notices-Discussions (Ankara, 1997), 19.

[16] Böckstiegel, *supra* no 14, 38; Blackaby, *supra* no 2, 363.

[17] Binder, *supra* no 11, 281.

[18] See, Article 19, UNCITRAL Model Law.

[19] Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), 524.

[20] Born, *supra* no 10, 1751; Blackaby, *supra* no 2, 180.

[21] Article 8A(1), IAL.

upon the applicability of foreign legislations/laws and institutional rules of arbitration to the arbitration procedure.[22]

[C] Validity of Agreements Regarding the Law Applicable to the Arbitration Procedure and their Interpretation

The substantive validity of agreements regarding arbitration procedures is subject to the *lex arbitri*.[23] In order for party agreement regarding arbitration procedure to bind the arbitral tribunal, the parties' express intent must be reflected in the agreement.[24] The compliance with or approval of, by the parties, of certain orders issued by the arbitral tribunal is not interpreted as an agreement as to arbitration procedure.[25] Similarly, the absence of an objection by a party to the procedural act of the other party does not constitute an agreement as to arbitration procedure.[26] This is primarily because the arbitral tribunal, in such a case, is at liberty to amend procedural rules without obtaining the parties' consent, provided that it is not in violation of the principle of good faith; whereas, the parties' agreement as to procedure is binding upon the arbitral tribunal.[27] In circumstances where there is doubt as to whether or not an agreement exists between the parties regarding the arbitration procedure, such doubt is to be resolved by way of interpretation.[28] The principles applicable to contractual interpretation shall also be applied when interpreting agreements regarding the law applicable to the arbitration procedure.[29]

The determination of whether or not an agreement regarding the arbitration procedure is valid, and therefore the duty of interpreting the agreement, falls upon the arbitral tribunal. A legal challenge cannot be brought against the arbitral tribunal's decision on this matter. However, this ground may be raised as an objection against a request for recognition or enforcement of an award rendered by the arbitral tribunal.[30]

As a general rule, an agreement by the parties as to the substantive law does not constitute an agreement as to the arbitration procedure.[31] In fact, Article 12C(1) of the IAL provides that, unless otherwise agreed, where a state's laws have been agreed upon as the applicable law, it shall be deemed that the parties have agreed upon the

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[22] T. Kalpsüz, *Türkiye'de Milletlerarası Tahkim* (International Arbitration in Turkey) (Ankara: Yetkin Publishing, 2010), 101; Z. Akıncı, *Milletlerarası Tahkim* (International Arbitration) (Istanbul: Vedat Publishing, 2013), 121; Ergin Nomer, Nuray Ekşi & Günseli Öztekin Gelgel, *Milletlerarası Tahkim Hukuku: Cilt I* (Law of International Arbitration: Volume I) (Istanbul: Beta Publishing, 2013), 42; 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), 104; S. Özel, *Milletlerarası Ticarî Tahkimde Kanunlar İhtilâfı Meseleleri* (Conflict of Laws Issues in International Commercial Arbitration) (Istanbul: Legal Publishing, 2008), 101; 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, 2013), 275; N. Ekşi, 'Milletlerarası Tahkim Kanunu Hakkında Genel Bir Değerlendirme (A General Evaluation of the International Arbitration Law)', in *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni - Prof. Dr. Gülören Tekinalp'e Armağan* (International Law and International Private Law Bulletin - In Honour of Prof. Dr. Gülören Tekinalp) 23/1-2 (2003): 326-327; 'It means that the parties are entitled to determine the legal rules and procedural rules to which arbitrators must adhere either in the arbitration agreement or at a later stage. Even arbitrators are obligated to strictly comply with such provisions of an arbitration agreement.' (15th Civil Division of the Court of Appeal, Date: 15 June 1989, File No: 1989/1023, Decision No: 1989/2841 (<www.kazanci.com>, August 2014)) [translated by the chapter authors].

[23] Schneider, *supra* no 5, 398.

[24] *Ibid*, 399.

[25] Poudret, *supra* no 15, 459; Bernhard Berger & Franz Kellerhalls, *International and Domestic Arbitration in Switzerland* (London: Sweet & Maxwell, 2010), 285; Roney, *supra* no 12, 51; Schneider, *supra* no 5, 399.

[26] Roney, *supra* no 12, 51; Schneider, *supra* no 5, 399. Another view expressed is that compliance with an order of the arbitral tribunal without an objection is sufficient for the existence of an agreement as to the arbitration procedure and binds the arbitral tribunal. However, such an approval can be evaluated only as covering procedural acts and transactions adopted by the arbitral tribunal and not as to the contents of the said acts and transactions: Poudret, *supra* no 15, 459.

[27] Roney, *supra* no 12, 51; Schneider, *supra* no 5, 399.

[28] Berger, *supra* no 25, 285.

[29] Schneider, *supra* no 5, 399.

[30] Article V(1)(d), New York Convention; Schneider, *supra* no 5, 407.

[31] A. Philip, 'Procedural Decisions by the Arbitral Tribunal', in *Introduction: The Law Governing the Procedure - Planning Efficient Arbitration Proceedings*, ed. A. van den BERG (The Hague: ICCA Congress Series No: 7, 1996), 374.

applicability of the substantive laws of that state to the agreement, and not the provisions relating to the conflict of laws or procedural rules. Therefore, a reference by the parties to the laws of another state does not constitute the selection of that state's provisions relating to arbitration procedure. In this respect, the Court of Appeal General Legal Assembly's decision, whereby it was held that the phrase 'Turkish laws in force'[32] covered Turkish procedural laws, has lost its validity in light of this provision contained in the IAL.[33]

[D] Form of Agreement Regarding the Law Applicable to the Arbitration Procedure

Generally there is no requirement as to the form of the agreement regarding the law applicable to the arbitration procedure. The determination of the rules applicable to the arbitration procedure may be made verbally or in writing; it can also be through an implied declaration of intent.[34] Since an arbitration agreement and an agreement as to the rules applicable to the arbitration procedure are two independent agreements, the invalidity of the agreement between the parties regarding the rules applicable to the arbitration procedure does not effect the validity of the arbitration agreement.[35]

Turkish law does not require agreement as to arbitration procedure to be executed in a certain form. An agreement as to arbitration procedure may therefore be executed verbally or in writing and expressly or impliedly. However, it is advised that such agreements are executed in writing to prevent future disputes from arising and to ensure predictability.[36]

[E] Procedural Rules That May Be Agreed Upon

The parties possess three different alternatives in the selection of procedural rules applicable to the arbitration procedure. First, the parties may agree upon the applicability of the provisions of a domestic legal system to the arbitration procedure. Secondly, the parties may select the arbitration rules of an arbitral institution. Finally, the parties may agree upon each and every rule that they wish to be applicable to the arbitration procedure (tailor made clauses).[37] Domestic legal systems provide the parties with the authority to amend and, in time, change the rules applicable to the arbitration procedure.[38]

It is rare in practice for the parties to draft tailor made rules applicable to the arbitration procedure. More often, the parties incorporate rules of arbitration of arbitral institutions by way of reference and insert provisions regarding the arbitration procedure into an arbitration agreement only on matters that are regarded important. In this respect, the parties enter into an agreement on matters such as the language of arbitration, the exchange of statements, the protection of secrets and the confidential nature of the arbitral proceedings or, contrarily, the

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[32] Court of Appeal General Legal Assembly, Date: 5 May 1999, File No: 1999/15-235, Decision No: 1999/273 (<www.kazanci.com>, August 2014).

[33] For a criticism of the decision, see: C. Şanlı, 'Türkiye'de Yargıtay Kararlarına Göre Yabancı Hakem Kararlarının Tanınması ve Tenfizi (The Recognition and Enforcement of Foreign Arbitral Awards in Turkey in Light of Court of Appeal Decisions)', 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) 22/2 (1997-1998): 406-407.

[34] Emmanuel Gaillard & John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), 649; Rubino, *supra* no 15, 477; K. Sachs & T. Lörcher, 'Arbitration in Germany The Model Law Practice', in *Arbitration in Germany The Model Law in Practice*, ed. K-H. Böckstiegel, S. Kröll & P. Nacimiento (The Netherlands: Kluwer Law International, 2007), 287; Berger, *supra* no 25, 285.

[35] Sachs, *supra* no 34, 287.

[36] Roney, *supra* no 12, 50; Schneider, *supra* no 5, 398; J. Sigvard, 'To What Extent Are Procedural Decisions of Arbitrators Subject to Court Review?', in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* - ICCA Congress Series Vol. 9 (1998), ed. A. van den Berg (The Hague: Kluwer Law International, 1999), 39. The UNCITRAL Arbitration Rules, however, accept that the parties may amend it provided that the parties agree in writing: David D. Caron, Caplan M. Lee & Matti Pellonpää, *The UNCITRAL Arbitration Rules* (New York: Oxford University Press, 2010), 30.

[37] Berger, *supra* no 25, 286.

[38] J. Waincymer, *Procedure and Evidence in International Arbitration* (The Netherlands: Kluwer Law International, 2012), 52; Gaillard, *supra* no 34, 648.

openness of the proceedings to the public.[39] The matters that do not fall within the above are either determined in light of the rules of arbitration incorporated by reference or by the arbitral tribunal through the exercise of its discretion.[40] In ad hoc arbitrations, parties generally incorporate the UNCITRAL Rules of Arbitration by way of reference. The parties may determine the procedural rules to be applied in the event an issue is not regulated by the institutional rules of arbitration selected by the parties.[41]

(1) The selection of domestic legal systems as being applicable to the arbitration procedure

The parties are entitled to select domestic legal systems, consisting of both domestic laws as to procedure and domestic laws as to arbitration. This view is supported by a liberal interpretation of Article V(1)(d) of the New York Convention.[42] Under Turkish law, the parties are at liberty to select the laws of another state to be applicable to the arbitration procedure. This has been expressly accepted by the IAL (Article 8A(1)).

In the event a domestic legal system is chosen, certain matters require clarification. The law chosen by the parties may be the procedural laws applied by the courts (i.e., the provisions of the CCP) or domestic arbitration rules applicable to arbitral proceedings.[43] The matter that must be determined is whether or not the choice relates to the laws as to procedure or arbitration rules.[44] In light of the fact that the parties are at liberty to choose both, where the parties' true intent cannot be determined from the agreement, it is more acceptable to conclude that the parties agreed upon the applicability of the domestic laws related to the arbitration procedure.[45]

The effect of selecting the laws of another state as the rules applicable to the arbitration procedure is somewhat restricted. The parties may change the provisions of the laws inherent in domestic legal systems, provided that the mandatory provisions of the *lex arbitri* are not violated. This is because the mandatory provisions of the law chosen lose their effect as being mandatory.[46] In such a case, it will be deemed that the procedural laws of the other state have been agreed upon, subject to the mandatory provisions of the *lex arbitri* (Article 19, UNCITRAL Model Law; Article 8A, IAL). In other words, the supervision of the *lex arbitri* will continue over the arbitration even where the procedural laws of another state have been agreed upon.[47] The parties may agree upon the applicability of the procedural laws of another state only if the implementation of such laws by the arbitral tribunal is possible. The parties are only permitted to agree upon the procedural laws applied by the courts insofar as such choice is permitted by the *lex arbitri*. For instance, the parties may not agree upon and thereby amend the entitlement to correct or interpret awards rendered or the legal avenues available against such awards.[48] In fact, and independent of the parties' choice as to the rules applicable to the arbitration procedure, where an application is made to the courts for the courts' assistance with regards to the collection of evidence, the courts will consider this request in light of its own domestic laws (Article 27, UNCITRAL Model Law; Article 12B(1), IAL).

(2) The selection of arbitration rules of arbitral institutions

In accordance with the principle of party autonomy, the parties are at liberty to agree that the arbitration rules of an arbitral institution shall be applied to the arbitration procedure. Today most arbitration agreements incorporate arbitration rules of arbitral institutions by reference; such rules lay down the framework within which arbitral proceedings are to be conducted. Most legal systems accept that the parties enjoy such a freedom.[49] The parties may adopt the arbitration rules of arbitral institutions either in the arbitration agreement or before or during the

[39] Berger, *supra* no 25, 286; Poudret, *supra* no 15, 459-460.
[40] Poudret, *supra* no 15, 459-460; K.P. Berger, 'Understanding International Commercial Arbitration', in *CENTRAL Practice and Study Guides Vol. 2: Understanding Transnational Commercial Arbitration* (Cologne: Quadis, 2000), 27.
[41] Lew, *supra* no 19, 524.
[42] Franz T. Schwarz & Christian W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (The Netherlands: Kluwer Law International, 2009), 80; Lew, *supra* no 19, 524; Poudret, *supra* no 15, 461.
[43] Berger, *supra* no 25, 287.
[44] G. Petrochilos, *Procedural Law in International Arbitration* (New York: Oxford University Press, 2004), 195; Schwarz, *supra* no 42, 80.
[45] Schneider, *supra* no 5, 406.
[46] D.T. Hascher, 'The Law Governing Procedure: Express or Implied Choice by the Parties - Contractual Practice', in *Introduction: The Law Governing the Procedure - Planning Efficient Arbitration Proceedings*, ed. A. van den BERG (The Hague: ICCA Congress Series No: 7, 1996), 329; Berger, *supra* no 25, 288.
[47] Waincymer, *supra* no 38, 189.
[48] Şanlı, *supra* no 22, 275.
[49] Roney, *supra* no 12, 51.

arbitral proceedings. However, in practice, the parties generally incorporate the arbitration rules of arbitral institutions in their arbitration agreement.[50] In fact, Turkish law has also accepted that parties may incorporate the rules of arbitration of arbitral institutions and deem future or present disputes subject to such rules. Article 8A(1) of the IAL provides that the parties may determine the rules as to the arbitral proceedings by 'reference to international or institutional arbitration rules'.[51] Where the parties agree upon the applicability of institutional arbitration rules, the arbitral tribunal has the jurisdiction and, is indeed, obligated to apply the rules of arbitration chosen, within the limits laid down by the applicable law.

The incorporation of institutional arbitration rules constitute acceptance of all provisions of the institution regarding arbitration. For instance, where the rules of arbitration of the ICC are chosen, the provisions regarding the internal working and costs and fees of the arbitral tribunal will be deemed accepted.[52] The parties may also agree upon the applicability of ad hoc or independent international rules of arbitration. The most regularly resorted to ad hoc arbitration rules is undoubtedly the UNCITRAL Arbitration Rules.[53] Through the incorporation of such independent rules, the arbitral proceedings are made subject to advanced regulations. According to Articles 1(2) and 15(1) of the UNCITRAL Arbitration Rules, the tribunal is not under an obligation to apply domestic procedural laws on matters not regulated by the UNCITRAL Arbitration Rules, unless otherwise agreed by the parties or determined by the arbitral tribunal.

Institutional arbitration rules may not contain provisions dealing with all stages of an arbitration. Where a procedural matter is not regulated by the institutional arbitration rules, the applicable procedural rules are to be determined in accordance with the principles applicable to the determination of the law applicable to the arbitration procedure. On such matters the arbitral tribunal possesses wide discretionary powers; subject of course to any contrary party agreement. For instance, Article 19 of the ICC Rules of Arbitration provide that where the Rules are silent as to how the proceedings are to be conducted, the arbitral proceedings are to be conducted in accordance with the rules agreed upon by the parties or, in the absence of such an agreement, in accordance with the rules settled upon by the arbitral tribunal, regardless of whether or not reference is made to the rules of procedure of a national law to be applied to the arbitration.

[F] Arbitral Tribunal's Determination as to the Law Applicable to the Arbitration Procedure

(1) In general

Most domestic legal systems provide the parties a broad freedom; however, in practice, it is not common for parties to draft a detailed arbitration agreement regarding the arbitration procedure. In most cases, the parties deem it sufficient for the incorporation of institutional arbitration rules. In the absence of a party agreement or in the event the arbitration rules chosen do not contain a provision on a certain matter, the issue then arises as to how the rules applicable to the arbitration procedure is to be determined.

In international commercial arbitration, many procedural matters, in both ad hoc and institutional arbitrations, have been left to the discretion of the arbitral tribunal, despite the fact that the mandatory provisions of the place of arbitration and the institutional arbitration rules, which constitute the rules applicable to the arbitration procedure, lay down a framework for such procedural issues.[54] Unless otherwise agreed by the parties, the arbitral tribunal's authority to determine the law applicable to the arbitration procedure is one of the fundamental principles of international commercial arbitration.[55] The arbitral tribunal's authority to determine the law applicable to the arbitration procedure has been accepted, without exception in both national and international legislations.

[50] Greenberg, *supra* no 11, 308.
[51] [Translated by the chapter authors]. Kalpsüz, *supra* no 22, 101; Şanlı, *supra* no 22, 275; Akıncı, *supra* no 22, 163; Özel, *supra* no 22, 101.
[52] Schneider, *supra* no 5, 404.
[53] Roney, *supra* no 12, 51.
[54] Heuman, *supra* no 15, 264.
[55] Blackaby, *supra* no 2, 369.

According to Article 19(2) of the UNCITRAL Model Law, it has been accepted that the arbitral tribunal will conduct the arbitral proceedings in such manner as it considers appropriate and in accordance with the Model Law, in the absence of an agreement between the parties as to the arbitration procedure. In accordance with this provision, the arbitral tribunal will determine the law applicable to the arbitration procedure in accordance with the general laws of procedure.

It appears that under Turkish law the arbitral tribunal's discretionary powers have been restricted, when compared to the provisions of the UNCITRAL Model Law. Article 8A(2) provides that, in a mandatory sense, in the absence of an agreement between the parties, the arbitral tribunal shall conduct the arbitral proceedings in accordance with the provisions of the IAL. The phrase 'in such manner as it considers appropriate' contained in the UNCITRAL Model Law appears not to have been adopted by the IAL. However, it should be noted that the UNCITRAL Model Law does contain the expression 'subject to the provisions of this Law'.[56] Similarly, under Turkish law the arbitral tribunal, unless otherwise agreed by the parties, is to apply the provisions of the IAL. The fact that the arbitral tribunal must apply the provisions of the IAL when conducting the arbitral proceedings, in the absence of an agreement between the parties, is generally accepted by Turkish scholars.[57] With regards to matters not regulated by the IAL, just as is the case with the UNCITRAL Model Law and other modern legal systems, the arbitral tribunal is equipped with the discretion as to the manner on which the arbitral proceedings are to be conducted.[58]

On matters not regulated by the IAL, the arbitral tribunal is not under an obligation to comply with the procedural laws applied by state courts. According to Article 17(1) of the IAL, the CCP shall not be applicable with regards to matters regulated by the IAL, unless a provision to the contrary exists. Therefore, an express provision in the IAL must exist for a statutory provision regarding domestic procedure or domestic arbitration, that is applied by the Turkish courts, to be applicable to an arbitration conducted under the IAL. For instance, Article 12B(1) provides that the arbitral tribunal may request the court of first instance's assistance in the collection of evidence, and that such a request will be considered pursuant to the CCP. Consequently, with regards to matters not regulated by the IAL, the arbitral tribunal is not under an obligation to apply the domestic procedural laws applied by domestic courts or the provisions on the CCP regarding domestic arbitration.[59] However, this does not mean that the arbitral tribunal will not apply the provisions of the CCP. This is a matter that falls entirely within the scope of discretion of the arbitral tribunal. For instance, whether or not a provision regarding evidence contained in the CCP will be applied by the arbitral tribunal is at the arbitral tribunal's discretion (i.e., the applicability of the rule dictating that proof of certain matters requires proof by deed (*senetle ispat zorunluluğu* in Turkish)).

Similarly, institutional arbitration rules do not contain sufficient number of provisions regarding the arbitration procedure pursuant to which proceedings are to be carried out. Institutional arbitration rules also grant the arbitral tribunal wide discretionary powers in the determination of the rules applicable to the arbitration procedure. The arbitral tribunal is entitled to determine the rules applicable to the arbitration procedure within the context of the discretionary powers entrusted to them, taking into consideration the peculiarities of each concrete case.

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[56] In fact, under German law, which has adopted the UNCITRAL Model Law, the arbitral tribunal is under an obligation to apply, in the absence of a party agreement, the provisions of the German Code of Civil Procedure regarding arbitration, and the arbitral tribunal may conduct the arbitral proceedings in the manner it considers appropriate only in the event there is no provision in the said Code on the matter.

[57] Kalpsüz, *supra* no 22, 102; Şanlı, *supra* no 22, 275; Akıncı, *supra* no 22, 164. For an explanation on the different legislative provisions regarding the parties' entitlement to determine the applicable law to the merits in international and domestic arbitrations, see: İ.G. Esin, D. Gültutan & A. Yeşilırmak, 'Turkey', in *Getting The Deal Through 2014: Arbitration in 49 Jurisdictions Worldwide*, ed. G. Wegen & S. Wilske (London: Law Business Research, 2014), 422.

[58] 'In determining the procedural laws to be applied by the arbitrators, attention must primarily be paid to whether or not the parties have reached an agreement on this matter in their arbitration agreement or in a separate document. In the absence of such an agreement, the parties' intent as to which state's procedural laws are to be applicable to the arbitration shall be determined through the interpretation of the other terms of the arbitration agreement. Where a conclusion cannot be reached following such an interpretation, it must be accepted that the parties intended for the choice as to the applicable arbitration procedural rules to be left to the arbitrators. In such a case, the arbitral tribunal is to determine which state's procedural law is to be applied in the resolution of the dispute.' (13th Civil Division of the Court of Appeal, Date: 7 July 1998, File No: 1998/5441, Decision No: 1998/6064 (<www.kazanci.com>, August 2014)) [translated by the chapter authors].

[59] Akıncı, *supra* no 22, 202, fn. 361.

(2) Time when the law applicable to the arbitration procedure is to be determined

The arbitral tribunal may exercise its discretion and determine the rules applicable to the arbitration procedure either at the commencement of the arbitral proceedings or at a later stage, as the exercise of such power becomes requisite. In other words, the arbitral tribunal possesses discretion as to the time when the law applicable to the arbitration procedure is to be determined.[60] It is difficult to lay down a rule as to when the arbitral tribunal should, and at what scope, determine the law/rules applicable to the arbitration procedure. The arbitral tribunal should ideally strike a balance between predictability and flexibility. In this respect, it may be deemed appropriate for the arbitral tribunal to determine the fundamental matters regarding arbitral proceedings at the commencement of the proceedings so that the parties' rights are adequately protected. For instance, matters as to the place of arbitration, the language of arbitration and the rules to be applied for the collection of evidence (if any) shall be determined at the commencement stage.[61] The arbitral tribunal should never disregard the fact that an agreement may be reached between the parties and the arbitral tribunal following the commencement of the arbitral proceedings on matters regarding procedure. Therefore, rules applicable to the arbitration procedure may be determined when the need arises, upon consultation with the parties.

