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PUBLIC POLICY AS A GROUND FOR REFUSING RECOGNITION AND ENFORCEMENT OF NEW YORK CONVENTION AWARDS IN ENGLAND AND TURKEY

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AUTHORSHIP DECLARATION

I, Halil ONVER, declare that this dissertation comprises my own work and not the work of any other individual or individuals. This dissertation is submitted in partial fulfilment of the requirements of the degree of Master of Laws in International & Commercial Dispute Resolution Law (LLM) at the Westminster School of Law, Faculty of Social Sciences and Humanities, University of Westminster, and I further declare that neither the whole nor any part of this dissertation has been or is being submitted to any other university or other institution or organisation for an award (or credits) of any kind.

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ABSTRACT

The strong connection between arbitration as a dispute resolution and the recognition and enforcement of the arbitral awards requires an effective set of rules which is applicable world-wide. The New York Convention provides such provision; however, its success heavily relies on the appropriate application and interpretation by the national courts. Public policy is one of the limited grounds provided by the convention for refusing recognition and enforcement of convention awards. Unfortunately, the convention did not provide a definition or criteria for interpreting such ground. Therefore, different courts across the world have applied this exception different, sometimes, unfairly. In this paper, the public policy considerations of English and Turkish Courts will be examined, presented and compared. In order to do that, firstly, in the light of New York Convention, the general overview of recognition and enforcement of convention awards will be drawn. In the second place, the public policy expectations in the decision of English Courts will be observed. Following to this, the attitude of Turkish Courts towards the public policy exception will be determined. In conclusion, the findings from the English and Turkish courts will be compared and certain ideas will be presented in order to improve recognition and enforcement of foreign awards in Turkey.

Keywords: International Commercial Arbitration, Recognition and Enforcement of Foreign Award, New York Convention, Grounds for Refusal, Public Policy Exception, English Law, Turkish Law

CHAPTER I
INTRODUCTION

Recent years have shown that the number of the dispute arising out of international commercial contracts in which several jurisdictions are involved, is increasing gradually. This has brought the need of solving such disputes swiftly and effectively in line with the fast-developing character of international trade. International commercial arbitration, as an alternative to litigation before the national courts, has become the most popular means of dispute resolution amongst the traders and companies as well as states, owing to its effectiveness and flexibility.

The non-judicial nature of the arbitration as means of dispute resolution alternative to litigation before the national courts provides a great extent of flexibility and less formality as well as party autonomy for the disputing parties to agree on most of the process during the arbitration proceeding as they wish. That being said, it is a fact that its effectiveness heavily lies on the willingness and the consensus of the disputing parties. This fact is still valid right after the arbitral tribunal rendered its award bind upon the parties. If the losing party refuse to satisfy the award, arbitration cannot be considered completed successfully even though the award is made. Further steps should be taken in order to recognise and enforce such an award which requires intervention of national courts. This strong connection between the success of arbitration and recognition and enforcement of arbitral awards is considered by national laws, bilateral and multilateral treaties, international and regional conventions and various methods developed for this regard.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) is the milestone instrument of the international commercial arbitration and provides very straightforward method for recognition and enforcement of the arbitral awards fall within the scope of the article I. The convention contains an exhaustive list of the refusal grounds, however, there is no definition or certain criteria to take into consideration when applying these grounds. That absences of interpretation tools and broad language caused wide discretion and inconsistent application of the convention by member states. A result of its ambiguity, the public policy[1] ground is one of the most debated ground

[1] Instead of public policy, in civil law countries, it more common to use the term public order. Therefore, Turkish scholars and national courts prefer to use public order. On the other hand, in common law countries

which result different applications and wide interpretations by the member states of the convention.

Arbitration in Turkey has a long-past presence dating back to the articles 40-52 of the Trade Code (Kanunname-i Ticaret) which entered into force on 1850 during the age of Ottoman Empire. It is the first code regulated arbitration as means of dispute settlement in Turkey, in line with the modern and secular legislations. Since then, there had been various legislations concerning arbitration from thereon. All major conventions including the most effective arbitration regulation on enforcement of foreign awards, the New York Convention have been signed and ratified in Turkey. Despite the progress accomplished in making national regulations and implementing international conventions, Turkey has not been included among the countries that are considered as arbitration heavens, especially as a result of unjust application of the public policy exceptions provided in the New York Convention. England, on the other hand, has been considered an arbitration-friendly and pro-enforcement forum with respect to recognition and enforcement of foreign award. The practice, both domestic and international, has been advanced via case-law in favour of international arbitration owing to narrow interpretation of refusal grounds provided in New York Convention. Therefore, it will be an appropriate model for Turkish judges, particularly when interpreting the article V/2-b of the convention.

The purpose in this paper is, therefore, to set forth the public policy considerations according to the doctrinal works and the decisions of England and Turkish courts. Following to this, the difference between two states will be compared with the aim to find out how these courts interpreted public policy. In order to do that, in first place, the general overview of recognition and enforcement of New York Convention awards is examined with special reference to the developments in Turkish law, the scope of convention awards and the general principles of the convention such as court discretion, onus of proof and reservations. Secondly, public policy expectations in both legal system is presented. The definition, scope and application of this exception is set forth according to the English and Turkish Courts decisions. Finally, in the conclusion chapter, a comparison is drawn between the consideration of public policy exception of England and Turkey. According to the findings of this comparison, an attempt will be made to give suggestions