(3) Matters to be considered by the arbitral tribunal in determining the rules applicable to the arbitration procedure

It is expressed that it would be proper practice for the arbitral tribunal to consult and negotiate with the parties before a procedural decision is adopted.[62] In fact, it is accepted in international arbitration that procedural matters should be negotiated as between the arbitral tribunal and the parties.[63] This demonstrates that party autonomy is an important element that assists the arbitral tribunal even during the decision-making phase. Even where the parties and the arbitral tribunal do not succeed in reaching an agreement, the arbitral tribunal would be in a position where it could determine the disagreement and choose the most appropriate rule(s) that would satisfy the needs of both parties as best as possible, in light of the negotiations undertaken. In addition, the parties would no doubt obtain vital information as to how the arbitral proceedings are to be organized, and acquaint itself with the procedural timetable.[64] However, the fact that the arbitral tribunal consults and negotiates with the parties does not necessarily mean that the arbitral tribunal must, in all cases, resolve the disagreement in a manner that would satisfy the parties' expectations. In certain cases, provided that the arbitral tribunal deems it more appropriate and reasonable, the arbitral tribunal may accept the offer of one of the parties. The principle of equal treatment does not prevent the arbitral tribunal from adopting such a decision, since the principle would be deemed violated only in cases where a procedural right afforded to one party is not afforded to the other.

The arbitral tribunal may determine the applicability of institutional arbitration rules or domestic procedural laws to the arbitrational procedure. However, in practice, arbitrators rarely select domestic procedural rules.[65] Where a reference is made in the terms of reference to a domestic law, this reference should not be interpreted as the applicability of the domestic procedural laws of the domestic law to which reference is made.

Parties who prefer the resolution of international commercial disputes through arbitration expect the arbitral proceedings to be conducted in a manner that would be fair and just for both parties, as opposed to the application of rigid procedural rules applied by the courts where the arbitration is seated.[66] This is primarily due to the fact that the characteristic element of international commercial arbitration is that it involves the element of internationality. Consequently, arbitrators may prefer institutional arbitration rules or international regulations as opposed to domestic legal rules. Further, such a preference with regards to a dispute that involves legal and natural

[60] Rubino, *supra* no 15, 464; Schneider, *supra* no 5, 408.
[61] Berger, *supra* no 25, 289.
[62] Sachs, *supra* no 34, 289.
[63] C. Newmark, 'Efficient, Economical and Fair: The Mantra of The New IBA Rules', *International Arbitration Law Review* 13/5 (2010): 165-168.
[64] Heuman, *supra* no 15, 251.
[65] Rubino, *supra* no 15, 488.
[66] Borris, *supra* no 15, 2-3.

persons of different nationality can be regarded as being more independent. The arbitral tribunal may also determine that different rules shall be applied to different procedural matters (*depeçage*).[67]

Where a procedural order is issued by the arbitral tribunal, which violates procedural justice, the aggrieved party should immediately object against such an order. It is accepted that where a party does not raise such an objection, it will not be entitled to raise this issue at the annulment or enforcement phase. Similarly, the parties must raise an immediate objection when there is a violation with regards to the rules that must be applied. Otherwise, it will be deemed to have waived its right of objection.[68]

An arbitral tribunal's procedural order, which governs the rules applicable to the arbitration procedure, is not subject to any form of review. In other words, an arbitral tribunal's orders regarding the arbitration procedure are not orders that are subject to cancellation/set aside proceedings. Such orders are regarded as procedural resolutions and regulations.[69] Further, such orders do not necessarily need to contain a reasoning. However, the arbitral tribunal should explain verbally the reasoning for the order where the order concerns a procedural order that is wide in its scope. Interim orders regarding the arbitration procedure are not capable of being recognised or enforced. In particular, such orders fall outside the scope of the New York Convention.[70]

[G] Limits on Party Autonomy and the Arbitral Tribunal's Discretion

(1) In general

In the determination of the applicable rules to the arbitration procedure, both party autonomy and the discretion afforded to the arbitral tribunal have its limits. The limits to party autonomy have been laid down by domestic legal systems under certain conditions and circumstances. The principle of party autonomy cannot be used to violate the right to be heard, and is therefore limited in that respect. Such limitations are in the interests of the parties, particularly for weaker parties or parties who occupy a disadvantageous position against the other party. The limitation of party autonomy and the discretion afforded to the arbitral tribunal relies upon the purpose of protecting the fundamental principles of law. Such principles are universally accepted in domestic and international regulations regarding arbitration. The purpose of such principles is to provide the parties with procedural guarantees, thereby ensuring the right to raise claims and defences.

(2) Mandatory rules of the place of arbitration

Mandatory procedural rules are rules which cannot be derogated from by the parties, and which apply regardless of party intent.[71] However, it is accepted in international arbitral proceedings that it would be difficult to determine in each concrete case whether or not a rule is mandatory. Where the legislator's intent is for the rule to be applied regardless of party intent and the arbitral tribunal's discretion,[72] such rule should be deemed mandatory in nature.[73]

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[67] Poudret, *supra* no 15, 464.

[68] Roney, *supra* no 12, 53-54. For a comparison, see: Article 409, CCP.

[69] Berger, *supra* no 25, 289; Schneider, *supra* no 5, 410. Interim awards rendered by arbitrators that are unlawful or unjust do not justify the setting aside of arbitral awards on their own. Similarly, the arbitral tribunal's failure to comply with its own decision/order is not a justification for the award to be set aside. It may constitute a bar to enforcement or cause an award to be set aside only where it is deemed a breach of the principle of equal treatment or the right to be heard, or violates public policy: Roney, *supra* no 12, 53; Poudret, *supra* no 15, 465; Schneider, *supra* no 5, 410.

[70] Poudret, *supra* no 15, 46.

[71] Waincymer, *supra* no 38, 38. Violations of mandatory provisions in the law of civil procedure are not subject to invalidity, contrary to violations of mandatory provisions in civil law. The only recourse available against violations of mandatory provisions is to resort to the appellate mechanism. For detailed information regarding the distinction between mandatory and non-mandatory provisions in the law of civil procedure, see: Yavuz Alangoya, Kamil Yıldırım & Nevhis Deren-Yıldırım, *Medenî Usul Hukuku Esasları* (Fundamentals of the Law of Civil Procedure) (Istanbul: Beta Publishing, 2009), 12.

[72] For detailed information on whether provisions equipping judges with discretionary powers are mandatory, see: Alangoya, *supra* no 71, 12.

[73] Waincymer, *supra* no 38, 182.

Certain legal systems, such as England and Wales through the Arbitration Act 1996, specify which rules are of mandatory nature.[74]

The mandatory provisions of the place of arbitration limit both party autonomy and the arbitral tribunal's discretion. In particular, the procedural public policy of the *lex loci arbitratus* may not be disregarded by the arbitral tribunal.[75] For instance, where the rules applicable to the arbitration procedure agreed upon by the parties, whether it be express or implied, entitles the arbitral tribunal to grant interim injunctions, attention should be paid to whether or not such entitlement violates the public policy of the place of arbitration. This is because international public policy rules of the place of arbitration are applicable to arbitrations that are not subject to its own procedural laws.

The mandatory provisions of the place of arbitration are the public policy rules of its international procedural law.[76] However, it must be borne in mind that the concept of public policy accepted in the law of international commercial arbitration is different to that accepted with regards to domestic legal systems, and that the concept of public policy in international commercial arbitration is much narrower and limited in comparison.[77]

Article 8A(1)-(2) provides that the limit to party autonomy in the determination of the rules applicable to the arbitration procedure is the mandatory provisions of the applicable law. The parties and the arbitral tribunal are not entitled to agree upon the applicability of a procedure that contravenes the mandatory provisions of the law. The IAL has expressed the limitation on party autonomy and the arbitral tribunal's discretion with the words 'subject to the mandatory provisions of this Law'.[78] Turkish law has not expressly set out which rules are mandatory rules and may therefore not be derogated from.[79]

However, the principle of equal treatment and the right to be heard are regarded as the main rules that relate to public policy and therefore limit party autonomy and the discretion afforded to the arbitral tribunal in international commercial arbitration.[80] These fundamental procedural principles have been accepted in all legal systems and in international regulations, and constitute the minimum standard of international procedural law to be applied by both state courts and arbitral tribunals. These principles are regarded as the Magna Carta of arbitral

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[74] Ekşi, *supra* no 22, 327; see, Arbitration Act 1996, Schedule 1 (Chapter 23).

[75] 'However, it cannot be said that the discretion granted by law to the parties or to the arbitrators, in the absence of an agreement, is without its limits. The parties and the arbitral tribunal must take into account provisions of the law of civil procedure that concern public policy.': Yavuz Alangoya, *Medenî Usul Hukukumuzda Tahkimin Niteliği ve Denetlenmesi* (The Nature of Arbitration and its Review in Our Law of Civil Procedure) (Istanbul: Istanbul University Publications, 1973), 162.

[76] Kalpsüz, *supra* no 22, 101-102.

[77] Schneider, *supra* no 5, 412. For detailed information as to the difference between the concept of public policy in domestic law and in international private law, see: Aysel Çelikel & B. Bahadır Erdem, *Milletlerarası Özel Hukuk* (International Private Law) (Istanbul: Beta Publishing, 2012), 149. In fact, the 13th Civil Division of the Court of Appeal (Date: 17 April 2012, File No: 2012/8426, Decision No: 2012/10349), after having re-stated the boundaries of the public policy ground, distinguished between public policy in domestic law and public policy in international private law: 'in domestic law, public policy is the complete set of rules protecting the fundamental structure and fundamental interests of Turkish society. Such rules whether arising from public or private law, must be complied with by parties under domestic law. International public policy, on the other hand, is narrower and restricted compared to domestic law. 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.' [translated by the chapter authors]. For more on the decision, see: İ.G. Esin, A. Yeşilırmak & D. Gültutan, 'Turkey', in *The Baker & McKenzie International Arbitration Yearbook 2013-2014*, ed. L. Williams (New York: JurisNet LLC, 2014), 331-332.

[78] Kalpsüz, *supra* no 22, 101; Akıncı, *supra* no 22, 122; Özel, *supra* no 22, 101.

[79] In respect of the provisions of the IAL, it has been said that the following are in the nature of mandatory provisions: Articles 1 and 2 regulating the scope of application of the IAL; Article 3 regulating competence of the courts; Article 4(2) regulating requirements as to form; Article 5 regulating arbitration objections; Article 14A regulating mandatory content requirements as to awards; and Article 15 regulating the setting aside procedure and grounds: H. Özdemir Kocasakal, 'Milletlerarası Tahkim Kanununun Uygulama Alanının Belirlenmesi (The Determination of the Scope of Application of the International Arbitration Law)', in *Prof. Dr. Özer Seliçi'ye Armağan* (In Honour of Prof. Dr. Özer Seliçi) (Ankara: Seçkin Publishing, 2006), 362. For detailed information with respect to problems that may arise in identifying mandatory provisions in the IAL, see: Ekşi, *supra* no 22, 326 *et seq*.

[80] The right to a fair trial is considered one of the fundamental rights in the law of civil procedure. The right to a fair trial includes, in particular, the principle of equal treatment between the parties and the parties being granted the appropriate opportunities for the submission of their claims and defences: Hakan Pekcanıtez, Oğuz Atalay & Muhammet Özekes, *Medenî Usûl Hukuku* (Law of Civil Procedure) (Ankara: Yetkin Publishing, 2013), 380.

proceedings. The aim of these fundamental principles is to provide the parties with certain procedural guarantees. They enable the conducting of international arbitral proceedings in accordance with the fundamental principles. Further, they form part of the untouchable provisions of the law of civil procedure. The principles of equal treatment and the right to be heard are fundamental human rights. In fact, the European Convention on Human Rights, which has become an important part of the European legal system, guarantees the right to a fair trial (Article 6). This provision is equally applicable to international arbitration.

Article 18 of the UNCITRAL Model Law regulates the principles of equal treatment and the right to be heard as mandatory provisions. An award rendered in violation of these principles would be subject to set aside proceedings or dismissal of the request for enforcement, as the case may be (Article V(1)(d), New York Convention). However, the adoption of these principles in all modern legal systems and international arbitration rules does not necessarily mean the adherence to such principles in the same manner and to the same extent. In fact, the application of these principles may differ from time to time in a particular state.[81]

(a) Principle of equal treatment

The principle of equal treatment is regarded as the minimum procedural standard.[82] If the first principle of international commercial arbitration is party autonomy, the second principle, which is probably as important as the first, if not more, is the principle of equal treatment. The principle of equal treatment ensures the fairness of the arbitration procedure.[83] Article 8B(1) of the IAL has accepted the principle of equal treatment as a mandatory provision by expressing that '[t]he parties enjoy equal rights and powers in the arbitral proceedings'. What is meant here is an equality in the sense of fairness and justice, as opposed to equality as a mere formality. The principle of equal treatment does not require the absolute equal treatment of the parties in respect of procedural matters. It requires that in similar cases, parties should be treated on similar terms. In reference to objective differences between the parties, it is possible for different rules to be applied to the parties; in fact, fairness may require it.[84] Providing the parties equal periods of time without taking into consideration the circumstances of each case may not be fair or just. Justice may require that in certain cases the parties should be granted different periods of time in light of the specifics of the case at hand. Further, the use of a procedural right may, in certain cases, be in the interests of only one of the parties. In such a case, it should not be deemed that the principle of equal treatment has been violated. For instance, the right to examine a witness may be granted only to one of the parties.[85] Similarly, the fact that the arbitral tribunal asks more or fewer questions to a party's witness will not constitute a violation of the principle of equal treatment.[86] It is difficult, if not impossible, for one to be able to state beforehand whether or not treating the parties differently would violate the principle of equal treatment. Consequently, each case should be considered on its own facts, and a determination should be made as to whether or not the principle of equal treatment has been violated.

The principle of equal treatment dictates that the parties shall enjoy equal procedural rights and obligations and that each party shall be provided with the opportunity to assert its claims and defences and submit its evidence. The arbitral tribunal shall not favour one party over the other, nor shall it impose restrictions against the interests of the other party. In principle, the equal treatment of the parties means that the arbitral tribunal should apply the same procedural rules to both parties and should make the submission of evidence, the examination of witnesses and the submission of statements subject to the same conditions. The principle of equal treatment has both a positive and a negative element.[87] The arbitral tribunal may not deprive a party of a right it has granted to the other

[81] Poudret, *supra* no 15, 470; Lew, *supra* no 19, 525-526.
[82] Waincymer, *supra* no 38, 182; Schneider, *supra* no 5, 415. 'The principle of equal treatment requires that the parties are not only formally treated equal before the judge and during trial, but that parties are actually granted equal opportunities and are treated equally by the judge.': M. Özekes, *Medeni Usul Hukukunda Hukuki Dinlenilme Hakkı* (The Right to be Heard in the Law of Civil Procedure) (Ankara: Yetkin Publishing, 2003), 48.
[83] Waincymer, *supra* no 38, 15.
[84] Poudret, *supra* no 15, 479; Schneider, *supra* no 5, 416; Waincymer, *supra* no 38, 15-16.
[85] Heuman, *supra* no 15, 261.
[86] Waincymer, *supra* no 38, 81.
[87] Schneider, *supra* no 5, 416.

party. On the other hand the arbitral tribunal may not grant a right to a party where it has rejected the other party's request for such a right.[88]

The principle of equal treatment not only prevents the arbitral tribunal from conducting the arbitral proceedings in favour of one of the parties, it deems agreements that grant a procedural right to only one of the parties, or which deprives one of the parties of a procedural right, as invalid.[89] However, agreements that limit the rights of both parties are deemed valid. For instance, an agreement that grants one party the right to appoint one arbitrator but grants the other party the right to appoint two arbitrators is regarded as being invalid. Agreements that authorize the abolition of procedural rights unilaterally are also deemed contrary to the principle of equal treatment.[90] Further, agreements that permit legal representation by only one of the parties, permit only one of the parties to object to an arbitrator or permit only one party to make amendments are deemed invalid. Similarly, an agreement which provides that a hearing shall be held with the participation of only one of the parties is invalid.[91] However, an agreement whereby the burden of proof is equally shared between the parties or whereby the burden of proof is imposed upon one of the parties does not breach the principle of equal treatment.

(b) Right to be heard

Another fundamental principle that places limitations upon party autonomy, and on the arbitral tribunal's discretion in the determination of the rules applicable to the arbitration procedure in international arbitration, is the right to be heard.[92] The right to be heard is an element of the right to a fair trial and the principle of equity.[93] The right to be heard is accepted as being a right that occupies the central position of procedural rights, and is therefore deemed a fundamental procedural right.[94] This right constitutes the essence of public policy in national legal systems, and must be applied in the absolute sense during the trial. The right to be heard must be applied and adhered to even in the absence of an express provision in the law as a result of its inherent nature. This right is not an obligation imposed upon the parties. In other words, a party to whom such a right has been provided by the court/tribunal is not under an obligation to exercise this right.[95]

Article V(1)(b) of the New York Convention accepts that the request for enforcement will be refused in the event '[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case.' The right to be heard, together with the principle of equal treatment, has been accepted in both the UNCITRAL Model Law and other national legal systems as a mandatory provision that cannot be contracted out of. Article 8B(1) of the IAL, in expressing the right to be heard, provides that the parties shall be provided with the opportunity to present their claims and defences.

The right to be heard can be split up into three different elements. These are the rights to be informed, make explanations and for explanations made to be properly evaluated and considered (see, Article 27(2), CCP).[96] The first element of the right to be heard in international commercial arbitration is that the parties must be properly informed of the arbitral proceedings. Naturally, the first and the most important step to take in any arbitration is to inform the other party that arbitral proceedings have been commenced. Therefore, once the other party is informed that arbitral proceedings have been commenced, it will be entitled to exercise its right to be heard. The right to be heard covers not only the fact that arbitral proceedings have been commenced, but also includes claims,

[88] Roney, *supra* no 12, 58; Schneider, *supra* no 5, 416; Akıncı, *supra* no 22, 124.
[89] Heuman, *supra* no 15, 260; Blackaby, *supra* no 2, 366; Akıncı, *supra* no 22, 124; Y. Kaplan, *Milletlerarası Tahkimde Usule Aykırılık* (Procedural Violations in International Arbitration) (Ankara: Seçkin Publishing, 2002), 127.
[90] Heuman, *supra* no 15, 260.
[91] Blackaby, *supra* no 2, 366; Kaplan, *supra* no 89, 127.
[92] For detailed information as to the implementation of the right to be heard in domestic arbitrations, see: Özekes, *supra* no 82, 220.
[93] Waincymer, *supra* no 38, 16. For explanation of the connection between the right to a fair trial and the right to be heard, see: Özekes, *supra* no 82, 55 *et seq*.
[94] Waincymer, *supra* no 38, 16.
[95] Özekes, *supra* no 82, 61-62.
[96] For detailed information, see: Özekes, *supra* no 82, 85 *et seq*.

evidence and legal grounds concerning the lawsuit.[97] Similarly, the right covers the parties' entitlement to be informed of the arbitral proceedings.[98]

Another element of the right to be heard is the right to make explanations/declarations. In this respect, the right to be heard includes the provision of sufficient time period for the submission of a defence,[99] enabling the parties to submit to the arbitral tribunal the evidence supporting their claims and defences,[100] and the right to submit to the arbitral tribunal the factual and legal grounds relating to the lawsuit before the award is rendered.[101] The right to be heard also includes the right of a representative, acting on behalf of one of the parties, to perform its duties and participate in the proceedings.[102] Finally, it should be noted that this right should be strictly observed without examining whether or not it has an effect on the outcome.

The right to be heard must be observed at every stage of the arbitral proceedings. Matters such as the submission of factual and legal issues, the language of arbitration and the collection of evidence are matters that are important in respect of the right to be heard. For instance, the right to be heard may be violated depending on whether or not the parties were provided with the opportunity to participate during the stage where an expert report was being obtained.[103] In the event the evidence is being collected for the assistance of a national court, the parties also have a right to participate with respect to this phase.[104]

The third element of the right to be heard is that explanations and declarations made by the parties must be properly evaluated and considered by the arbitral tribunal.[105] However, the inaccurate evaluation of evidence does not of itself constitute a breach of the right to be heard. This is because, in principle, evaluation of a case falls within the boundaries of the arbitral tribunal's discretion. However, the right to be heard may be violated in circumstances where the arbitral tribunal disregards a fact or evidence by a blatant error, and the agreed party clearly establishes that such is the case.[106]

For a violation of the right to be heard to result in the setting aside of an arbitral award, the issue of whether or not the violation effected the outcome of the dispute should be considered. Violation of the right to be heard may, in some cases, result in the setting aside of the award regardless of whether or not it had an effect on the outcome. This is primarily because the right to be heard forms part of the rules of public policy relating to the law of procedure. The underlying reasoning behind this is that public policy not only protects the parties, it also protects the integrity of the arbitral proceedings.[107] This view has been adopted by most legal systems in Continental Europe. The German and Swiss courts have accepted that a violation of the right to be heard is a ground for setting aside of the award, regardless of whether or not such violation had an effect on the outcome. According to Article V(1)(b) of the New York Convention, it is sufficient for a party to establish that the right to be heard was violated; the aggrieved party is not under an obligation to prove that had the right not been violated, the award would have been in his favour.[108]

The right to be heard does not require the suspension of the arbitral proceedings where such proceedings are not attended by one of the parties, provided that such party was informed of the arbitral proceedings and was provided the opportunity to submit its claims and evidence. However, the arbitral tribunal may not render an award in favour of the participating party without evaluating the legal and factual grounds submitted.[109]

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[97] Böckstiegel, *supra* no 14, 37-38; Schneider, *supra* no 5, 412; Pekcanıtez, *supra* no 80, 393.
[98] Kaplan, *supra* no 89, 119.
[99] Böckstiegel, *supra* no 14, 37-38; Schwarz, *supra* no 42, 426.
[100] Schwarz, *supra* no 42, 429.
[101] Böckstiegel, *supra* no 14, 37-38; Schneider, *supra* no 5, 412.
[102] Böckstiegel, *supra* no 14, 38.
[103] Poudret, *supra* no 15, 479.
[104] Schwarz, *supra* no 42, 430.
[105] Özekes, *supra* no 82, 156.
[106] Poudret, *supra* no 15, 478.
[107] Schwarz, *supra* no 42, 442.
[108] Gaillard, *supra* no 34, 987.
[109] Roney, *supra* no 12, 58.

§5.02. PLACE OF ARBITRATION

[A] Importance of the Place of Arbitration

The determination of the place of arbitration carries vital importance. This is primarily because of the fact that *lex arbitri* is the law of the place of arbitration.[110] The principle of territoriality has wide support[111] and, in both theory and in practice, the place of arbitration is taken into account when determining the *lex arbitri*.[112] Although under Turkish law there were different doctrinal opinions in reliance upon court of appeal decisions,[113] following the enactment of the IAL the principle of territoriality is considered as the primary principle in the determination of the scope of application of the IAL.[114] In doctrine it is asserted that, in parallel with the provision contained in Article I(1) of the New York Convention, the interpretation of Article 1(2) of the IAL, which permits the parties and the arbitral tribunal to apply the IAL even where the place of arbitration has not been expressed as a place in

[110] Turner, *supra* no 10, 114.

[111] Poudret, *supra* no 15, 84; Kaufmann-Kohler, *supra* no 3, 338.

[112] Blackaby, *supra* no 2, 180. 'The *lex arbitri* is the *lex loci arbitri*': W.W. Park, *Arbitration of International Business Disputes* (New York: Oxford University Press, 2006), 159.

[113] Under Turkish law it was generally accepted that when determining the *lex arbitri*, the procedural law criteria was to be applied (Court of Appeal General Legal Assembly, Date: 7 November 1951, File No: 1951/126, Decision No: 1951/109). The Court of Appeal has decided in this decision that 'an arbitral award rendered pursuant to the authority of a foreign law' will be deemed foreign [translated by the chapter authors]: Z. Akıncı, *Milletlerarası Ticarî Hakem Kararları ve Tenfizi* (International Commercial Arbitral Awards and their Enforcement) (Ankara: Dokuz Eylül University Publications, 1994), 10. In parallel with this decision, Turkish scholars have mostly accepted the procedural law criteria. For decisions where the Court of Appeal has applied the procedural law criteria, see: Erol Ertekin & İzzet Karataş, *Uygulamada İhtiyarî Tahkim ve Yabancı Hakem Kararlarının Tenfizi Tanınması* (Voluntary Arbitration and the Recognition and Enforcement of Foreign Arbitral Awards in Practice) (Ankara: Yetkin Publishing, 1997), 430-461. Although the procedural law criteria was applied by the Court of Appeal until 1976, the principle of territoriality was applied by the 15th Civil Division of the Court of Appeal in the famous decision known as the Keban Dam Decision (*Keban Barajı Kararı*) (15th Civil Division of the Court of Appeal, Date: 10 March 1976, File No: 1975/1617, Decision No: 1976/1052). This decision has, however, also been criticized in doctrine: R. Koral, *Hakemliğin Milliyeti ve Yargıtay XV Hukuk Dairesinin 1976 Tarihli Kararının Eleştirisi* (Nationality of Arbitration and Criticisms of the 15th Civil Division of the Court of Appeal's 1976 Dated Decision) (Istanbul, 1979), 419. According to a view, the Court of Appeal did not derogate from the procedural law criteria but rather considered the place of arbitration as a subsidiary criteria since the nationality of the arbitral award could not be determined in light of the procedural law criteria: S. Üstündağ, 'Yabancı Hakem Kararlarının Türkiye'de Tanınması ve Tenfizi (The Recognition and Enforcement of Foreign Arbitral Awards in Turkey)', in *II: Tahkim Haftası* (2nd Arbitration Week) (Ankara: 1983), 15. The Court of Appeal decisions rendered after 1976 have stated once again that the procedural law criteria is to be applied: Ertekin, *supra* no 113, 467; Çelikel, *supra* no 77, 678; B. Şit, *Kurumsal Tahkim ve Hakem Kararlarının Tanınması ve Tenfizi* (Institutional Arbitration and the Recognition and Enforcement of Arbitral Awards) (Ankara: İmaj Publishing, 2005), 187. Another view, which predominantly supports the procedural law criteria, is that the place of arbitration criteria shall be used as a secondary criteria to be used only where the procedural law criteria proves insufficient: Nomer, *supra* no 22, 65; Çelikel, *supra* no 77, 679; Akıncı, *supra* no 113, 13; 15th Civil Division of the Court of Appeal, Date: 19 December 1985, File No: 1985/7355, Decision No: 1985/7099. For the decision see, Ata Sakmar, Nuray Ekşi & İlhan Yılmaz, *Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun Mahkeme Kararları* (Court Decisions on the Law on International Private Law and Procedural Law) (Istanbul: Beta Publishing, 2001), 367-368. In accordance with these views, an arbitral award rendered pursuant to Turkish procedural rules is deemed a Turkish (domestic) arbitral award. In general, it is accepted that it would be sufficient for the mandatory provisions of the Turkish procedural law to be complied with: Çelikel, *supra* no 678; Şit, *supra* no 113, 184-186; E. Nomer, *Devletler Hususî Hukuku* (International Private Law) (Istanbul: Beta Publishing, 2013), 537.

[114] Özel, *supra* no 22, 61; Akıncı, *supra* no 22, 127-128. Şanlı, *supra* no 22, 265: 'The determination of the place of arbitration as Turkey means that the arbitration is to be subject to the [IAL]. In this respect, the expression of the place of arbitration as Turkey is a connecting factor and these arbitrations are considered as seated in Turkey. Accordingly, the [IAL] becomes mandatorily applicable (*Lex Loci Arbitri*) to arbitrations containing a foreign element and seated in Turkey.' [translated by the chapter authors]. However, the same scholar has expressed that the application of the principle of territoriality is not mandatory and that if the parties have expressly or impliedly declared that they do not wish to be bound by the IAL, it would not be possible to speak of the IAL as being the *lex arbitri*: Şanlı, *supra* no 22, 265. See also, Özdemir Kocasakal, *supra* no 79, 361. However, in our opinion the place of arbitration as the connecting factor is mandatory in the determination of the *lex arbitri* and the parties may not contract out of the mandatory provisions of the regulations of the place of arbitration. The mandatory nature of the place of arbitration as a connecting factor rests upon the identification of the powers of local courts in relation to the review of arbitral awards. The parties cannot, by way of contract, agree that the place of arbitration shall be accepted as being located in another state without transferring the place of arbitration to another state.

Turkey, permits a conclusion that the *lex arbitri* may be determined as being Turkish law as a result of party intent, even where the place of arbitration has not been agreed upon as Turkey (procedural law criteria).[115]

The court of appeal's recent decisions, however, afford priority to the place of arbitration when making a determination. The Court of Appeal General Legal Assembly, in one of its decisions, expressed that where an arbitral award is rendered in a foreign state, the award should be deemed a foreign arbitral award.[116] The place of arbitration generally and historically refers to a territorial connection.[117] However, it is presently accepted that the place of arbitration is a legal concept and not a geographical concept. In other words, the place of arbitration creates a connection between the arbitration and a legal system.[118]

In the determination of the place of arbitration, legal fictions are benefited from as opposed to geographical and physical criteria.[119] In accordance with this view, there is no need for a physical or geographical connection between the place of arbitration and the place where the arbitration activities are performed. In other words, the place of arbitration may be different from the place where the arbitrators perform their functions or where the hearings are held.[120] For instance, it is possible for the arbitral tribunal to have the following activities performed at a place other than the place of arbitration: witness examinations; site visits; and negotiations when rendering the award. In such cases, the place of arbitration will not be deemed to have been changed. In fact, this has been expressly stated in Article 9(2) of the IAL. The IAL accepts that the arbitral tribunal may meet at a place other than the place of arbitration, provided the parties are properly notified. Even though the IAL refers to the meeting of the arbitral tribunal, there is no doubt this provision is applicable to cases where the activity requires party participation.[121] Further, the IAL shall not be interpreted as imposing an obligation on the arbitral tribunal to notify the parties of meetings attended by the members of the arbitral tribunal alone.[122]

The arbitral tribunal may perform their duties at a place other than the place of arbitration only where the parties have been notified of such fact. The notification must be made within a reasonable period prior to the performance of such duties.[123] The IAL does not require the arbitral tribunal to obtain the parties' permission and consent on this matter.[124] However, the arbitral tribunal's decision on this issue must not be arbitrary and must be founded upon necessity and reasonableness. This is primarily due to the fact that performing trial activities at a place other than the place of arbitration may affect the parties' right to be heard, and such may lead to the setting aside of the arbitral award. For instance, examination of witnesses at the place of domicile of the witnesses or the reduction of trial costs may be accepted as justifiable reasons.

In practice, arbitral tribunals determine certain disputes upon examination of the evidence alone without holding a hearing, provided the nature of the dispute does not require a hearing to be held. In addition, in most

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[115] Özel, *supra* no 22, 61-62; Akıncı, *supra* no 22, 57.

[116] Court of Appeal General Legal Assembly, Date: 8 February 2012, File No: 2011/13-568, Decision No: 2012/47: 'Even though there are different opinions in doctrine regarding the determination of whether or not an arbitral award is domestic or foreign, termed as "law under which it is rendered" and "territoriality", since Article I of the New York Convention expresses that "[t]his Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal", the said Convention clearly accepts the "territoriality" principle. It should be accepted that arbitral awards that are rendered outside Turkey are "foreign arbitral awards".' (<www.kazanci.com>, August 2014) [translated by the chapter authors].

[117] Akıncı, *supra* no 113, 10.

[118] Petrochilos, *supra* no 44, 22; N. Deren-Yıldırım, *Milletlerarası Tahkimin Esaslı Sorunları* (Fundamental Problems of International Arbitration) (Istanbul: Alkım Publishing, 2004), 94. The place of arbitration shall not be understood as the place where hearings are held. Hearings may be held in different country(ies) than the place of arbitration. The UNCITRAL Model Law (Article 16), ICC Rules of Arbitration (Article 18) and the London Court of International Arbitration's (LCIA) Arbitration Rules (Article 16) accept that hearings may be held at a place other than the place of arbitration: Blackaby, *supra* no 2, 181-183.

[119] Özel, *supra* no 22, 61; Sentner, *supra* no 7, 161; Akıncı, *supra* no 22, 126, 128; M. Birsel, *Milletlerarası Tahkimde Tahkim Yerinin Seçiminin Önemi* (The Importance of the Place of Arbitration Selection in International Arbitration) (Ankara: International Arbitration Seminar, 2003), 65; Ekşi, *supra* no 22, 333.

[120] Kalpsüz, *supra* no 22, 40.

[121] *Id*.

[122] Akıncı, *supra* no 22, 171.

[123] *Id*.

[124] Kalpsüz, *supra* no 22, 40.

cases, it may be unnecessary and inefficient in the financial sense for the arbitrators to travel to the place of arbitration and render their award at the place of arbitration. In such cases, it is sufficient for the arbitral tribunal to express in its award that the award was issued at the seat of arbitration; it is therefore not under an obligation to physically render the award at the place of arbitration.[125]

[B] Determining the Place of Arbitration

The IAL provides that the place of arbitration may be freely determined by the parties or an arbitral institution selected by the parties. In the event the parties have agreed upon an institutional arbitration, the place of arbitration may be determined by the institution in accordance with its rules of arbitration. Where the parties have not agreed upon the place of arbitration, the place of arbitration is to be determined by the arbitral tribunal having regard to the specifics of the case (Article 9(1), IAL). In practice, it is very rare to come across arbitration agreements whereby the parties have not agreed upon the place of arbitration. It is usually among the several points/matters that are made express in the arbitration agreement. In fact, model arbitration clauses of well-established and widely used arbitral institutions advise that the arbitration clause/agreement explicitly state the place of arbitration. This is ultimately due to the fact that the failure to do so is likely to cause ambiguities, uncertainties and, most of all, delay in the conclusive resolution of the dispute; it may in fact lay the groundwork for the setting aside of the award.

As noted above, in the absence of an agreement, the arbitral tribunal is to determine the place of arbitration having regard to the 'specifics of the case'. The efficient conducting of arbitral proceedings depends ultimately on the provisions of the procedural laws of the place of arbitration regarding arbitration. In the event the procedural laws of the place of arbitration contain provisions that will assist the arbitral tribunal in conducting the arbitral proceedings, the arbitral proceedings can be conducted more efficiently. Despite the fact that arbitral tribunals possess the jurisdiction to issue interim measures, arbitral tribunals lack the power to enforce such orders or the power to forcefully enter a property, and thus require the assistance of national courts.[126]

As mentioned above, in international arbitration practice, parties and arbitral tribunals generally agree upon a country as the place of arbitration if they have the opinion that the arbitral proceedings can be efficiently carried out. The reasons that may ensure the efficient conduct of arbitral proceedings may be factual or legal. For instance, the law of the place of arbitration and the attitude of the local courts of the place of arbitration as to arbitration are considered legal reasons.[127] Similarly, an important element that can be taken into account when determining the place of arbitration is whether or not the state of the place of arbitration is a member to the New York Convention.[128] Conditions such as the availability of travel and accommodation, and human resources at the place of arbitration, may also be considered when determining the place of arbitration.[129]

§5.03. ARBITRAL PROCEEDINGS

[A] Commencing the Lawsuit

(1) Date of commencement

A party who intends to resort to arbitration for the resolution of a dispute by reliance upon an arbitration agreement or an arbitration clause should state in its request for arbitration the nature of the dispute, the grounds giving rise to the dispute and the relief sought. This has been expressed in Article 10A(1) with the words 'the request for the resolution of the dispute through arbitration'. Despite the fact that the IAL contains no express provision as to matters that must exist in the request for arbitration, the existence of a declaration regarding the relief sought is

[125] Akıncı, *supra* no 22, 171-172.
[126] Yeşilırmak, *supra* no 22, 105-106. It should be noted, however, that arbitral interim measures are enforceable under the CCP (see, Article 414(2)).
[127] Birsel, *supra* no 119, 65.
[128] *Id*, 69.
[129] *Id*, 65.

deemed sufficient, and it is not deemed mandatory for the factual and legal grounds to be explained in the request for arbitration.[130]

The IAL regulates the date on which the claim is deemed commenced (Article 10A(1)) and the date on which the arbitration period begins to run (Article 10B(1)) differently. The date on which the claim is commenced is important with respect to time limitations (statue of limitations), the preservation of final time limitations after which the right ceases to exist (*hak düşürücü süre* in Turkish) and the preservation of interim measures.[131] In particular, in the event an interim measure is requested from the court and the request is granted, the party requesting the interim measure is under an obligation to commence arbitral proceedings within 30 days in order for the interim measure to continue to have effect (Article 19A(2)).

With respect to the commencement of the arbitration, the IAL lays down a more detailed provision compared to the UNCITRAL Model Law. The Model Law expresses that the dispute will be deemed to have commenced on the date the defendant receives the request for arbitration. The IAL, on the other hand, provides that, unless otherwise agreed, arbitral proceedings are commenced on the following dates:

- the date an application is made to the competent court or to the person or the arbitral institution determined by the parties as being responsible for the appointment of the arbitrator;
- where the parties are to appoint the arbitrators, the date the claimant notifies its appointment to the defendant;
- where the arbitrators are agreed upon by name in the arbitration agreement, the date the defendant receives the request for arbitration.

(2) Arbitration period

(a) Issuance of the award within the arbitration period

The arbitration period constitutes the maximum period within which the arbitral tribunal must render its award. Neither the UNCITRAL Model Law nor legal systems that have adopted the Model Law, nor legal systems that have not adopted the Model Law (i.e. Switzerland), contain a provision on this matter. Article 10B(1) of the IAL, on the other hand, foresees an arbitration period that can be modified by the parties.

The principle of party autonomy applies also to the determination of the arbitration period; the parties are entitled to determine the arbitration period at their will. The parties may agree upon a longer or shorter period of time in the agreement.[132] There are different views in Turkish doctrine, which express, on the one hand, that expressions such as 'within the time required to resolve the dispute', which foresee an undeterminable time period, will be invalid,[133] and that, on the other hand, the parties are entitled to refrain from expressing any time period.[134] However, the determination of the period of arbitration in an undetermined manner is rejected in Turkish law on the basis that the requirement that disputes must be resolved within a certain period of time is a matter that

[130] Deren-Yıldırım, *supra* no 118, 97.

[131] Kalpsüz, *supra* no 22, 65; Akıncı, *supra* no 22, 172.

[132] Kalpsüz, *supra* no 22, 66; Akıncı, *supra* no 22, 178. The 15th Civil Division of the Court of Appeal (Date: 13 December 2010, File No: 2010/4287, Decision No: 2010/6858 (<www.kazanci.com>, August 2014)) expressed this rule with the following expression: 'The parties have agreed in Article 25.1 of their agreement dated 23 September 2008 and numbered ELB-W2 that "[t]he Arbitrator must render its written award within 28 days as of receipt of the notice relating to the dispute"; thus, the arbitration period has been expressed as 28 days. It must be accepted that the notice relating to the dispute was received by the arbitral tribunal on 23 September 2009, the date on which the first meeting was held by the arbitral tribunal. However, despite this provision, the award was rendered on 14 January 2010, much later than the 28 day period agreed upon. In such a case, the dispute must be resolved by the general state courts since the arbitration period was not extended and the award was rendered following the expiration of the arbitration period thereby leading one to conclude that the arbitration clause between the parties is ineffective and that the arbitral tribunal no longer possesses the jurisdiction to resolve the dispute. The arbitral award must therefore be set aside.' [translated by the chapter authors].

[133] Kalpsüz, *supra* no 22, 66.

[134] B. Yeşilova, *Milletlerarası Ticarî Tahkimde Nihai Karardan Önce Mahkemelerin Yardımı ve Denetimi* (The Courts' Assistance and Review Before Final Awards in International Commercial Arbitration) (Izmir: Güncel Hukuk Publishing, 2008), 376-378.

concerns public policy.[135] The provisions contained in both the IAL (Article 10B(1)) and the CCP (Article 427) regulate the need to comply with the arbitration period in a mandatory manner. The legislator's purpose here is to ensure that arbitral proceedings are brought to an end in a certain period of time, and therefore not unreasonably delayed for long periods of time. In fact, one of the grounds under the IAL for the setting aside of the award is that the arbitral tribunal has failed to render the award within the applicable time period.[136] If the arbitral award is set aside for this reason, the dispute can no longer be resolved through arbitration. All activities undertaken by the arbitral tribunal would become invalid.[137] Consequently, the parties have been provided with the entitlement to shorten or extend the arbitration period, but they have not been equipped with the power to make this period undeterminable.

In the event the agreement entered into between the parties contains no express provision regarding the arbitration period, but makes reference to the rules applicable to the arbitration procedure, it should be accepted that an agreement exists between the parties. In such a case, the arbitration period expressed in the procedural rules agreed upon by the parties shall be applicable. For instance, in the event the parties have agreed upon the application of the ICC Rules of Arbitration, it should be deemed that the arbitration period has been agreed upon by the parties as being six months (see, Article 30).[138]

The IAL provides that unless otherwise agreed by the parties, the arbitration period is one year (Article 10B(1)). It should be noted that this requirement is a peculiarity of Turkish law, the ultimate aim of which is to ensure a speedy resolution of the dispute and to preserve the court's review over arbitral proceedings. However, it may in fact transpire to be extremely cumbersome in certain cases, particularly with respect to cases of extreme complexity. It also requires the direction of unnecessary time and effort by party counsels to ensure that the arbitration period is adhered to or, where that appears unlikely, extended. Although parties are at liberty to agree upon a longer period of time when executing the relevant agreement, it is extremely rare in practice. The very reason why prenuptial agreements are rare to come across applies equally with respect to arbitration clauses/agreements; the last thing parties wish to think is the idea of their investment going sour. However, an experienced draftsman is advised to consider all possible scenarios when drafting an arbitration clause/agreement and take precautions accordingly. Otherwise, a ground for the setting aside of the award may surface. The fact that once an award is rendered after the expiration of the arbitration period the award and the arbitration agreement become null and void, and that the dispute would thereafter have to be heard by the domestic courts, should be kept in mind at all times.

(b) Commencement of the arbitration period

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[135] Kalpsüz, *supra* no 22, 67; Akıncı, *supra* no 22, 179. The 15th Civil Division of the Court of Appeal (Date: 16 April 1997, File No: 1997/1447, Decision No: 1997/2163 (<www.kazanci.com>, August 2014)) expresses this with the following words: 'Article 10 of the agreement executed by the parties dated 10 October 1990 which concerns arbitration provides that "[t]he arbitral tribunal's decision shall be final and the dispute shall be resolved within 30 days as of the date of the first meeting". In fact, it is possible for the parties to shorten or extend the 6 month time period expressed in Article 529 of [Law No. 1086] within the limits of the principle of party autonomy, provided that the extension of the time period is not made in a manner which deems the period undeterminable' [translated by the chapter authors]. For additional Court of Appeal decisions and the fact that this interpretation is equally applicable to arbitrations conducted pursuant to the IAL, see: Kalpsüz, *supra* no 22, 67-68; Yeşilova, *supra* no 134, 377.

[136] Article 15A(2)(1)(c), IAL. In fact, the Kadıköy (Anadolu) 2nd Civil Court of First Instance (Date: 31 May 2011; File No: 2011/11; Decision No: 2011/247 (unpublished)) set aside an ICC award on the ground that the award was not rendered within the applicable period; 6 months under the ICC Rules of Arbitration. The first instance decision was overruled by the 11th Civil Division of the Court of Appeal (Date: 15 March 2012; File No: 2012/2110; Decision No: 2012/3915 (unpublished)), but on different grounds. What this case demonstrates is that the extension of the arbitration period is crucial and parties must, where the arbitration is administered by an institution and the institution is granted the power to extend the arbitration period, follow the matter closely and ensure that the relevant steps are being taken by the institution so as to avoid the drastic consequences that arise from failure to comply with the relevant provision. An application to the court for the extension of the arbitration period should be considered if the alternatives appear unlikely to produce results and such course of action appears most appropriate in the circumstances. For an analysis of the decision, see: D. Gültutan, İ.G. Esin & A. Yeşilırmak, 'Awards subject to Turkey's International Arbitration Law must be rendered before the expiration of applicable time limits or risk being set aside', *IBA Arbitration News* 18/1 (February 2013): 43.

[137] Akıncı, *supra* no 22, 179; Kalpsüz, *supra* no 22, 67.

[138] Yeşilova, *supra* no 134, 377; Esin, *supra* no 136.

The parties may agree upon the date on which the arbitration period shall start to run. In such a case, the arbitration period will start to run as of the date agreed upon (Article 10B(1)). Similarly, where the parties have incorporated institutional arbitration rules by reference, the date expressed in the said rules of arbitration should be taken into account. For instance, in the event the parties have agreed upon the application of the ICC Rules of Arbitration, the arbitration period will start to run on the date of the last signature by the arbitral tribunal or by the parties of the terms of reference (Article 30(1)).

In the absence of an agreement between the parties as to the arbitration period, the award as to the substance of the dispute must be rendered 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)). In arbitrations with a sole arbitrator, the time period shall start to run on the following dates: where the sole arbitrator has been determined by the parties, on the date the offer is made to the sole arbitrator; where the sole arbitrator's appointment is left to an institution, on the date the sole arbitrator is appointed by the said institution; where the sole arbitrator is appointed by the court in the event of party disagreement, on the date the sole arbitrator is appointed by the court.[139] However, it is asserted in doctrine that where a sole arbitrator is to be appointed, the arbitration period shall start to run from the moment the sole arbitrator accepts the offer made by the parties, or the date on which the court notifies the sole arbitrator as to its appointment, and the arbitrator does not object to this appointment. As noted above, where more than one arbitrator is to be appointed, the arbitration period shall commence to run as of the date the arbitrators draft their first minutes of meeting.

(c) Extension of the arbitration period

In light of the fact that the subject matter of a dispute may be complex and large in scope, it may be possible for the arbitral proceedings not to be completed within the time period foreseen by the IAL or by the parties. In such cases, the need to extend the arbitration period arises. According to Article 10B(2), the arbitration period may be extended by party agreement or, in the event such an agreement cannot be reached between the parties, by the competent court. First, it should be noted that the parties are permitted to agree upon the extension of the arbitration period. It is expressed in doctrine that such an agreement may be executed by way of amending the arbitration agreement, drafting a document during the hearing whereby the parties agree to the extension of the arbitration period or by way of exchange of letters.[140] Like the arbitration period, the extension should be determinable. Agreements to extend the arbitration periods that are indeterminable are invalid.[141]

In the event the parties fail to agree upon the extension, the arbitration period may be extended by the court of first instance upon an application by either party (Article 10B(2)). According to Article 3, the competent court is the civil court of first instance (*asliye hukuk mahkemesi* in Turkish) 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 (*İstanbul Asliye Hukuk Mahkemesi* in Turkish). However, Article 5(3) of the Law on the Formation, Duties and Powers of Civil Courts of First Instance and District Courts, which was amended by the Law Regarding the Amendment of the Turkish Penal Code and Other Codes on 18 June 2014, now provide that the commercial court of first instance (*asliye ticaret mahkemesi* in Turkish) is the competent court with regards to matters regarding arbitration procedures conducted pursuant to the IAL and the CCP (in particular, disputes concerning arbitration objections, set aside lawsuits, appointment and challenge of arbitrators and the recognition and enforcement of foreign arbitral awards).[142]

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[139] Akıncı, *supra* no 22, 176; Kalpsüz, *supra* no 22, 69.

[140] Kalpsüz, *supra* no 22, 70; Akıncı, *supra* no 22, 180. It should be emphasised that the requirement of special authority to execute an arbitration agreement may be held to be equally applicable to amendment made to such agreements: see, Chapter 3 for more information on the special authority to represent requirement.

[141] Kalpsüz, *supra* no 22, 70; 15th Civil Division of the Court of Appeal, Date: 16 April 1997, File No: 1997/1447, Decision No: 1997/2163 (<www.kazanci.com>, August 2014). For same result in domestic arbitration, see: B. Umar, *Hukuk Muhakemeleri Kanunu Şerhi* (Annotation of the Code of Civil Procedure) (Ankara: Yetkin Publishing, 2011), 1177. For a different view, see: Yeşilova, *supra* no 134, 381.

[142] Law on the Formation, Duties and Powers of Civil Courts of First Instance and the District Courts, Law No. 5235 of 26 September 2004, published in the Official Gazette Numbered 25606 and dated 7 October 2004 (Law No. 5235), amended by the Law Regarding the Amendment of the Turkish Penal Code and Other Codes, Law No. 6545 of 18 June 2014, published in the Official Gazette Numbered 29044 and dated 28 June 2014 (Law No. 6545). It should be reminded that

The party who wishes to have the arbitration period extended must, within the arbitration period, make a request for extension. Since following the expiration of the arbitration period the arbitration agreement will cease to exist, the court cannot extend the arbitration period where an application is made after the expiry of the arbitration period.[143]

The IAL contains no express provision as to whether or not the decision regarding the extension of the arbitration period shall be made upon examination of the documents alone or following the holding of a hearing, having heard the counterparty's objections, if any. In light of the fact that a refusal of the request for extension carries with it heavy consequences, there are scholars who argue that the counterparty should be heard on whether or not the request was made in time, the request relies upon valid reasons and the requested extension is appropriate under the circumstances.[144] However, the circumstances of the case may deem it justifiable for the court to render its decision where the examination of the documents alone appears sufficient. The court's decision regarding the time extension is final (Article 10B(2)).

In the event the court rejects the applicant's request for time extension, the arbitral proceedings will come to an end following the end of the arbitration period (Articles 10B(2) and 13B(1)(iv)), and the arbitrators' jurisdiction to resolve the dispute will cease to exist (Article 13B(2)). In accordance with these provisions, all acts and transactions undertaken by the arbitral tribunal following the expiration of this time period or all decisions rendered thereafter will be invalid. Consequently, refusals of requests for the extension of arbitration periods produce fatal results for the parties and the arbitral tribunal. The arbitrators may in fact be held liable for failing to resolve the dispute within the time period due to intentional acts or negligence (Article 506, Code of Obligations).[145]

In the event one of the parties to the arbitral proceedings loses its party status, the arbitral tribunal should postpone the arbitral proceedings and notify such postponement to the parties. The arbitration period will not continue to run during this period (Article 11B(1)). According to Article 11B(2), unless a notification is made within the six-month period, or the parties to whom notification is made do not expressly inform the other party or the arbitral tribunal of their intention to continue the arbitral proceedings, the arbitral proceedings will come to an end.

[B] Language of Arbitration

Article 10C(1) of the IAL provides that the arbitral proceedings may be conducted in Turkish or in the official language of a foreign state that is recognised by the Republic of Turkey. Therefore, it is possible for the language of arbitration to be a language other than Turkish. This provision therefore permits the selection of a language that is most appropriate in light of the specifics of the case at hand. The only restriction imposed by the IAL is that the

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the relationship between the civil court of first instance and the commercial court of first instance is one of competence (*görev ilişkisi* in Turkish) and not of the division of workload (*iş bölümü ilişkisi* in Turkish) (Article 5(3), TCC) - the latter requiring party assertion whereas the former is to be considered by the court of its own motion (*ex officio*). Thus, it is important that the request is made to the competent court. For an explanation on the difference between competence and jurisdiction under Turkish law and the practical consequences of non-compliance, see: Pekcanıtez, *supra* no 80, 138-200.

[143] Kalpsüz, *supra* no 22, 71; Akıncı, *supra* no 22, 181; Yeşilova, *supra* no 134, 390. The 15th Civil Division of the Court of Appeal (Date: 4 March 1976, File No: 1975/5159, Decision No: 1976/920 (<www.kazanci.com>, August 2014)) held that: 'Time extension requests in arbitration shall be made before the time period expires; the application should be made on the last day of the arbitration period by the latest (Prof. Dr. Baki Kuru, Hukuk Muhakemeleri Usulü (Law of Civil Procedure), 1968, 749, fn. 114; Rasih Yeğengil, Tahkim (Arbitration), 1974, 312; Court of Appeal Commercial Division, Date: 3 June 1958, File No: 874, Decision No: 1529; İsmail Doğanay, Türk Ticaret Kanunu ve Tahkim Müessesesi (The Turkish Commercial Code and Arbitration), 1964, 802-803). Otherwise, the arbitration agreement will cease to exist. A request for the extension of the arbitration period following the expiration of the said period, after which the arbitration period ceases to exist, cannot grant validity to an otherwise invalid arbitration agreement. In such a case, the court should refuse the request for extension. However, even where the court grants the request for extension, such decision will not have an effect. All acts and transactions undertaken following the expiration of the arbitration period are null and void and the dispute must thereafter be resolved by the courts [Law No. 1086].' [translated by the chapter authors]. This decision is valid in light of current legislation.

[144] Akıncı, *supra* no 22, 181.

[145] Kalpsüz, *supra* no 22, 73.

language of arbitration must be the official language of a state that is recognised by the Republic of Turkey. In the event the language chosen is the language of a state not recognised by the Republic of Turkey, or which is not the official language of the state recognised, such language cannot be agreed upon as being the language of arbitration.

First, the IAL has provided the parties with party autonomy when it comes to the selection of the language of arbitration. The parties are freely entitled to determine the language of arbitration. There is no requirement as to the form of the agreement relating to the choice of the language of arbitration; the parties may agree upon the language of arbitration by way of express or implied declarations of intent. The parties may reach such an agreement either at the stage of execution of the arbitration agreement or during the arbitral proceedings once arbitration has been resorted to.[146] Parties should bear in mind the cost and effort of translating documents when determining the language of arbitration, particularly the cost of having each exhibit officially approved by the notary public upon court order before being able to submit it to the court (Article 223(2), CCP). In the event it transpires that one or more of the arbitrators do not know the language of arbitration, such arbitrators should resign and pave the way for the appointment of arbitrators who may properly conduct the arbitral proceedings.[147]

The parties may also determine that the arbitration is to have more than one language. It is possible in international arbitration practice for the parties to agree, for the purpose of reducing the costs of arbitration and for the purpose of making the proceedings more convenient for the parties, that all statements and evidence submitted to the arbitral tribunal by the parties and their representatives are to be submitted in the parties' own language or in the language the documents were originally drafted.[148] For instance, the parties may agree that the documents are to be submitted in their original form, but that the hearings are to be held in Turkish. However, where an application is to be made to the local courts, the mandatory provisions of the CCP will apply (Articles 223 and 224). In such cases, all documents submitted to the Turkish courts must be translated into Turkish.

In the absence of an agreement between the parties as to the language of arbitration, the language of arbitration is to be determined by the arbitral tribunal (Article 10C(1)). In determining the language of arbitration the arbitral tribunal shall refrain from violating the principle of equal treatment and the right to be heard. With the exception of these mandatory provisions, there is no express provision in the IAL as to how the arbitral tribunal is to determine the language of arbitration, and what factors shall be taken into account when making such determination. In doctrine it is expressed that the arbitral tribunal, when determining the language of arbitration, shall take into account matters such as the nationality of the parties and the arbitrators, the language in which the documents relating to the dispute were drafted and the language used between the parties in the commercial relationship.[149]

The language of arbitration determined by the parties or the arbitral tribunal, unless otherwise agreed by the parties or determined by the arbitral tribunal, applies to all written statements, hearings, all interim orders and final orders, and to all other written communications (Article 10C(1)). In international arbitration, party representatives shall submit all their written and verbal declarations in the language of arbitration. Declarations that are made by the parties and their representatives in a language other than the language of arbitration may be disregarded by the arbitral tribunal.[150] Although the use of translators by legal representatives is theoretically possible, it appears difficult in practice. Thus, it is advisable for parties to instruct lawyers who have knowledge of the language of arbitration so as to avoid such impracticalities. With regards to witnesses who do not possess the required knowledge of the language of arbitration, the use of translators should not pose such a difficulty.[151]

The arbitral tribunal may order that all documents submitted by the parties during the arbitral proceedings shall be submitted in the language of arbitration or translated to the language of arbitration (Article 10C(2)). The cost of translating the documents into the language of arbitration, following such an order by the arbitral tribunal, can be considered part of the trial costs pursuant to Article 16B(2)(iii). However, it is not a requirement that

[146] Sachs, *supra* no 34, 307-308; Akıncı, *supra* no 22, 185.
[147] Sachs, *supra* no 34, 308.
[148] Sachs, *supra* no 34, 308; Kalpsüz, *supra* no 22, 41; Akıncı, *supra* no 22, 184; Şanlı, *supra* no 22, 279.
[149] Akıncı, *supra* no 22, 184; Sachs, *supra* no 34, 308; Deren-Yıldırım, *supra* no 118, 100.
[150] Sachs, *supra* no 34, 310.
[151] Akıncı, *supra* no 22, 186.

documents must be translated by a sworn translator and/or for such documents to be approved by the notary public.[152] Consequently, the provision in the IAL, contrary to provisions regarding the submission of documents to local courts contained in the CCP, provides that documents that are drafted in a language other than the language of arbitration do not necessarily need to be translated into the language of arbitration. This is a matter that falls within the discretion of the arbitral tribunal.[153]

[C] Representation by Lawyers

Under Turkish law, any person, whether legal or natural, may commence his/her own lawsuit and represent himself/herself in the lawsuit commenced. Such person may alternatively appoint a legal representative for the commencement and his/her representation during such lawsuit. With regards to lawsuits commenced before the local courts and before arbitrators (for domestic arbitrations), only natural persons who are registered with the relevant bar as an attorney may represent a party to the lawsuit/arbitration (Article 35(1), Attorneyship Law). It should be noted that only Turkish nationals may become a member of a Turkish Bar as an attorney (Article 3, Attorneyship Law).

Similar to representation before the local courts, parties are not under an obligation to have their case represented before the arbitral tribunal by an attorney. According to the IAL, the parties may be represented during the arbitral proceedings by foreign natural or legal persons (Article 8B(2)). Consequently, the parties may instruct foreign lawyers or scholars to represent them before the arbitral tribunal. The parties' representatives do not necessarily need to be registered with a Bar in Turkey. In fact, party representatives do not need to be a member of a Bar of a foreign jurisdiction.[154] The choice as to whom is to represent the parties is entirely within the discretion of the parties. The representative must, in any case, prove that it possesses the authority to represent.

However, Article 8B(2) of the IAL accepts that where an application is to be made to the local courts with regards to the arbitral proceedings, the said provision will not be applicable. Therefore, the provisions in the Attorneyship Law will apply in the event an application is made to the local courts.

[D] Statements of Claim and Answer

(1) Submission of the statements of claim and answer

Following the constitution of the arbitral tribunal in accordance with the applicable procedure, the parties should submit statements regarding their claims and defences to the arbitral tribunal. The rules as to procedure under which the statements of claim and answer are to be submitted by the parties during the arbitration procedure, and matters which the statements should contain, have been regulated in the IAL (Article 10D(1)). Article 10D(1) provides that the claimant is to submit its statement of claim within the period agreed upon or, in the absence of an agreement, within the period determined by the arbitral tribunal. The statement of claim is different compared to the request for arbitration, which commences the arbitral proceedings and demonstrates an intention to have the dispute resolved by arbitration. The request for arbitration is submitted before the arbitral tribunal is constituted, provided the arbitrators have not been determined in advance, whereas the statement of claim is submitted once the arbitral tribunal is properly constituted. In addition, there is a difference as to their contents.[155] With regards to the matters that must be included in the statement of claim, the IAL provides that the statement of claim should contain the name, title and address of the parties and their representatives, the arbitration clause or agreement, the agreement or the legal relationship from which the dispute has arisen or is connected to, the facts on which the claim is based, the subject matter of the dispute, the amount in dispute and the relief sought (Article 10D(1)).

[152] Deren-Yıldırım, *supra* no 118, 100.
[153] Şanlı, *supra* no 22, 279.
[154] For Swiss law to the same effect, see: Schneider, *supra* no 5, 419.
[155] Kalpsüz, *supra* no 22, 73-74.

The defendant should thereafter submit the statement of answer within the time period agreed upon or, in the absence of an agreement, the period determined by the arbitral tribunal following its receipt of the statement of claim (Article 10D(1)). The procedure as to the notification of the statements of claim and answer to the parties is to be determined pursuant to party agreement or, in the absence of party agreement, pursuant to the procedure determined by the arbitral tribunal. The defendant is to submit its answers as to both procedure and the substance in its statement of answer. In particular, the defendant may object to the arbitration agreement or the arbitral tribunal's jurisdiction. Especially, objections as to the arbitral tribunal's jurisdiction should be made in the statement of answer (Article 7H(2)). However, objections made at a later stage may be accepted by the arbitral tribunal where the objection raised at a later stage can be explained by justifiable reasons (Article 7H(4)).

Despite the fact the IAL contains no express provision on this point, in the event the defendant wishes to assert a counterclaim, it should submit its counterclaim together with its statement of answer within the time period provided for the submission of the statement of answer.[156] However, the counterclaim must also fall within the scope of the arbitration agreement. Arbitrators lack jurisdiction with regards to disputes that fall outside the scope of the arbitration agreement. This point, which has been noted with regards to counterclaims, is equally applicable to set off claims asserted by the defendant or the claimant in the counterclaim.[157] The provisions relating to statements of claim and answer are also applied to counterclaims.[158]

(2) Submission of evidence with the statements

The arbitral tribunal possesses wide discretion with regards to the time when evidence is submitted. According to Article 12B(1) of the IAL, parties must submit their evidence within the time period specified by the arbitral tribunal. The arbitral tribunal's jurisdiction is limited with the mandatory provisions of the *lex arbitri* and the arbitration procedure, and by party agreement, if any.[159] With regards to the timing of the submission of evidence, it is accepted that provisions that entitle a party to submit its evidence in a manner that enables such party to prepare its defence properly, are of the nature of mandatory provisions.[160]

In international commercial arbitration practice, it is generally accepted that a party should submit its evidence, which forms the basis of its claims or defences, together with its statement where such claims and defences are asserted. This practice has been expressly regulated in Articles 20(4) and 21(2) of the UNCITRAL Arbitration Rules. The custom and practice in international commercial arbitration is also to this effect.[161] Turkish law also provides the parties with freedom as to the submission of documents together with the statements. Article 10D(1) of the IAL provides that the parties may submit their evidence together with their statements or submit such evidence at a later stage. The expression in the IAL is not in the nature of a mandatory provision; it has been drafted in such a manner to provide the parties with an entitlement. The parties may agree that rather than the submission of the evidence, a list of the relevant evidence may be submitted.

The statements and evidence submitted with such statements must be submitted in the number of the arbitrators plus an additional spare copy. However, where there is an arbitral tribunal secretary, the number of additional copies provided should be two.[162]

(3) Assertion of additional claims and defences

In lawsuits heard by Turkish courts, the claimant is not permitted to assert additional claims after the submission of the statement of reply to answer (the second statement) (Article 141, CCP). The facts constituting the subject matter of the dispute and the relief sought are matters that fall within the prohibition. For instance, the assertion

[156] Kalpsüz, *supra* no 22, 75.
[157] Sachs, *supra* no 34, 315-316.
[158] Deren-Yıldırım, *supra* no 118, 103.
[159] Waincymer, *supra* no 38, 820.
[160] Waincymer, *supra* no 38, 821.
[161] Roney, *supra* no 12, 60.
[162] Akıncı, *supra* no 22, 187-188.

of new claims or an increase in the amount claimed is prohibited. An amendment of the legal ground(s) asserted or a reduction of the request made, however, is not within the scope of the prohibition. The prohibition against asserting additional claims and defences is accepted as a consequence of the principle of restriction (*teksif ilkesi* in Turkish).[163]

In lawsuits seen before the courts, the prohibition against asserting additional defences is also applicable to defendants. The prohibition against asserting additional defences by the defendant commences following the submission of its statement of answer to reply (Article 141, CCP). The explanations made above regarding the prohibition against asserting new claims also apply to the prohibition against asserting new defences. In contrast, the parties are permitted to assert new claims and defences, and amend such claims and defences during any stage of the arbitral proceedings unless an agreement to the contrary has been reached (Article 10D(2)). With this provision the parties are permitted to amend their claims and defences, provided an agreement has not been reached to the contrary. For instance, the claimant may assert a new claim or increase the amount claimed, when in fact such issues were not raised in the statement of claim.

There are two restrictions introduced by the IAL with regards to the assertion of additional claims and defences. The first is that an additional claim or defence cannot be asserted if the said claim or defence exceeds the scope of the arbitration agreement. Second, the additional claim or defence cannot be asserted if it is determined that such additional claim or defence is asserted at a very late stage in the proceedings, or its assertion would impose an unfair burden on the other party (Article 10D(2)). In such cases, the arbitral tribunal may not permit the assertion of additional claims or defences having regard to all relevant facts and circumstances. Thus, the arbitral tribunal has discretion when considering whether or not to permit the assertion of additional claims or defences. For instance, the arbitral tribunal may not permit the assertion of additional claims or defences in the event the assertion of additional claims and defences will cause unreasonable or incurable delay. The arbitral tribunal's task here is to undertake a balancing exercise between the parties' right to be heard, and the effects of a possible delay in the resolution of the dispute. The arbitral tribunal, when determining this matter, may take into account the reason for the delay advanced by the party asserting additional claims or defences and the burden this will have on the counterparty.[164] Similarly, if the parties have asserted additional claims or defences with no apparent reason at a very late stage of the arbitral proceedings, the arbitral tribunal may dismiss such assertion of additional claims and defences.[165] Further, where the arbitral tribunal has specified a specific time period within which additional claims and defences may be asserted, the assertion of additional claims and defences after the expiry of this period will be disregarded.[166]

[E] Terms of Reference

The terms of reference is specifically regulated by the IAL, unlike the UNCITRAL Model Law. Article 10E(1) provides that, unless otherwise agreed, the arbitral tribunal is to prepare a terms of reference following the submission of the statements of claim and answer. In the event a counterclaim is raised in the statement of answer, it would be appropriate for the terms of reference to be prepared following the submission of the answer to the counterclaim, since the arbitrators must be aware of all claims and defences when drafting the terms of reference.[167] In practice, parties and the arbitral tribunal in international arbitration attend a meeting and hold a hearing for the execution of the terms of reference, despite there being no obligation under the IAL or the ICC Rules of Arbitration to that effect. The first occasion on which the parties and the arbitral tribunal attend a meeting in a substantive manner is either for the execution of the terms of reference or the conducting of a pre-hearing.[168]

Unless otherwise agreed, the arbitral tribunal must prepare a terms of reference. In the absence of an agreement to the contrary, the failure of the arbitral tribunal to prepare a terms of reference will constitute a breach of the

[163] Pekcanıtez, *supra* no 80, 554.
[164] Sachs, *supra* no 34, 314.
[165] Akıncı, *supra* no 22, 189.
[166] Sachs, *supra* no 34, 314.
[167] Kalpsüz, *supra* no 22, 83; Akıncı, *supra* no 22, 192.
[168] Yeşilırmak, *supra* no 22, 102.

rules as to arbitration procedure. However, since all procedural breaches do not constitute a ground for setting aside, the award rendered may be set aside only where the failure to prepare the terms of reference affects on the substance of the dispute (Article 15A(2)(f)).

In international arbitration practice, the chairman of the arbitral tribunal either prepares a draft terms of reference in light of the claims and defences expressed in the statements of claim and answer, and submits the draft to the parties for their comments, or requests the parties share a summary of their claims and defences for insertion into the terms of reference. The parties will then submit the views on the draft prepared or the summary submitted, as applicable. In the event the procedure followed is for the arbitral tribunal to prepare the draft after having invited the parties to provide summaries, the arbitral tribunal will prepare the draft terms of reference, having regard to the items that must exist in the terms of reference, and will invite the parties to submit comments within a specified period of time. Where the parties are in dispute with regards to the content of the terms of reference, it is advisable for a hearing to be held in order to facilitate a settlement and for the execution of the terms of reference. The terms of reference is to be signed by the parties and the arbitrators (Article 10E(3)). As noted above, it is general practice in international commercial arbitration for the terms of reference to be signed at a meeting attended in person by all parties and arbitrators, alongside procedural orders regarding how the arbitration is to be conducted, provided that a draft has already been shared with the parties in advance and their comments have been obtained.

The failure of one of the parties to attend the hearing or sign the terms of reference has not been specifically regulated by the IAL. Where a party refrains from signing the terms of reference in relation to certain items to which it objects, it would be more appropriate for such party to sign the terms of reference with an annotation as to its objection.[169] However, it may be the case that one of the parties refrains from signing the terms of reference with the intention of delaying the arbitral proceedings in bad faith. Such circumstances do not and should not prevent the continuance of the arbitral proceedings. In fact, the arbitral tribunal shall prepare a terms of reference even where no party participates in the arbitral proceedings. In such a case, the arbitral tribunal shall continue with the arbitral proceedings.

The points that must exist in the terms of reference have been expressed in a non-exhaustive manner in the IAL. The terms of reference should include the name, title and address of the parties and the arbitral tribunal, a summary of the claims and defences, the relief sought, an explanation as to the dispute, the place of arbitration, the arbitration period, the commencement of the arbitration period, the applicable procedural laws and whether or not the arbitrators have been authorized to decide *ex aequo et bono* or as *amiable compositeur* (Article 10E(2)). In doctrine it is expressed that the terms of reference may contain information regarding the dispute to be resolved by the arbitral tribunal, the arbitral tribunal's jurisdiction, the place of arbitration, the language of arbitration, the applicable law (if undisputed between the parties), the rules applicable to the arbitration procedure (whether institutional or ad hoc arbitration rules are applicable), the arbitral tribunal's jurisdiction in the granting of interim measures and the payment of arbitrators' fees and expenses in ad hoc arbitrations.[170]

A distinction should be drawn, however, between pre-hearing conferences/meetings whereby parties and the arbitral tribunal meet to determine the procedural rules applicable to the arbitral proceedings and to make the necessary arrangements for the proper and efficient conduct of a hearing on the one hand, and the stage where meetings are held with the purpose of preparing the terms of reference or other similar documents pursuant to Article 10E of the IAL. The terms of reference is to be signed by the parties and the arbitral tribunal, and contain vital elements regarding arbitral proceedings. Following the execution of the terms of reference by the parties and the arbitral tribunal, the document (and other documents of equal value and importance) is binding upon the parties and the arbitral tribunal, and cannot be amended without party consent.[171] However, the arbitral tribunal

[169] Kalpsüz, *supra* no 22, 86.
[170] Roney, *supra* no 12, 55-56.
[171] Roney, *supra* no 12, 56. However, the matters which constitute the essential components of the arbitral proceedings are determined in the terms of reference. Terms of references are also prepared in arbitrations that are not subject to the ICC Rules of Arbitration: Schneider, *supra* no 5, 408. In Turkish doctrine it has been expressed that where a party does not raise an objection as to the validity of the arbitration agreement at an earlier stage, the assertion of the invalidity of the arbitration agreement at the enforcement stage may be held as being contrary to the principle of good faith, and may fall within the scope of the prohibition against contradictory acts (*çelişkili davranış yasağı* in Turkish): Şanlı, *supra* no 22,

determines the rules applicable to the arbitration procedure as part of its discretionary power before the pre-hearing conference. Consequently, the arbitral tribunal is not bound by decisions adopted in pre-hearing conferences.[172]

It is observed in practice that experienced arbitrators do not include a very detailed set of provisions in the terms of reference. This is primarily because where such detailed provisions are determined in advance, the arbitrators would not possess the flexibility required to amend or insert provisions into the terms of reference by way of procedural orders when the need arises during the arbitral proceedings.[173]

[F] Hearings in International Commercial Arbitration

(1) In general

There are two purposes for holding a hearing in international arbitration. The first is for the parties' claims and defences to be expressed verbally in the presence of the arbitral tribunal. The second is for the witnesses (inclusive of expert witnesses) to be heard. Needless to say, both these purposes may be performed at the same meeting.[174] In the classic sense, the word hearing constitutes the physical meeting of the parties (and their representatives) and the arbitrators with the purpose of examining witnesses (including independent and party experts), and the verbal submission of claims and defences.[175]

In international arbitration, contrary to trial before state courts, the holding of a hearing by the arbitral tribunal is not mandatory unless the parties have requested for a hearing to be held. In the event parties do not request that a hearing be held, the arbitral tribunal has discretion as to whether or not to hold a hearing; the arbitral tribunal may, in such a case, determine that the dispute is to be resolved solely upon examination of the documents submitted. The arbitral tribunal may decide to hold a hearing if it considers that it would be most appropriate under the circumstances of the case, even where a request by neither party is made for a hearing to be held. The IAL indeed expresses that the arbitral tribunal may hold a hearing in connection with matters such as the submission of evidence, the making of verbal declarations and requests for explanation from the experts (Article 11A(1)). The IAL, therefore, grants the arbitral tribunal with wide discretionary powers.

The custom in international commercial arbitration is to hold a hearing before rendering the award. Therefore, it is rare for awards to be rendered in international commercial arbitration without the holding of a hearing.[176] This is equally applicable with regards to the custom of Turkish arbitrations.[177] The parties and their representatives are generally of the opinion that their case cannot be presented properly unless a face to face meeting is held with the arbitrators, and the witnesses are heard in such fashion.[178] In fact, hearings provide the

359, fn. 356. The Court of Appeal has, however, held that the parties cannot amend the arbitration agreement between them through the terms of reference, and that the terms of reference will not be regarded as a new arbitration agreement and that, therefore, in the event of inconsistencies between the terms of reference and the arbitration agreement, the arbitration agreement will be decisive. The Court of Appeal General Legal Assembly, Date: 18 October 2006, File No: 2006/15-609, Decision No: 2006/656, has expressed this with the following words: 'The agreement between the parties is afforded priority. The terms of reference may not be accepted as an amendment agreement or as a new arbitration clause. In addition, the representatives who executed the terms of reference where not provided with such authority.' (<www.kazanci.com>, August 2014) [translated by the chapter authors]. See also, Court of Appeal General Legal Assembly, Date: 18 July 2007, File No: 2007/15-444, Decision No: 2007/554 (<www.kazanci.com>, August 2014). For the view that this decision is incorrect, see: Şanlı, *supra* no 22, 208, fn. 306.

[172] For detailed information, see: M. Aygül, *Milletlerarası Ticarî Tahkimde Tahkim Usulüne Uygulanacak Hukuk ve Deliller* (Law Applicable to the Arbitration Procedure in International Commercial Arbitration and Evidence) (Konya: 2013), 69 *et seq*.

[173] Roney, *supra* no 12, 56; Schneider, *supra* no 5, 408. To ensure procedural flexibility, it may be agreed in the terms of reference that, in certain circumstances, the determination of certain procedural rules may be made by the chairman of the tribunal.

[174] For detailed information, see: Aygül, *supra* no 172, 69 et *seq*.

[175] Greenberg, *supra* no 11, 354. Hearings are defined in Turkish law as the stage of the trial where parties are ready and appear before the judge: Pekcanıtez, *supra* no 80, 585.

[176] Blackaby, *supra* no 2, 413; Akıncı, *supra* no 22, 159; Kalpsüz, *supra* no 22, 87.

[177] Z. Akıncı, *Arbitration Law of Turkey: Practice and Procedure* (New York: JurisNet LLC, 2011), 113.

[178] 'The holding of hearings is crucial with respect to most of the fundamental principles, including the right to be heard, the principle of transparency, the principle of directness (*doğrudanlık ilkesi* in Turkish) and the principle of expressions (*sözlülük ilkesi* in Turkish)': Pekcanıtez, *supra* no 80, 586.

arbitral tribunal with important opportunities with regards to the evaluation of certain matters expressed in the documents submitted and shedding light on certain disputed issues.[179] Hearings are considered the sole opportunity where the parties come together and attempt to influence the progress of the claim, and for the arbitrators to focus on the issues in dispute.[180] In international commercial arbitration, the common practice is for the written declarations, documents, written witness statements and expert reports to be submitted prior to hearings, generally with the submission of memorials. The main purpose of hearings with regards to such documents is for their contents to be explored in great detail and uncertain matters to be clarified, particularly by the counterparty and the arbitral tribunal. It is at this stage that the cross-examination of counterparty witnesses gains momentum.

The arbitral tribunal may see fit to impose certain restrictions with regards to hearings. For instance, the number and length of hearings may be limited in arbitrations particularly where the arbitrators, parties, parties' representatives, witnesses and experts travel abroad to attend the hearing. The arbitral tribunal may, in such cases, prefer written procedures as much as possible. Further, it is particularly difficult for hearings to be organized where the number of attendees is excessively high. In such cases, the arbitral tribunal will try as much as possible to avoid holding verbal hearings.[181] However, in practice, hearings are held almost automatically. Despite the absence of a request for a hearing, parties expect the arbitral tribunal to organize a hearing and inform the parties of the date and venue of the hearing.

(2) Hearings held upon party request

The right to request the holding of hearings is accepted as a necessary component of the right to be heard in international commercial arbitration.[182] Where one or both parties request that a hearing be held, such request is deemed a justifiable reason for a hearing to be held. In fact, the right to a hearing is interpreted as being a right protected by the European Convention on Human Rights.[183]

Unless otherwise agreed by the parties, the arbitral tribunal lacks the discretion and must hold a hearing where one of the parties requests that a hearing be held by the arbitral tribunal for the collection of evidence or for the submission of claims and defences. Since the right to request that a hearing be held is part of the right to be heard, the right exists even where it appears that the purpose of exercising the right is to delay the conclusive resolution of the dispute contrary to good faith, and the arbitral tribunal must hold the hearing even in cases where the dispute can be resolved solely by the examination of documents. In fact, the IAL provides in a mandatory wording that, unless the parties have agreed otherwise, where a party requests that a hearing be held, the arbitral tribunal must hold the hearing (Article 11A(1)).

(3) Giving the parties adequate notice as to the date of the hearing

As a necessity of the right to be heard, the parties must be notified of the date of the hearing. For one to be able to speak of a fair trial, the date of the hearing and its venue should be notified to the parties within a reasonable period of time prior to the hearing.[184] In parallel with Article 24(2) of the UNCITRAL Model Law, Turkish Law has also accepted that the arbitral tribunal shall inform the parties as to hearings and meetings to be held with regards to site visits, expert investigations and the evaluation of other evidence, that such notification shall be

[179] Blackaby, *supra* no 2, 413; Akıncı, *supra* no 22, 160. It is expressed that in most ICC arbitrations hearings are indeed held and that hearings are generally not held only in cases where the amount involved is relatively low: Yves Derains & Eric Schwartz, *A Guide to the ICC Rules of Arbitration* (The Hague: Kluwer Law International, 2005), 274.

[180] Jacob Grierson & Annet van Hooft, Arbitrating Under the 2012 ICC Rules (The Netherlands: Kluwer Law International, 2012), 181.

[181] Derains, *supra* no 179, 274.

[182] Derains, *supra* no 179, 273.

[183] For the view that, despite the absence of direct application, Article 6 of the European Convention on Human Rights should be considered with regards to provisions regarding international arbitration, see: N.D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (London: Informa Law, 2012), 229, fn. 3.

[184] Greenberg, *supra* no 11, 354; Article 26(1) of the ICC Rules of Arbitration provide that when a hearing is to be held, the arbitral tribunal shall give the parties reasonable notice when requiring the parties to appear before it on the day and at the place determined. The determination of what is 'reasonable' depends on each particular case and shall be determined in light of the facts and circumstances involved in each case: Derains, *supra* no 179, 287.

made within a reasonable period of time prior to the meeting or hearing concerned, and that the consequences of failure to attend should be stated (Article 11A(2)).

In the event a party fails to attend the hearing or meeting concerned despite being notified of it, the arbitral tribunal may continue with the hearing in the absence of the party concerned.[185] In order for a hearing to be held in the absence of one of the parties, the absentee must not have a valid reason for the failure to attend (Article 11C(1)(iv)). Whether or not a reason is valid and justifies the postponement of the hearing should be considered in light of the circumstances of each particular case. Arbitral tribunals generally try to understand parties' position and ensure that the parties' intention of holding a hearing is satisfied as far as possible, so long as the tribunal is not of the view that the parties are acting in bad faith to prolong the arbitral proceedings.[186]

In practice, the arbitral tribunal attempts to organize the hearing on a date convenient to all parties after having consulted the parties. Experienced chairmen of arbitral tribunals generally request parties and other members of the arbitral tribunal inform him/her of the dates as to their availability at the earliest opportunity, and request that such dates be reserved for the hearing. However, the arbitral tribunal may determine the date for the hearing even where all parties are not in agreement as to the date, provided the arbitral tribunal is satisfied the date set is the most appropriate.[187]

The determination of what constitutes a reasonable period will be determined in light of the circumstances of each case and pursuant to the discretion afforded to the arbitral tribunal. In determining this period, the arbitral tribunal should take into account matters such as the organization of the hearing, and the travel that would have to be endured by the witnesses to attend the hearing.[188]

(4) Rendering an award solely upon evaluation of documents submitted

In international arbitration, contrary to trials before state courts, the arbitral tribunal is not obligated to hold a hearing where the parties have not requested that a hearing be held. The arbitral tribunal may, therefore, make its determination without holding a hearing (Article 11A(1)).[189] In particular, where the parties have agreed that a hearing should not be held, the arbitral tribunal must determine the dispute upon examination of the documents submitted.

The rendering of a judgment without a hearing is generally the practice in certain legal systems with regards to small claims and claims that fall within certain categories. In international commercial arbitration, disputes that arise from charter parties and relevant documentations that are heard by the London Maritime Arbitrators Association, may be shown as arbitrations where an award is rendered solely upon examination of the documents submitted.

[G] Failure of One of the Parties to Participate in the Arbitration

The provision contained in Article 25 of the UNCITRAL Model Law, relating to the failure of one of the parties to participate in the proceedings, has been adopted by the IAL, with the addition of a provision that did not exist in the Model Law (Article 11C(1)(ii)). These provisions contained in the Model Law and the IAL regulate the consequences of one of the parties' failure to participate in the arbitral proceedings, taking into consideration various possibilities.

The first possibility relates to the claimant's failure to submit its statement of claim within the time limit, without a valid reason. In such a case, the arbitral tribunal will terminate the arbitral proceedings (Article

[185] Greenberg, *supra* no 11, 354.
[186] Derains, *supra* no 179, 288.
[187] *Id*, 287.
[188] G. Nater-Bass, 'Further Written Statements', in *Swiss Rules of International Arbitration*, ed. T. Zuberbuhler, C. Muller & P. Habegger (Basel: Kluwer Law International, 2005), 218-219.
[189] Yeşilırmak, *supra* no 22, 108; Akıncı, *supra* no 22, 211.

11C(1)(i)). Thus, the legal consequences of the claimant's failure to submit its statement of claim within the time applicable is the termination of the arbitral proceedings.

In the event the statement of claim is submitted within the legal period specified, but lacks the conditions that are foreseen by the IAL, the arbitral tribunal shall grant the claimant an extension of time for the deficiency to be cured (Article 10D(1)). In the event the claimant fails to cure the deficiency within the time provided, the arbitral tribunal will terminate the proceedings (Article 11C(1)(ii)). In such a case, the arbitral tribunal will meet to terminate the arbitral proceedings.

A third possibility is where the defendant fails to submit its statement of answer. This does not constitute the acceptance of the assertions advanced in the statement of claim; the arbitral proceedings will continue without a defence (Article 11C(1)(iii)). This is to ensure the defendant does not block the arbitral proceedings through its failure to participate.

Finally, the arbitral tribunal will proceed with the arbitral proceedings, and determine on the basis of the evidence submitted, in the event one of the parties fails to attend the hearing or submit its evidence without any valid reason (Article 11C(1)(iv)).

§5.04. EVIDENCE IN INTERNATIONAL ARBITRATION

[A] In General

With regards to state courts, there are many procedural rules that must be complied with in relation to the collection of evidence. For instance, there are procedural rules that determine in advance how evidence is to be collected and how such evidence should be evaluated. In international commercial arbitration, however, there are no such provisions in domestic or international rules regulating arbitration. This is because it is generally accepted that the collection and evaluation of evidence is to be undertaken within the context of the law applicable to the arbitration procedure.[190]

Domestic arbitration rules generally do not contain a detailed set of provisions with regards to the collection of evidence by arbitral tribunals, and contain only a very few number of mandatory provisions. This is the case in most legislation, regardless of whether or not the Model Law was influential in the drafting of such legislation. It has been deemed more appropriate, both in continental European and common law legal systems, for the arbitral tribunal to be granted wide discretionary powers in relation to evidence, rather than imposing detailed provisions, which must be taken into account when conducting the arbitral proceedings, provided that the mandatory provisions of the place of arbitration are respected.[191] The absence of detailed provisions regarding evidence can also be seen in provisions regarding international private law. Consequently, both domestic and international rules do not contain detailed sets of provisions on the rules applicable to evidence. The clear meaning of this is that arbitral tribunals are not restricted by procedural rules in the conduct of arbitral proceedings and, both with respect to institutional and ad hoc arbitrations, the arbitral tribunals possess wide discretionary powers in this respect, so long as mandatory provisions are adhered to. This contributes to one of the most important advantages of arbitration as compared with litigation: flexibility.

[B] Documents

It is widely accepted in international commercial arbitration that evidence, which is the most persuasive and therefore the best, is documentary evidence. This is a rule that is also accepted by lawyers with a common law background. Declarations of intent, offers and settlements relating to international contractual relationships are

[190] P.M. Patocchi & I.L. Meakin, 'Procedure and The Taking of Evidence in International Commercial Arbitration, The Interaction of Civil Law and Common Law Procedures', *International Business Law Journal* (1996): 888.

[191] H. Smith, 'The Role of the Arbitral Tribunal in Civil and Common Law Systems with Respect to the Presentation of Evidence', in *Planning Efficient Arbitration Proceedings*, ed. A. van den BERG (The Hague: ICCA Congress Series No: 7, 1996), 161.

usually in writing, and such relationships are therefore founded upon documents.[192] Arbitrations are no exception to this; such disputes generally arise from relationships that are well-documented, and such documents play a much greater role when compared to others. Similarly, and in most cases more so, documents play a vital role when an application is made for an interim protective measure. In such cases, the arbitrators would be more inclined to grant the measure requested if documentary evidence submitted supports the argument raised in favour of the measure.

First, it is the party who bears the burden of proof who must submit the document in its possession to discharge such burden and prove the existence or non-existence of relevant facts. In international commercial arbitration, the practice is also for the party who bears the burden of proof to submit documents to the arbitral tribunal to prove its allegations. In fact, this rule, which is widely accepted in the international arbitration practice, has been expressed in Article 3(1) of the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules). This provision requires that '[w]ithin the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including public Documents and those in the public domain, except for any Documents that have already been submitted by another Party.' However, the parties are not under an obligation to submit any document already submitted by the counterparty. This is a principle accepted in both continental European and common law jurisdictions.[193]

Article 12B(1) provides that the arbitral tribunal may seek the assistance of the court of first instance (*asliye hukuk mahkemesi* in Turkish) as to the collection of evidence.[194] The same provision expresses that the court of first instance shall apply the provisions of Law No. 1086.[195] Under Turkish law, evidence that is in the possession of a third party may be obtained only through a request to the domestic court. Pursuant to the IAL, the arbitral tribunal is equipped with the power of requesting the assistance of the domestic courts with regards to the collection of evidence (Article 12B(1)). In such a case, the provisions of the CCP shall be applicable.

The practice is usually for the submission of copies as opposed to the submission of the originals of documents.[196] However, it goes without saying that the copies must match the original. Unless otherwise proven, copies are deemed identical copies of the original document. This assumption makes arbitral proceedings much more efficient. Thus, the parties are not under an obligation to submit the original of a document unless otherwise agreed or requested by the arbitral tribunal. Arbitral tribunals tend to order the submission of the original documents where the authenticity of the document is in dispute. Such a determination may be made *ex officio* or upon request by a party.[197] The arbitral tribunal may order the submission of an original document in cases where there is a valid reason to doubt the authenticity of the document, and thus, minor differences between the original document and the copy may not warrant such an order where the difference does not relate to the substance of the document (i.e., notes on the document). Where the original is not produced despite an order for its production, the arbitral tribunal may rule that the document is to be disregarded as evidence. This is a determination that will be made taking into consideration the reason for the failure to submit.

[C] Witnesses

Witnesses are probably the oldest and the most established form of evidence accepted in legal systems. Despite the acceptance of documentary evidence as a more reliable form of evidence in international commercial arbitration, witnesses are commonly used in such proceedings. In some cases witnesses play an important role in influencing the outcome of the case, particularly where the documents are found to be insufficient in the evaluation of the dispute, and additional evidence is required for the arbitral tribunal to determine the matter.

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[192] Poudret, *supra* no 15, 554; Waincymer, *supra* no 38, 826.
[193] Tobias Zuberbühler, et al., *IBA Rules of Evidence* (Zurich: Schulthess Verlag, 2012), 42; Caron, *supra* no 36, 574.
[194] For comparison, see Article 432, CCP. Note that the competent court with regards to arbitration is now the commercial court of first instance (*asliye ticaret mahkemesi*), see: *supra* no 142.
[195] Law No. 1086 was repealed by the CCP. In light of Article 447 of the CCP, which provides that references to Law No. 1086 shall be understood as references to the CCP, references to Law No. 1086 in the IAL shall be understood as references to the CCP. This provision has ben criticized in doctrine. It has been rightly suggested that the provision should have made reference to 'the applicable procedural law' thereby including international agreements: Kalpsüz, *supra* no 22, 90.
[196] Schneider, *supra* no 5, 438.
[197] O'Malley, *supra* no 183, 80-81.

There are no detailed provisions regulating witness evidence in both domestic and international arbitration. Consequently, it is up to the arbitral tribunal to determine how witness evidence is to be taken, provided that mandatory provisions of procedural law are complied with. Although arbitral tribunals are granted wide discretionary powers with regards to evidentiary matters, care should be taken when such decisions are being made. This is primarily because of the fact that different legal systems have very different provisions as to witnesses. For instance, it is widely known that common law jurisdictions place great importance on the taking of witness evidence compared with continental European legal systems.

In international commercial arbitration practice, there appears to be a mixture of common law and continental European law-based procedural rules.[198] There has, therefore, been an increase in the use of witness evidence in international commercial arbitration, even where arbitrations are conducted by lawyers with a continental European law background. The determination of whether or not a specific person can be heard as a witness depends ultimately with the arbitral tribunal. This determination is to be made in light of the law applicable to the arbitration procedure.

In international arbitration, the arbitral tribunal may determine the dispute solely upon examination of documents submitted in the event the parties fail to attend the hearing. However, the tribunal may, if it deems it absolutely necessary, require court assistance in forcing an unwilling witness to attend a hearing (Article 12B(1)). In the event the witness concerned is resident in a foreign country, the assistance of the foreign country's court may be requested. In such a case, the procedural rules of the foreign country will be applicable in the determination of the request for assistance.

[D] Experts

Turkish scholars have defined experts as 'third parties whose opinion is sought in cases where the determination of a dispute requires special and technical knowledge not possessed by the judge'.[199] There is a difference between the approaches of Continental European legal systems and common jurisdictions with respect to experts. There is a difference particularly with respect to by whom the appointment is to be made. In Continental European jurisdictions, experts are generally appointed by courts, and such experts must be independent and impartial. In common law legal systems, however, the usual practice is for the experts to be appointed by the parties. As a legal system that has adopted the Continental European legal system, in Turkey experts are appointed by the courts, and the expert reports produced by such experts are deemed independent and impartial. The treatment of expert evidence, including rules as to by whom the evidence is to be obtained, therefore varies in international arbitration, depending on the tribunal's nationality.

As with other procedural issues, the arbitral tribunal has wide discretionary powers. However, the use of this discretion will most likely be influenced by the legal background of the arbitrators. For instance, the IAL provides that the arbitral tribunal may appoint one or more experts to submit a report on certain issues (Article 12A(1)). Unlike the UNCITRAL Model Law, Turkish Law does not permit the parties to agree to the contrary. In fact, the court of appeal decided in its decisions rendered before the entry into force of the IAL that a failure to resort to an expert justifies the reversal of the first instance decision.[200]

However, the IAL does indeed expressly accept that the parties may appoint their own experts, by accepting that the parties may have their own experts testify before the arbitral tribunal at the hearing (Article 12A(2)).[201] This is something on which Turkish law differs from domestic arbitrations. Although there are no provisions restricting or prohibiting the use of party-appointed experts in domestic arbitrations, it is more common for experts to be appointed by the arbitral tribunal in domestic arbitrations than the appointment of experts by parties.

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[198] Zuberbühler, *supra* no 193, 86.

[199] Baki Kuru, Ramazan Arslan & Ejder Yılmaz, *Medeni Usul Hukuku* (Law of Civil Procedure) (Ankara: Yetkin Publishing, 2013), 423.

[200] Akıncı, *supra* no 22, 218; 15th Civil Division of the Court of Appeal, Date: 20 November 2001, File No: 2001/4352, Decision No: 2001/5322 (<www.kazanci.com>, August 2014).

[201] Kalpsüz, *supra* no 22, 93.

It must be stressed that experts are not appointed to determine the dispute. That is a function reserved solely for the arbitrators. In other words, the arbitral tribunal cannot assign its powers and responsibilities to an expert unless the parties have expressly agreed that it may. The duty of an expert is to form an opinion on a point requiring technical knowledge and communicate that opinion by way of an expert report. An expert should therefore refrain from reaching conclusions that require legal knowledge, unless the expert is appointed as an expert of a foreign law. Similarly, arbitral tribunals should refrain from directing legal questions to experts. Although Article 12A(1)(i) provides that the arbitral tribunal may instruct an expert to provide a report on matters identified by itself, it is advised that the tribunal obtain the parties' views as to the questions drafted.[202] The tribunal may also seek the parties' views as to the evidence to be shared with the expert(s).

As a principle, the experts should be provided with access to all information, documents and evidence that would be required in order for the expert report to be prepared. In such cases, the arbitral tribunal may order the parties to provide the expert(s) with the requisite information and documents. This may be the case particularly in cases where a request is made by the expert for the provision of documents. Of course, whether or not the arbitral tribunal is empowered to issue such orders ultimately depends on the law applicable to the procedure. In fact, Article 12A(1)(ii) of the IAL provides that the arbitral tribunal may issue orders requiring the parties to make the necessary explanations to the expert(s), and to provide such expert(s) with the relevant information and documents. Similar to the provision contained in Article 26(1)(b) of the UNCITRAL Model Law, the parties' obligation arises with the arbitral tribunal's order; without such an order, the parties are not under such an obligation.

The parties are entitled to submit their views in response to the expert report drafted. In particular, the failure to provide a party against whom the report was rendered the opportunity to submit its objections, may constitute a violation of the right to be heard. The arbitral tribunal may not render its award in accordance with an expert report if such report has not been shared with the parties.[203]

Article 26(2) of the UNCITRAL Model Law provides that, unless otherwise agreed, following the submission of the expert report, whether verbally or in writing, the parties are entitled to direct questions to the expert(s) or have its own party-appointed expert heard by the arbitral tribunal, provided that such is deemed necessary and appropriate by the arbitral tribunal or is requested by either of the parties. This provision is not a mandatory provision, and the parties may therefore agree to the contrary, to facilitate a faster resolution of the dispute.[204] The IAL has adopted this provision in the same exact form (Article 12A(2)). Consequently, the above explanations are equally valid for arbitrations under the IAL.

[E] Site Visits

Site visits are held where a judge deems it appropriate to examine the subject matter of the dispute and acquire knowledge regarding the subject matter through its sensual organs (Article 288, CCP).[205] In international commercial arbitration, the arbitrators may obtain detailed knowledge as to the parties' assertions and evidence by examining in person the evidence and the facts that are the subject matter of the dispute. The subject of the site visit may be a person, a property, an area, a machine, a warehouse or any other object; it may also be a phase or a document.[206]

It is accepted that the arbitral tribunal, unless otherwise agreed, possesses the jurisdiction to agree upon site visits upon a party's request or *ex officio* (Article 7, IBA Rules). It is rare for the parties to agree that the arbitral

[202] Waincymer, *supra* no 38, 953.
[203] O'Malley, *supra* no 183, 182.
[204] Binder, *supra* no 11, 325.
[205] Kuru, supra no *199*, 436; Pekcanıtez, *supra* no 80, 794; Kalpsüz, *supra* no 22, 94.
[206] Berger, *supra* no 25, 353.

tribunal shall not possess such a power.[207] Turkish law also provides the arbitral tribunal with the authority to determine that a site visit be held (Article 12A(1)(iii)). In the event an arbitral tribunal decides that a site visit is to be held, the parties must be notified of the site visit within a reasonable period of time in advance.[208] In fact, Article 11A(2) provides that the arbitral tribunal shall notify the parties within a reasonable period of time in advance of the date of site visits, expert examinations or the date of meetings or hearings held for the purpose of examination of other evidence, as well as the consequences of a party's failure to attend.

[F] Admissibility and Evaluation of Evidence

The arbitral tribunal is equipped with wide discretionary powers when it comes to the admissibility of evidence in international commercial arbitration. This has in fact been regulated in most international rules regarding arbitration.[209] Unlike Article 19(2) of the UNCITRAL Model Law, the IAL contains no express provision whereby reference is made to the arbitral tribunal's discretion in the evaluation of evidence. However, Turkish law does, in principle, accept the principle. First, Turkish procedural law accepts the principle that evidence is to be freely evaluated by the courts. Further, the parties are entitled to rely upon other forms of evidence not regulated by the law (Article 192, CCP). Similarly, Turkish law accepts that a judge has discretion when evaluating the evidence submitted, subject to the exceptions contained in the law (Article 198, CCP).[210]

In general, exceptions present in the laws of the place of arbitration or in any other domestic procedural law with regards to the reliability are not applicable in international commercial arbitration.[211] The arbitrators generally refrain from applying rigid rules restricting the reliability of evidence, to prevent the setting aside of arbitral awards for violation of the right to be heard.[212] In other words, in international commercial arbitration practice, there is a trend towards the acceptance of all evidence submitted by the parties. In addition, the arbitral tribunal is not bound by the law applicable to the substance of the dispute in relation to the reliability of evidence. It should be noted that certain disputes require proof by way of documents drafted or signed by the party concerned, and in such cases, a matter in dispute cannot be proven by witness evidence. This is the case with Turkish law (Article 200, CCP). However, such limitations contained in domestic legal systems are rarely applied in international arbitration.[213]

The arbitral tribunal's discretion in the evaluation of evidence is limited by party intent, the mandatory provisions of the *lex arbitri* and of international public policy. The principle of party autonomy, which is accepted as one of the most fundamental principles of international commercial arbitration, is valid also with respect to the evaluation of evidence. Therefore, the parties may impose certain restrictions with regards to how evidence is to be evaluated. For instance, the parties may agree that only documents may be submitted. An agreement reached by the parties to such effect will bind the parties. The evaluation of evidence principally constitutes the consideration of documents submitted to determine whether or not the facts alleged are proven by such documents. In other words, through the evaluation of evidence, the arbitral tribunal is to determine whether or not a fact alleged by a party is proven to be correct by a document submitted.[214] Consequently, the power of proof of a document is always dependent upon the fact of each concrete case. Thus, the evaluation of evidence is one of the most important stages of international commercial arbitration. This is primarily because of the fact that arbitral tribunals possess wide discretionary powers with respect to the evaluation of evidence and objections raised against such evidence.

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[207] Blackaby, *supra* no 2, 411.
[208] Zuberbühler, *supra* no 193, 146; Kalpsüz, *supra* no 22, 94.
[209] Waincymer, *supra* no 38, 791.
[210] For more information, see: Pekcanıtez, *supra* no 80, 712 *et seq*.
[211] Schneider, *supra* no 5, 438; Nater-Bass, *supra* no 188, 226; O'Malley, *supra* no 183, 194-195.
[212] Zuberbühler, *supra* no 193, 168.
[213] It is accepted that Article 200 of the CCP will not be applicable even to domestic arbitrations: Umar, *supra* no 141, 1185. This is primarily because both the IAL (Article 17) and the CCP (Article 444) has deemed the applicability of a restrictive provision in the domestic law of civil procedural dependent upon express legislative provision. It was debated in doctrine, before the entry into force of the IAL, whether Article 288 of Law No. 1086 (the previous CCP) requiring proof by documentary evidence was applicable in international commercial arbitration: Akıncı, *supra* no 22, 221, fn. 395.
[214] Alangoya, *supra* no 71, 296.

§5.05. LAW APPLICABLE TO THE MERITS

In the determination of the applicable law in international commercial arbitration, the principle of party autonomy is at the forefront. Research demonstrates that in 80% of arbitrations commenced before the ICC, the parties had agreed as to the law applicable to the agreement.[215] In fact, Article 12C(1) provides that the arbitral tribunal shall render its award in accordance with the terms of the agreement executed between the parties and the law applicable to the agreement, as chosen by the parties. The choice as to the applicable law may be express or implied. The express choice should be understood from the words expressed without the need to resort to external elements. The incorporation of the rules of a legal system so as to make such rules a part of the agreement by the parties does not constitute an agreement as to the applicable law.

An implied choice of the applicable law is where the choice as to the applicability of the law of a state cannot be understood in a clear manner from the parties' declarations, but can be determined, without a doubt, as being the parties' agreement from the terms of the agreement or from the circumstances of the case. If the existence of a choice as to the applicable law is clearly demonstrated by the terms of the agreement or the circumstances of the case, an implied choice of law is deemed to exist. In relation to implied choices of law, there is a 'declaration as to choice' just like in express choices as to the applicable law; this choice is merely an implicit one.

The IAL does not impose a requirement as to form with respect to the choice of the applicable law. Consequently, implied choice of law is a concept recognised with respect to arbitrations subject to the IAL. However, an agreement as to the place of arbitration does not constitute an agreement for the applicability of the law of the place of arbitration. Similarly, the choice of the procedural rules of a state does not constitute an agreement as to the applicability of the substantive legal provisions of that state to the merits.[216] However, where in the agreement between the parties an agreement has been reached as to the applicable law but it is unclear from this choice whether or not the choice relates to the law applicable to the merits or to the arbitration procedure, the IAL provides that the choice relates to the law applicable to the merits. Article 12C(1) provides that, unless otherwise expressed, the choice of the laws of a state constitutes an agreement as to the applicability of the substantive provisions of the state concerned and not its conflict of laws or procedural provisions. Consequently, a reference by the parties to the laws of a state does not constitute an agreement as to the applicability of the rules regarding arbitration the procedure. In this respect, the interpretation of the Court of Appeal General Legal Assembly, delivered in one of its decisions in 1999 to the effect that the expression 'Turkish Laws in force' should be understood as covering Turkish procedural rules, no longer applies with respect to arbitrations governed by the IAL.[217]

It is generally accepted in international commercial arbitration that the parties may agree upon the applicability of *lex mercatoria*. The parties are at liberty to determine the applicability of rules to the dispute that are international in their nature.[218] This choice may be express or implied; an express choice would exist where the parties state clearly in the agreement that *lex mercatoria* shall be applied by the arbitral tribunal, and thus making a reference to the general principles of law, the flexible rules of international commerce and the rules of international commercial customs.[219] In the event the parties agree upon the applicability of *lex mercatoria*, the arbitral tribunal will be authorized to resolve the dispute in accordance with the principle *ex aequo et bono*, and

[215] Yeşilırmak, *supra* no 22, 111.
[216] Şanlı, *supra* no 22, 198.
[217] For a criticism of the decision, see: Şanlı, *supra* no 33, 406-407.
[218] For more information on party choice as to applicable law to the substance in international arbitration, see: Kalpsüz, *supra* no 22, 97. For a detailed explanation of the problems that arise when a law other than Turkish law is chosen as the applicable law in the execution of corporate documents (i.e. shareholder agreements and share purchase agreements) and ways in which such problems may be avoided, see: İ.G. Esin, D. Gültutan & A. Yeşilırmak, 'Turkey', in *Arbitration of M&A Transactions: A Practical Global Guide*, ed. E. Poulton (London: Globe Business Publishing, 2014), 242-246; İ.G. Esin & D. Gültutan, 'The Turkish Court of Appeal rules on the arbitrability of disputes arising under a company's articles of association', *IBA Arbitration News* 19/1 (February 2014): 42.
[219] V. Doğan, *Banka Teminat Mektupları, Ülke İçi Ticarî İlişkiler - Milletlerarası Ticarî İlişkiler* (Bank Letters of Guarantee, National and International Commercial Relationships) (Ankara: Seçkin Publishing, 2011), 177-178.

the dispute would have to be resolved pursuant to *lex mercatoria*. Further, *lex mercatoria* shall be applied if the parties' intention for the applicability of *lex mercatoria* can be understood by way of interpretation.

The IAL states that the trade customs and usage of the applicable law shall be taken into consideration in the interpretation of the provisions of the agreement (Article 12C(1)). This provision differs from the wording of Article 28(4) of the UNCITRAL Model Law. The UNCITRAL Model Law refers to the applicability of international trade customs and usage independent from domestic laws. In other words, the Model Law speaks of trade customs and usage comprising *lex mercatoria*, whereas the IAL requires the application of trade customs and usage existent in domestic law. Consequently, trade customs and usage serve the function of a completive norm since it is applicable where there is no provision on the issue.

The literal interpretation of the IAL requires the arbitral tribunal to apply the provisions of the agreement between the parties; the applicable law is to be resorted to only in cases where the agreement remains silent on the matter. In light of the superiority of the agreement, trade customs and usage that are in the status of agreements shall also be considered. However, in the application of the contractual provisions, the mandatory provisions are afforded priority. It is not possible for the mandatory provisions of law to be side-stepped by contractual provisions.[220]

In the absence of an agreement between the parties as to the law applicable, the law applicable to the dispute shall be determined by the arbitral tribunal. The arbitrators may take into account different connecting factors when determining the law applicable to the merits. The arbitral tribunal may determine the applicability of the laws of a state or the law that is most closely connected to the dispute. Article 7 of the European Convention on International Commercial Arbitration of 1961, to which Turkey is a party, provides that where the parties have not agreed upon the applicable law, the arbitral tribunal may apply the law in accordance with the appropriate conflict of laws provisions.[221] The IAL, on the other hand, accepts that in the absence of a party agreement as to the applicable law to the substance of the dispute, the arbitral tribunal is to apply the substantive laws of the state most closely connected to the dispute. This provision differs to the provision contained in the TPIL.[222] Thus, the principle of *renvoi* has been rejected through the preference for the application of the substantive laws of the state to which the dispute is most closely connected. In light of this provision in the IAL, Turkish scholars have expressed that the law that is most closely connected to the dispute must be the laws of a state, and that the arbitrators may not apply rules that are not national rules.[223]

Pursuant to the IAL, the arbitral tribunal must resolve the dispute in accordance with the applicable law. The arbitral tribunal may determine the dispute in accordance with the principles *ex aequo et bono* or *amiable compositeur* only if they have been expressly authorized by the parties (Article 12C(3), IAL; Article 28(3), UNCITRAL Model Law). In order for the arbitral tribunal to determine the dispute in accordance with the principles of justice rather than in adherence to substantive legal rules, the parties must have expressly granted such an entitlement to the arbitral tribunal. Consequently, it cannot be said that the parties authorized the arbitral tribunal to determine the dispute in accordance with the principles *ex aequo et bono* or *amiable compositeur* by implication or by appointing arbitrators who do not have a legal background. The arbitral tribunal may not resort to the principles of *ex aequo et bono* or *amiable compositeur* unless expressly authorized to do so.[224] Similarly, a

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[220] Özel, *supra* no 22, 155.

[221] The 19th Civil Division of the Court of Appeal (Date: 9 November 2000; File No: 2000/7171; Decision No: 2000/7602 (<www.kazanci.com>, August 2014)) expressed as follows: 'The defendant argues that the arbitrators exceeded their jurisdiction by applying English law to the merits of the case, when in fact it was under an obligation to apply Swiss law, pursuant to the specifications which is an integral part of the agreement. It is possible for the parties to determine in advance the law applicable to disputes that arise from an agreement. However, the agreements between the parties do not contain any express provision as to the law applicable to disputes. The Arbitral Tribunal has reached a determination on whether to apply English law or Swiss law, after having obtained expert evidence on the matter. Consequently, it cannot be accepted that the arbitrators exceeded their jurisdiction when rendering the award and making their determination.' [translated by the chapter authors].

[222] See: Yeşilırmak, *supra* no 22 - reference to the English translation of the law.

[223] Kalpsüz, *supra* no 22, 99; Özel, *supra* no 22, 142.

[224] Kalpsüz, *supra* no 22, 100; Akıncı, *supra* no 22, 227. The case-law of the court of appeal, although dated before the entry into force of the IAL, is to that effect: 'In light of these, it should be accepted that the failure to apply the substantive law chosen by the parties in the arbitration clause or agreement is a ground for appeal. The acceptance of the contrary view would result in the non-application or incomplete or even incorrect application of the arbitration clause or agreement by

request for the enforcement of an arbitral award may be dismissed where the tribunal applies *lex mercatoria* in cases where it was not authorized to determine the dispute in accordance with the principles *ex aequo et bono* or *amiable compositeur*. This is due to the fact that the arbitrators would exceed their jurisdiction or there would be a violation of public policy.

In any event, the parties may equip the arbitral tribunal with the authority to determine the dispute in accordance with the principles *ex aequo et bono* or *amiable compositeur* at any stage of the arbitral proceedings before the award is rendered. Where the arbitral tribunal is authorized to determine the dispute in accordance with the principles *ex aequo et bono* or *amiable compositeur*, and they do in fact determine the dispute in such manner, the arbitral tribunal must state in its award the rules of justice and equity. The authority to determine the dispute in accordance with the principles of equity and justice does not entitle the arbitral tribunal to render arbitrary awards. An arbitral tribunal who renders an award in accordance with the principles of equity and justice is thereby relieved from the obligation to comply with the inflexible domestic legal rules, which they consider unjust in the circumstances. In other words, the arbitrators are not obligated to render their award in compliance with the law. When determining the dispute in accordance with the principles of equity and justice, the arbitral tribunal must respect the fundamental principles of civil procedure and the provisions of the contract executed between the parties. Further, the arbitral tribunal should respect the public policy of the states concerned, as well as international public policies.[225] Similarly, the arbitral tribunal should respect the applicable mandatory provisions.[226]

§5.06. TERMINATION OF ARBITRAL PROCEEDINGS

Arbitral proceedings are generally concluded following the rendering of an arbitral award by the arbitral tribunal (Article 13B, IAL). In fact, Article 13B provides that the arbitral proceedings will terminate once the final arbitral award is rendered or one of the circumstances listed in the said provision materialises (see below).

[A] Termination of Arbitral Proceedings Via a Final Award

At the end of arbitral proceedings the arbitral tribunal renders a final and binding award with regards to all claims asserted. Consequently, arbitral proceedings come to an end following the rendering of an award. Following the award, the arbitral tribunal may no longer perform any further acts regarding the dispute or render any additional decision since its jurisdiction would have come to an end, with the exception of matters listed in Article 14B regarding the correction, interpretation and completion of awards. It should be noted that, unless otherwise agreed, the arbitral tribunal may render partial awards (Article 14A(2)).

The arbitral proceedings may also terminate following the execution of a settlement protocol before the arbitral tribunal. A settlement protocol is where the parties agree that, in proceedings already commenced, the disputed matters are finally resolved by the parties, in part or in full. When a settlement protocol is executed during a claim, the settlement gives rise to a circumstance that requires the termination of the claim.[227] This is equally applicable to arbitrations (Article 12D(1)). Although the IAL refers only to settlements, such expression shall be interpreted as including acceptance and waiver. The reference to settlement in this part is not a reference to settlements executed between the parties outside of the arbitral proceedings (see, Article 13B(1)(ii)). Here the arbitral tribunal renders an award in accordance with the parties' settlement.

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the arbitral tribunal. It is clear that such a view, which in essence disregards the law and agreement, cannot be permitted in a state where the rule of law prevails. It is also in adherence with equity and justice that arbitrators are subjected to supervision with respect to rules foreseen by the parties in the arbitration clause or agreement.' (Court of Appeal Case-Law Unification Committee, Date: 28 January 1994; File No: 1993/4; Decision No: 1994/1 (<www.kazanci.com>, August 2014)).

[225] Kalpsüz, *supra* no 22, 100.

[226] Özel, *supra* no 22, 161.

[227] Pekcanıtez, *supra* no 80, 826 *et seq*.

It is not mandatory for the parties to execute the settlement agreement with respect to the dispute in full; where a partial settlement is reached, the arbitral proceedings will continue for the remainder part. In this respect, the arbitral proceedings will terminate only with respect to disputes that fall within the scope of the settlement protocol. For instance, where the parties have not agreed upon how arbitration costs are to be apportioned between the parties, the arbitral tribunal will render an award on who is to bear the costs of arbitration.

The parties who request that the settlement reached be recorded in an arbitral award must notify such request to the arbitral tribunal. The arbitral tribunal must be satisfied that a valid settlement agreement exists between the parties and that the dispute between them has been resolved. This is primarily because of the fact that the arbitral award rendered as a result will constitute a final and binding decision. Where the arbitral tribunal deems the request appropriate, it will render an award covering the terms of the settlement agreement (Article 12D(1)). However, the arbitral tribunal may find the request inappropriate, for violating public policy or the mandatory provisions of law, and refuse to render an award addressing the matters expressed in the settlement reached. Such an arbitral award is capable of being enforced just like a final and binding arbitral award. Therefore, it must satisfy the substantive and formal requirements imposed upon arbitral awards.

[B] Procedural Matters With Respect to Rendering Awards

The procedure for rendering arbitral awards has been regulated in the IAL. Accordingly, unless otherwise agreed, the arbitral tribunal shall render its award by majority decision (Article 13A(1)). If the arbitral award consists of a sole arbitrator, no difficulty should arise when making a decision. However, if the arbitral tribunal consists of more than one arbitrator (which must be an even number according to Article 7A(1)), it is more preferable for the award to be rendered by unanimous decision. The award shall be rendered by majority decision if a unanimous decision cannot be reached. This provision is applicable to both partial and final awards. However, Article 13A(2) provides that the chairman may issue procedural orders without consulting or seeking the approval of the co-arbitrators if authorized by the parties or the co-arbitrators. For instance, it may be expressed in the terms of reference that the chairman may issue procedural orders without consulting the parties or the co-arbitrators. This power is limited to the issuance of procedural orders.[228] Therefore, this power granted to the chairman should not be extended to cover matters such as interim measures or determinations as to the merits.

Where the parties have agreed that the arbitral tribunal is to render its award unanimously, the award must be rendered by unanimous decision. If the award is not rendered by unanimous decision, the arbitral proceedings will come to an end. This is because the IAL expresses that where the award is not rendered by unanimous decision despite the parties' agreement that the award should be rendered by unanimous decision, the arbitral proceeding will terminate (Article 13B(1)(v)).

In certain cases, the arbitral tribunal may not render an award by majority decision. For instance, each of the arbitrators in a three-member panel may reach a different opinion. In such a case, it will be deemed that a valid award was not rendered and arbitral proceedings will consequently be terminated. It is advised in such cases that the parties authorize the chairman to render the award.[229]

Where an arbitral tribunal consists of more than one arbitrator, the award should be rendered following negotiations between the arbitrators. Since there is no express provision as to how the negotiation is to be conducted, the arbitral tribunal enjoys wide discretionary powers in this respect. In principle, all arbitrators should attend meetings where decisions are being taken. Decisions adopted at meetings attended by only the majority of the arbitrators are deemed invalid.[230] Consequently, the failure of one of the arbitrators to attend meetings where

[228] Derains, *supra* no 179, 287.
[229] Kalpsüz, *supra* no 22, 120.
[230] Umar, *supra* no 141, 1187; The relevant court of appeal decisions on this matter are as follows: 'In this case, an award that has been accepted by only two arbitrators cannot be accepted as a valid award rendered within the six month period in light of the fact that there is no document evidencing that three arbitrators negotiated with a view to rendering an award and that an award was rendered, whether there was dissent in the tribunal or whether the third arbitrator refused to sign the award, and, in particular, whether the award was rendered pursuant to the applicable procedural rules.' (Court of Appeal Commercial Division, Date: 7 October 1971, File No: 2842, Decision No: 5417 (in Ertekin, *supra* no 113, 264)); 'Even though Article 531 of [Law No. 1086] provides that arbitrators may decide by majority, this majority is the majority of the arbitral tribunal following its constitution in the complete sense; it is not legally possible for two of the three arbitrators to

decisions are taken prevents the continuance of arbitral proceedings. However, it is possible for a member of the tribunal to refuse to attend a decision-making meeting, refuse to take part in the voting stage or refuse to sign a decision adopted without a valid justification and for the sole purpose of preventing decision by majority. In fact, it is possible for an arbitrator to resign at the award phase for the same reasons. This issue has not been expressly regulated in the IAL. However, such circumstances should not affect the validity of the award. Otherwise, arbitrators who act in bad faith would be provided with the opportunity to easily block the arbitral proceedings.[231]

The arbitral award should, in principle, be issued at the place of arbitration. However, in arbitrations where there is a sole arbitrator and the award is to be rendered upon examination of the documents, the arbitral award may be rendered at a place other than the place of arbitration, provided that the place of arbitration is written in the award. This solution may also be justified in cases where the award is rendered by a tribunal where such appears reasonable and justifiable from the circumstances.

[C] Termination of Arbitral Proceedings for Reasons Other Than the Issuance of a Final Award

Article 13B lists the reasons that bring arbitral proceedings to an end other than the issuance of a final and binding award. Even for reasons other than the issuance of a final and binding award, which terminate arbitral proceedings, the arbitral tribunal should make a determination. However, a set aside action cannot be brought against such a decision since such a decision would lack finality and not be binding. In the event it is held by the arbitral tribunal that one of these reasons exist, the arbitral tribunal shall terminate the arbitration proceedings.

(1) Claimant's withdrawal of the claim

In the law of civil procedure, a claimant may decide to withdraw its claim through waiver (*davadan feragat* in Turkish), withdrawal (*davanın geri alınması* in Turkish) or cancellation (*davanın işlemden kaldırılması* in Turkish) of the claim. However, each of these produce different legal consequences. For instance, if the claim is brought to an end by way of a waiver, it will be deemed that the right that is the subject matter of the claim was waived; a new claim on the same issue cannot thereafter be commenced again in the future.[232]

Where the claimant withdraws its claim, the claimant will not be deemed to have waived its right and will therefore be entitled to commence the lawsuit on the same grounds in the future, provided that the limitation of time for commencing the lawsuit has not expired. However, the withdrawal of a claim requires the defendant's consent (Article 123, CCP).

The IAL provides that where the claimant withdraws its claim, such withdrawal will constitute a circumstance requiring the termination of the arbitration proceedings. However, as noted above, this requires the defendant's consent. Where the claimant notifies the arbitral tribunal that it wishes to withdraw its claim, the arbitral tribunal shall notify the defendant of such request and require the defendant to submit its objections within the period provided. In the event the defendant refuses to consent, the arbitral tribunal will determine whether or not the defendant has legal interest in the conclusive resolution of the dispute. If the arbitral tribunal determines that the defendant does have a legal interest in the continuance of the arbitration proceedings, it will continue with the proceedings; otherwise it will terminate the arbitral proceedings (Article 13B(1)(i)).

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render an award without the involvement of the third arbitrator and for such an award to be deemed an award rendered by majority. In such a case, the award should be set aside for not being an award lawfully rendered by valid tribunal, pursuant to Article 533 of [Law No. 1086].' (15th Civil Division of the Court of Appeal, Date: 21 December 2005; File No: 2005/7443; Decision No: 2005/6981 (<www.kazanci.com>, August 2014)) [translated by the chapter authors].

[231] Akıncı, *supra* no 22, 229; Umar, *supra* no 141, 1187; 'Since according to Article 525 of [Law No. 1086] the arbitral tribunal is entitled to determine the dispute solely upon examination of the documents and that, according to Article 531, the arbitral tribunal may render an award by majority provided that they meet to discuss and evaluate the issues, the claimant's attorney's argument that the award rendered is invalid since it was not signed by one of the three arbitrators (despite such arbitrator having attended tribunal meetings where the award was discussed and rendered) is without any legal basis.' (11th Civil Division of the Court of Appeal, Date: 2 October 1975, File No: 1975/2842, Decision No: 1975/5417 (<www.kazanci.com>, August 2014)) [translated by the chapter authors].

[232] Pekcanıtez, *supra* no 80, 819 *et seq*.

(2) Parties' agreement

Since in international arbitration it is accepted that the parties are the real 'owners' of the proceedings, the parties may agree for the claim to be withdrawn or not continued with. This is primarily because the arbitral tribunal is the parties' tribunal, and is bound by party agreement. Similar to the commencement of a lawsuit, party intent is required for the continuance of the proceedings. The IAL lists party agreement on concluding the arbitral proceedings as a reason for the termination of the arbitral proceedings (Article 13B(1)(ii)). There is no requirement as to the form of this agreement. In fact, the parties are not obligated to inform the court as to the reasons for settling. If the parties' agreement includes arbitration costs, the arbitral tribunal may issue an award that is enforceable with respect to such costs. If the parties' agreement does not render the arbitration agreement invalid, the parties are at liberty to commence fresh arbitration proceedings at a future date.

(3) Impossibility or redundancy of continuing the arbitral proceedings

The IAL provides that arbitration proceedings will terminate in the event the arbitral tribunal considers that continuing with the arbitral proceedings would be, for some reason, impossible or unnecessary (Article 13B(1)(iii)). These reasons may be legal or factual. An example of a factual reason that may necessitate the termination of the arbitral proceedings is where one of the parties is unable to participate in the arbitral proceedings due to war or a similar reason. As an example of a legal reason that may justify termination is where the arbitral tribunal cannot reach a unanimous decision, despite an agreement between the parties that a decision be rendered unanimously.[233] Similarly, there would be no need to conduct the arbitral proceedings and render an award where the claimant no longer has a legal interest in the claim, the subject matter of the lawsuit is no longer in existence, the debtor satisfies its debt or where the right that is the subject matter of the lawsuit ceases to exist. In such a case, the arbitral tribunal will terminate the arbitral proceedings, holding that it is unnecessary for a decision to be rendered on the merits. However, the award must express by whom the arbitration costs incurred so far are to be borne.[234]

(4) Arbitration period not being extended

The arbitral award must be rendered within the time foreseen in the IAL (Article 10B(1) - one year). The failure to issue the award within the time foreseen constitutes a ground for the setting aside of the award (Article 15A(2)(i)(c)). As expressed above, in the event it is understood that the arbitral tribunal would not be able to render the award within the time period foreseen, the arbitration period shall be extended by party agreement or, in the absence of an agreement between the parties, by the court of first instance upon either party's application. The arbitral tribunal does not possess the authority to apply to the courts or render an award themselves for the extension of the arbitration period. Consequently, either of the parties should make an application to the court for the extension of the arbitration period. In the event an application is not made to the court, the arbitration proceedings will terminate upon the expiration of the period. Similarly, where a request is made to the court by a party for the extension of the arbitration period, the arbitration proceedings will terminate in the event such application is rejected and the time period expires (Article 13B(1)(iv)).

(5) Arbitral tribunal's failure to render a unanimous decision despite party agreement

Where the parties have agreed that the arbitral tribunal shall render an award by unanimous decision, the arbitral tribunal is under an obligation to do so. The arbitral proceedings will terminate if the arbitral tribunal fails to render an award by unanimous decision (Article 13B(1)(v)).

(6) Loss of a party's legal capacity to remain a party

In the law of civil procedure, capacity is the legal capacity to be a party to a lawsuit, and therefore the subject of the procedure of the relationship. In other words, capacity is a person's ability to become the claimant or the defendant in a lawsuit. Article 50 of the CCP provides that a person possesses the legal capacity where such person

[233] F. von Schlabrendorff & A. Sessler, 'Arbitration in Germany: The Model Law Practice', in *Arbitration in Germany: The Model Law in Practice*, ed. K-H. Böckstiegel, S. Kröll & P. Nacimiento (The Netherlands: Kluwer Law International, 2007), 414.

[234] Kalpsüz, *supra* no 22, 107; Akıncı, *supra* no 22, 232.

possesses the right to benefit from civil rights; therefore any person who possesses civil rights capacity has the capacity to become and remain a party to a dispute.[235]

However much the legal capacity to being a party to a lawsuit is a concept that concerns the law of civil procedure, it is to be determined pursuant to the principles of substantive law. Consequently, one must first determine the applicable law when determining a party's legal capacity. Although it is possible to determine the law applicable to capacity for arbitrations seated in Turkey (Article 9, TPIL), it may not be equitable to apply Turkish conflict of laws provisions in all cases, since arbitral tribunals do not have a *lex fori*. The New York Convention also accepts that where a party is under some incapacity under the law applicable to them, the recognition and enforcement of an award may be refused. Therefore the law applicable to the parties' capacity should be determined in light of the conflict of laws provisions of the state deemed most appropriate by the arbitral tribunal.[236]

Article 11B(1) provides that where a party no longer possesses legal capacity in an arbitration, the arbitral tribunal shall suspend the proceedings and notify the concerned parties with a view to continuing the proceedings. There is no express provision in the IAL as to what should be understood from the expression 'concerned parties'. However, if one of the parties is a natural person and has died, the concerned parties in such a case would be the deceased's inheritors. Where the party who loses its legal capacity is a legal person, its legal successors should constitute the concerned person. Consequently, where a person no longer possesses the legal capacity to act as a party, the arbitral tribunal shall notify such concerned person. In the event such persons fail to notify the arbitral tribunal or the counterparty that they intend to continue with the proceedings, the arbitral proceedings will terminate. Further, the arbitral proceedings will terminate in the event the arbitral tribunal fails to notify the concerned parties within six months (Articles 11B(2) and 13B(1)(vi)).

(7) Non-payment of the advance payment

As is generally accepted in international arbitration practice, the arbitral tribunal is not under an obligation to continue with the proceedings unless the requested advance payment is made. The IAL provides that the arbitral tribunal may require the claimant to pay an advance payment to cover the trial costs (Article 16C(1)). Although express terms of the article do not provide that the parties are entitled to agree to the contrary, the parties may agree for the apportionment of the trial costs in a different way, within the boundaries of the principle of party autonomy. For instance, it is frequently seen in practice that parties agree for the trial costs to be borne equally by the parties.[237]

The arbitral tribunal usually determines a period of time within which the advance payment is to be made at its first meeting. In the event the advance payment is not made within this period, the arbitral tribunal will suspend the proceedings. If the advance payment is made within 30 days as of the parties being notified of the suspension, the proceedings will be re-commenced; otherwise the proceedings will terminate (Article 16C(2)). In order for the suspension to be lifted and the proceedings re-opened, the advance does not necessarily have to be paid by the party under an obligation to pay. It may be paid by either of the parties.[238] If a counterclaim has been asserted by

[235] Pekcanıtez, *supra* no 80, 294.

[236] Akıncı, *supra* no 22, 195, fn. 346. In one of its decisions regarding enforcement of a foreign arbitral award, the court of appeal determined the law applicable to determine a company's capacity pursuant to the conflict of laws provisions of the seat of arbitration (Bulgaria): 'There is no provision in either Article 8 of the [previous TPIL] or in the New York Convention as to the law applicable in determining a party's capacity to execute an arbitration agreement. Article 8 of the [previous TPIL] provides that a party's capacity is to be determined in accordance with the national law the concerned person is subject to. Article 282 of the Bulgarian Commercial Code provides that the representation of a company is subject to the laws where it is registered; in the present case, it is to be determined in accordance with Turkish law.' (19th Civil Division of the Court of Appeal, Date: 15 November 1995, File No: 1995/9108, Decision No: 1995/9685 (in N. Ekşi, *Milletlerarası Nitelikli Davalara İlişkin Mahkeme Kararları* (Court Decisions Regarding Lawsuits of International Nature) (Istanbul: Arıkan Publishing, 2007), 460)) [translated by the chapter authors].

[237] Kalpsüz, *supra* no 22, 109.

[238] *Id*, 110.

the defendant, the arbitral tribunal may require the defendant to make an advance payment for the counterclaim. The explanations made above are equally applicable to counterclaims.[239]

The IAL contains no express provisions as to the amount of the advance payment and what such payment is to cover. The arbitral tribunal will determine the amount to be made. However, custom may dictate that a fixed amount be paid to cover the arbitrator fees and the cost of other matters listed in Article 16B to be calculated in light of the amount in dispute. The arbitral tribunal may demand the payment of additional advance on cost during the arbitral proceedings. The arbitral tribunal should, following the rendering of the final award, share with the parties a document showing the amounts and the explanations for each payment made from the advance payment, and refund the excess amount, if any.

§5.07. FORM AND CONTENT OF ARBITRAL AWARDS

The provision concerning form and content requirements of arbitral awards is Article 14A. The reference to an arbitral award here is a reference to a final award. Other interim orders (procedural orders), particularly interim measure orders, do not fall within the scope of this provision. Consequently, although a final award must be in writing, there is no such requirement with regards to interim orders concerning the arbitration procedure. This is because interim orders are not awards that may be subject to set aside actions. Further, it may be sufficient for interim orders to be signed by the chairman of the arbitral tribunal even where such orders are in writing, provided that the parties have not agreed otherwise. However, the requirements set out in Article 14A will be equally applicable with regards to the correction of substantial errors, the interpretation of the award and its completion.

Although the IAL does not expressly state that awards must be in written form, awards must be in writing in light of the fact that the IAL requires the award to contain the name, surname and signature of each of the arbitrators (Article 14A(1)(iv)), and that it permits the award to be submitted to the court of first instance upon either of the parties' request (Article 14A(4)).[240]

The following are the requirements that must be complied with when drafting an award:

(1) The award must contain the parties' and the representatives' name, surname, title and address (Article 14A(1)(i))

The importance of the award containing the name, title and address of the parties is to do with determining by whom the award is to be enforced, and against whom. It is advised that the parties' full trade name is contained in the award. Errors or incompleteness with reference to trade names may raise difficulties in enforcing the award. Further, the arbitral tribunal's duty to render an award that is capable of being enforced requires the parties' full name and title to be written in the award accurately and in full.

(2) The legal ground upon which the award is based, as well as its reasoning, must be specified (Article 14A(1)(ii))

The expression 'legal ground' constitutes a part of the reasoning of the award. Therefore, the provision is open to criticism. Under Turkish law, all judicial decisions must have a reasoning (Article 141(3), Turkish Constitution). The requirement that court decisions must contain a reasoning is closely linked to the right to be heard.[241] In fact, Article 31(2) of the UNCITRAL Model Law also requires an award to contain a reasoning; however, the parties are free to agree otherwise.

(3) The amount of compensation awarded should be expressed (Article 14A(1)(ii))

This requirement is intended to simplify the enforcement of awards concerning the payment of compensation. Consequently, the part of the award regarding relief sought must be understandable and enforceable without giving

[239] Akıncı, *supra* no 22, 235.
[240] Kalpsüz, *supra* no 22, 111.
[241] Pekcanıtez, *supra* no 80, 810. For detailed information on why arbitral awards must contain a reasoning, see: Kalpsüz, *supra* no 22, 113.

rise to doubts. For instance, the award must set out the amount of compensation awarded and the date on which interest begins to run.[242]

(4) The award must state the place of arbitration and the date of the award (Article 14A(1)(iii))

The place of arbitration is crucial with respect to the determination of matters, such as the *lex arbitri* and the legal avenues available against the award. Even where the arbitral tribunal convenes at a place other than the place of arbitration, the place of arbitration determined pursuant to Article 9 should be stated in the award. The arbitral tribunal should, in principle, render the award at the place of arbitration. However, with the advancement of technology, the arbitrators are able to render the decision without meeting in person at the place of arbitration. Therefore, in order to preserve legal predictability, it is assumed that the award was rendered at the place of arbitration.[243] Consequently, the place of arbitration, to which important legal consequences are attached, must be clearly written in the award.

The award must also contain the date of the award. The importance of the date becomes evident particularly where one needs to determine whether or not the award was rendered within the time period applicable. The uncertainty arising from circumstances where the arbitrators sign the award at different dates is resolved by the inclusion of a date reflecting the date of the award. The presumption is that the award is rendered on the date stated.[244] Where from the date of the award it seems that the award was rendered within the applicable time period but a party nevertheless alleges that the award was not rendered on the date stated, and therefore not within the applicable time period, such party must prove its allegation in an action to set aside the award. It should be emphasized that the date taken into account when determining whether or not an award was rendered within the applicable time period is the date of the award, and not the date on which the award was notified to the parties.[245]

(5) The award must contain the name, surname, signature and the dissenting vote(s) of the arbitrator(s) (Article 14A(1)(iv))

The award must contain the full name, surname and signature of each arbitrator regardless of whether or not there are dissenting arbitrators. An award that is not signed by the arbitral tribunal cannot gain validity. The dissenting arbitrator(s) may sign the award by inserting their dissenting opinion. In practice, one can observe that certain arbitrators who dissent refrain from signing the award or resign at the decision making phase. It cannot be said that an award will not be consummated, and therefore invalid, merely because the dissenting arbitrator refuses to sign the award despite the completion of the proceedings. Even though there is no express provision as to what will happen in such a case, it is accepted that the award may be signed by the majority, provided that the reason for the absent signature is explained.[246] In other words, the refusal of one of the arbitrators to sign the award does not affect the validity of the award. Therefore, it is sufficient for the award to be signed by the majority of the arbitral tribunal, provided the information is present in the award as to why the award was not signed by all members of the tribunal, so as to enable one to understand why the arbitral award is not complete. However, unlike certain other legal jurisdictions such as Switzerland, Turkish law does not empower the chairman of the arbitral tribunal to sign the award.

The signature(s) of the arbitrator(s) must be by hand, in accordance with Article 15 of the TCO. In international arbitration practice, although it is generally accepted that dissenting arbitrators can express their dissenting

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[242] Akıncı, *supra* no 22, 239; 'On the other hand, an arbitral award must also contain the enforcement conditions foreseen for court decisions in Articles 388 and 389 of [Law No. 1086]. However, since an amount has not been expressed, it is not possible to enforce the provision regarding the accrued interest. For this reason, the arbitral tribunal should document each payment date by obtaining information from the claimant and from official bodies, the accrued interest amount should be calculated from the discount ratio between the date of payment of the 8.4% legal fee payable by the defendant and the date of lawsuit, the calculated amount should be ordered to be paid by the defendant, and discount interest shall be accrued with respect to the main receivable from the date of lawsuit to the date of payment. The decision of the court of first instance is hereby overruled, and appeal objections are accepted, due to the failure to explore these issues and the failure to obtain information from the land registry and the tax office.' (15th Civil Division of the Court of Appeal, Date: 19 February 2007, File No: 2006/7195, Decision No: 2007/986 (<www.kazanci.com>, August 2014)) [translated by the chapter authors].

[243] von Schlabrendorff, *supra* no 238, 392.

[244] *Id*.

[245] Kalpsüz, *supra* no 22, 116.

[246] Kalpsüz, *supra* no 22, 117; Akıncı, *supra* no 22, 240.

opinion in the award, there are indeed different views and practices in this regard. Turkish law accepts that the dissenting vote of the dissenting arbitrator may be written in the award. However, the dissenting opinion must not contravene the principle requiring the confidentiality of negotiations, and must only include the dissenting arbitrator's opinion. The dissenting opinion must not be in the nature of advice to the party against whom the award is rendered.[247] It has been expressed that the dissenting opinion must relate to the legal grounds, and not to reasons relating to the evaluation of evidence, and also to the determination of facts unless it relates to the implementation of the rules regarding evidence.[248] The practice in Turkey is for the dissenting opinion to sign the award with reservation, and attach its dissenting opinion to the award.[249]

(6) The award must state that a set aside action may be brought against the award (Article 14A(1)(v))

The IAL requires arbitral awards to express, similar to court decisions, that a challenge may be brought against the award and the time period within which such challenge may be brought. Since only a set aside action may be commenced against an award subject to the IAL, the IAL provides that the award must express that a set aside action may be commenced against the award.

The IAL does not expressly regulate the legal consequences of failure of complying with these requirements. The award may become invalid without the presence of some of the requirements that are of a mandatory nature. For instance, a signature is a mandatory requirement. However, deficiencies related to some of the above-mentioned matters are capable of being cured at a later stage. For instance, where the award does not specify the place of arbitration or the date of the award, this should not justify the setting aside of the award. Such matters may be rectified at a later stage.

§5.08. NOTIFICATION OF THE AWARD AND FILING IT WITH THE COURT

The arbitral award must be notified to the parties by the chairman of the arbitral tribunal (Article 16A(3)). The award notified to the parties must contain each arbitrator's signature. The notification is important with regards to the correction, interpretation, completion and annulment of the award, since finalization of the award and the parties' ability to challenge the award depend on its notification. The 30-day period foreseen for the correction, interpretation, completion and annulment of the award commences with the notification of the award.[250]

The award may be notified to the parties by the arbitral tribunal or the court. The parties may request that the award be sent to the court of first instance, provided that the costs for doing so are paid. In such a case, the award will be submitted to the court of first instance by the arbitral tribunal and will be filed by the court clerk (Article 14A(4), IAL). The filing of the arbitral award with the court is not a legal prerequisite to the finalization and enforceability of the award. The award will become final following the notification of the award by the arbitral tribunal and the expiration of the applicable time period. However, in any event, a certificate of enforceability should be obtained from the court for the enforcement of the award in Turkey (Article 15B(1) and (2)).

The notification should naturally be made in writing. The arbitral tribunal is not under an obligation to notify the parties in accordance with the Law on Notifications.[251] It is possible for the notification to be made by post or via courier. The procedure as to notifications will be subject to the parties agreement or, in the absence thereof, in

[247] Kalpsüz, *supra* no 22, 118; Berger, *supra* no 25, 392.
[248] Berger, *supra* no 25, 392.
[249] Kalpsüz, *supra* no 22, 118.
[250] Kalpsüz, *supra* no 22, 121.
[251] Law on Notifications, Law No. 7201 of 11 February 1959, published in the Official Gazette Numbered 10139 and dated 19 February 1959. See, Şanlı, *supra* no 22, 368; Deren-Yıldırım, *supra* no 118, 137; 'It is understood from the sworn statement of Mr Frank Rehder, a member of the London Court of International Arbitration, that the decision relating to the appointment of arbitrator and the arbitration proceedings was notified to the defendant via fax and mail. The arbitral award was notified to the defendant through the same means. The fax confirmation sheets confirm that fax transmissions were sent to the number…not objected to the by the defendant. It is not mandatory for notifications in this case to have been made in compliance with rules applicable to notification made by the courts.' (11th Civil Division of the Court of Appeal, Date: 19 November 2001, File No: 2001/6144, Decision No: 2001/9045 (in Ekşi, *supra* no 241, 488)) [translated by the chapter authors].

accordance with the rules applicable to the arbitration procedure; in the absence of these, the arbitral tribunal will exercise its discretion. The notification may be made to the parties' representatives as well as the parties themselves.

Under the IAL, a written notification is deemed received when, unless otherwise agreed, it is delivered to the recipient or delivered to the place of domicile, place of residence, place of business or postal address of the recipient. In the event none of the above can be ascertained despite the necessary investigations being made, notifications are deemed received when the notice is sent to the last known place of domicile, place of residence, place of business or postal address of the recipient via registered letter, or via any other method where receipt is documented. Written notifications are deemed received on the date it is delivered in the usual method (Article 14C(1)-(3)). Such a procedure is in fact in compliance with the needs of international arbitration. However, this procedure will not be applied to notifications made by the court (Article 14C(4)).

If a notification cannot be made as a result of a party's address being outside of Turkey, the arbitral tribunal may seek the court's assistance for the notification to be made in accordance with the international rules concerning notifications.

§5.09. CORRECTION, INTERPRETATION AND COMPLETION OF THE AWARD

Disputes that are determined by arbitral tribunals may be extremely complex and may concern highly technical matters. Thus it is possible, almost natural, for arbitral awards dealing with such complexity and technicality to contain calculation errors or errors such as spelling mistakes, or contain conflicting statements. The award may also be difficult to understand or the award may not determine certain disputes. It is in such cases that awards require correction, interpretation and completion.

Each party may request the correction of calculation, spelling or other errors from the arbitral tribunal, provided that such request is made within 30 days as of the notification of the award to the party concerned, and the counterparty is notified of the request (Article 14B(1)(i)). The arbitral tribunal may also correct substantive factual errors of its own motion within 30 days following the date of the award (Article 14B(3)). Consequently, substantive factual errors in the award may be corrected both upon request of the parties and by the arbitral tribunal *ex officio*. Factual errors that are not substantive can therefore not be corrected within the scope of this article, for instance, a legal ground. In fact, only clear and simple errors are corrected within the scope of this article. An example of a substantive factual error is where a parties' name or title is incorrectly written or the currency in which payment is to be made, has not been clearly expressed.[252]

Each of the parties may request that the arbitral award be interpreted, in full or in part, within 30 days of being notified of the award, and provided that the counterparty is notified of such request (Article 14B(1)(ii)). Doubts may arise in the implementation of arbitral awards in the event the award is not sufficiently clear or there are conflicting statements in the award. In such cases, a request may be made to the arbitral tribunal for the interpretation of the award, to resolve the doubt. The interpretation of the award by the arbitral tribunal that rendered the award is not a challenge against the award. Interpretation of the award does not entitle the arbitral tribunal to change the original award. It merely entitles the arbitral tribunal to interpret an already rendered award.

All claims asserted in the arbitral proceedings by the parties must be determined upon by the arbitral tribunal. Therefore the parties may request from the arbitral tribunal, within the applicable period, to 'complete' the award in the event one or more claims were not determined upon by reason of neglect or any other reason. The IAL provides that either of the parties may request that the award be completed by the arbitral tribunal within 30 days of being notified of the award and provided the counterparty is notified of such request (Article 14B(4)). The completed arbitral award shall be rendered by the arbitral tribunal within 60 days provided the request is found to

[252] Berger, *supra* no 25, 399.

be justified. However, a request for the completion of the award cannot be made in relation to claims not asserted during the arbitral proceedings, even where such claims fall within the scope of the arbitral proceedings.[253]

Requests for correction, interpretation and completion of the award are to be made to the arbitral tribunal and notified to the counterparty. The counterparty may notify its views to the arbitral tribunal regarding the request made. Since determining such a dispute without notifying the counterparty will constitute a violation of the right to be heard, the award may be set aside.[254]

The arbitral tribunal, if it finds the request justified, will correct the substantive factual error or interpret the award within 30 days as of the date of the request (Article 14B(2)). This decision will be notified to the parties (Article 14B(5)). In such a case, the time period for the commencement of set aside proceedings against the award will begin to run from the date the corrected or interpreted award is notified to the parties (Article 15A(4)). The award of the arbitral tribunal correcting, interpreting or completing the original award is not an additional award, but becomes part of the original award (Article 14B(5)). The award of the arbitral tribunal correcting, interpreting or completing the original award cannot be made subject to a separate set aside action.

§5.10. ARBITRATION COSTS

[A] Items Constituting Arbitration Costs

Arbitration costs refers to all expenses made for the arbitral proceedings to be properly conducted. The arbitral tribunal not only decides, in its final award, the merits of the dispute, but it is also required to determine the arbitration costs and who is to be liable for such costs. In fact, Articles 16B(1) and Article 16D(2) provides expressly that an arbitral award must contain a determination as to the arbitration costs.[255] Article 16B(2) lists the matters that are regarded as falling within the scope of arbitration costs: (i) arbitrators' fees; (ii) travel and other expenses of the arbitral tribunal; (iii) fees paid to experts and other third parties (i.e., translators) by the arbitral tribunal whose assistance is acquired, and expenses relating to the duties performed; (iv) travel and other expenses of witnesses to the extent approved by the arbitral tribunal; (v) attorney fees awarded by the tribunal in accordance with the minimum fee tariff for attorneys in favour of the successful party;[256] (vi) court fees for applications made to the courts; and (vii) notification costs.

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[253] Kalpsüz, *supra* no 22, 123.

[254] Deren-Yıldırım, *supra* no 118, 136.

[255] 'Article 530 of [Law No. 1086] provides that the arbitral tribunal must, in the award, "rule on the costs of the claim and specify the amount of costs". It is -undoubtedly- mandatory for this provision to be complied with, being a provision that is of crucial importance with respect to the principles of transparency and trust and which concern public policy. In fact, the parties have -independent of such provisions contained in the arbitration agreement- claimed in their statements for the payment of "arbitrator costs and other expenses", for the claim, and "all expenses related to the arbitration proceedings", for the counterclaim. Consequently, the decision should comply with the said requirements, covering all claims made, whereby its implementation and enforcement is made possible.' (Court of Appeal Commercial Division, Date: 18 September 1972, File No: 3429, Decision No: 3711); 15th Civil Division of the Court of Appeal, Date: 9 November 1992, File No: 4476, Decision No: 5204 (in Ertekin, *supra* no 113, 272-273)) [translated by the chapter authors].

[256] Article 16B(2)(v) provides that attorney fees of the successful party, determined in accordance with the minimum fee tariff for attorneys, fall within the concept of arbitration costs. The court of appeal approves this in one of its decisions: 'Although a determination as to trial costs has been made by the Türsab Arbitral Tribunal in its award dated 25 October 2009 accepting the claim commenced, the determination has been made in an incomplete manner due to the fact that attorney fees was not ruled upon in favour of the claimant who was represented by an attorney and which constitutes as part of the trial costs, pursuant to Article 530(3) of [Law No. 1086] and the provisions of the Attorneys Minimum Fee Tariff. The determination is therefore incorrect in this respect.' (19th Civil Division of the Court of Appeal, Date: 22 March 2011, File No: 2010/10631, Decision No: 2011/3674 (<www.kazanci.com>, August 2014)) [translated by the chapter authors]. Under Turkish law, there are two types of representation fees. The first is the fee determined pursuant to the agreement between the party and its attorney. The parties are free to determine the amount of this provided that it does not fall below the minimum fee tariff. The second is the fee awarded to the successful party by the court where the successful party is represented by an attorney. The IAL covers only the second type. Turkish law, different from arbitrations conducted pursuant to the ICC Rules of Arbitration, do not accept fees paid by a party to its own attorney pursuant to the representation agreement as arbitration costs: see, T. Kalpsüz, *Tahkim Giderleri* (Arbitration Costs) (Ankara: International Arbitration Seminar, 2006), 25.

(1) Arbitrator fees

With regards to arbitrator fees, it should be noted that the agreement entered into by the parties and the arbitrators is an agreement that is subject to the TCO.[257] This is an agreement that is independent from the arbitration agreement, and identifies the rights and obligations of the arbitrators and the parties. It is accepted under Turkish law that such an agreement is in the nature of an agreement to represent.[258] Therefore, the provision in the TCO concerning agreements to represent (Articles 502-514) are to be applicable to arbitration agreements subject to Turkish law. In accordance with the TCO, a representative is entitled to a fee if there is agreement or custom to that effect (Article 502(3)). In fact, the custom in Turkish law is that an arbitrator is entitled to a fee.[259] The IAL does state expressly that arbitrators are entitled to a fee (Articles 16A and 16B).[260] However, although services as an arbitrator may indeed be provided for free, this would require clear written agreement or must be understood from the circumstance of the case without a doubt.

Under Turkish law, the parties are jointly liable for the arbitrators' fees. In doctrine, it is accepted that the joint liability for the payment of the arbitrators' fees is justified with respect to the independence and impartiality of the arbitrators.

(2) Determining arbitrator fees

Article 16A(1) regulates how arbitrator fees are to be determined. Unless otherwise agreed, the arbitrator fees are to be determined by an agreement between the parties and the arbitral tribunal, taking into consideration the amount in dispute, the nature of the dispute and the length of the arbitral proceedings.

The first concept recognised by the IAL is the principle of party autonomy. The parties and the arbitral tribunal may execute an arbitrator agreement. This agreement may determine the amount to be paid to the arbitrators as arbitrator fees. In fact, the parties and the arbitral tribunal may execute an agreement solely concerning the fees. Such an agreement may be entered into before, during or after the arbitral proceedings following the rendering of the award.[261] In such a case, the fees of the arbitrators would have been determined by an agreement. In practice, arbitrator fees are generally determined in the terms of reference. The terms of reference or any other document with similar features signed by the parties and the arbitral tribunal are binding upon both sides and cannot be amended, unless such amendment has been consented to.[262]

The parties may also determine the arbitrator fees by making reference to international arbitration rules or to the rules of arbitration of international arbitral institutions (Article 16A(2)). For instance, in the event the Rules of Arbitration of the ICC are incorporated into the arbitration agreement, the provisions in the Rules of Arbitration relating to the internal conduct and fees of the arbitrators would be deemed accepted, and thus applicable. In this respect, Article 4 of Appendix III of the Rules of Arbitration lays out rules in determining the amount that is to be paid to the arbitrators as arbitrator fees. Where an arbitrator accepts a nomination for his or her appointment as an arbitrator in connection with an arbitration governed by the rules of an institutional rules of arbitration, such arbitrator is deemed to have accepted the amount foreseen in such institutional rules as arbitrator fees. In such cases, there is no need to execute a separate fee agreement or insert a provision in the terms of reference regarding arbitrator fees.

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[257] It is expressed in doctrine that an arbitration agreement is an agreement that has consequences with respect to both procedural law and substantive law: Pekcanıtez, *supra* no 80, 1071.

[258] 'In accordance with the dominant view of scholars, an arbitration agreement is a procedural law agreement and an agreement with the arbitrators is an agreement to represent, in the legal sense, due to the fact that it is regulated in a civil procedure code, the foundations of vital acts and transactions are in the procedural code and that arbitral awards carry a judicial role' (Court of Appeal General Legal Assembly, Date: 19 March 2003; File No: 2003/15-142; Decision No: 2003/182 (<www.kazanci.com>, August 2014); Court of Appeal General Legal Assembly, Date: 6 December 1969; File No: 1969/866; Decision No: 1970/5 (<www.kazanci.com>, August 2014)).

[259] Kalpsüz, *supra* no 262, 19.

[260] Therefore, the provision in the Code of Obligations regarding agreements to represent, whereby it is expressed that a representative will be entitled to a fee only if an agreement exists to that effect or there is a custom to that effect, is not applicable to agreements with arbitrators. This is because both the CCP (Article 400) and the IAL (Article 16) express clearly that arbitrators are to be paid a fee.

[261] Akıncı, *supra* no 22, 306.

[262] Roney, *supra* no 12, 56; Schneider, *supra* no 5, 408.

In the event the parties and the arbitral tribunal fail to agree upon the amount to be paid as arbitrator fees, and there is no provision in the arbitration agreement regarding the determination of arbitrator fees or reference has not been made to the rules of an arbitral institution in this respect, the arbitrator fees are to be determined in accordance with the fee tariff[263] published annually by the Ministry of Justice, after having obtained the views of the relevant professional bodies (16(A)(3)).

In line with these provisions, Turkish law does not accept the rule that arbitrators may determine on a unilateral basis, the fee that is to be paid to them.[264] In fact, the court of appeal has expressed its opinion in line with this rule.[265] However, since the unlawful determination by the arbitral tribunal of the fees payable to the arbitrators in breach of the applicable tariff does not concern public policy, it can only be taken into consideration upon a party's application to set aside the award. In such a case, the award shall not be set aside in full, but only the part concerning the arbitrator fees shall be set aside.[266] If the parties refuse to pay the arbitrator fees set out in the award as part of the arbitration costs, the arbitrators may commence a lawsuit for the payment of the outstanding amount.

(3) Court costs

The need for court assistance or review of arbitration proceedings may arise during the arbitral proceedings. For instance, the court's assistance may be required with regards to applications for interim measures (Article 6), the constitution of the arbitral tribunal (Article 7B) and the collection of evidence (Article 12B). It is in such cases that court costs are incurred; such costs fall within the context of arbitration costs (Article 16B(2)(vi)).

[B] Responsibility to Pay Arbitration Costs

The provision governing the responsibility to pay arbitration costs has been regulated in Article 16D. Unless otherwise agreed or determined in accordance with the applicable rules, trial costs are to be borne by the unsuccessful party. In the event both parties partially prevail**,** the arbitration costs are to be apportioned in accordance with the proportion in which they prevail (Article 16D(1)).

§5.11. CONCLUSION

The IAL contains detailed provisions that respect modern rules and principles in international commercial arbitration concerning arbitration procedure. The principle of party autonomy, almost universally accepted as a cornerstone of international commercial arbitration, is now part of Turkish arbitration practice through the IAL. With a few exceptions, parties now have wide powers to determine, before or after a dispute has arisen, the required procedure to reach a final and binding resolution. Exceptions generally relate to public policy and the right to be heard, principles of equal, if not greater, importance in international commercial arbitration. The IAL therefore compels the parties and arbitral tribunal to balance competing principles when determining the arbitration procedure. Utmost caution should be made in doing so, considering the drastic consequences of noncompliance.

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[263] See Tariff for International Arbitrtaion Law in 2014, published in the Official Gazette Numbered 28942, and dated 15 March 2014.

[264] The rule that arbitrators cannot determine their fees has been criticised by scholars: Kalpsüz, *supra* no 262, 20 *et seq*.

[265] 'The agreement between the parties did not pre-determine a fee payable to the arbitrators as arbitrator fees; further, an agreement was not reached following the execution of the agreement as to arbitrator fees. The arbitral tribunal has nevertheless determined the fees to be paid as arbitrator fees. However, as explained by the Court of Appeal Case-Law Unification Committee in its decision dated 13 May 1964 and numbered 1/3, arbitrators may not determine their own fees. The acceptance of the contrary would constitute the breach of the rule that a person may not adjudicate upon his own personal receivable. It would contradict the principle of impartiality for an arbitrator to determine the fee payable to itself in return for its service. Again, pursuant to the same decision on the unification of case-law, arbitrator fees should be determined by a court. In light of the above, it has been unlawful for the arbitral tribunal to determine the fee payable to itself, in contravention of the said decision, and the award should for this reason be set aside.' (11th Civil Division of the Court of Appeal, Date: 13 March 2006, File No: 2005/2781, Decision No: 2006/2521 (<www.kazanci.com>, August 2014) [translated by the chapter authors].

[266] Akıncı, *supra* no 22, 308-309.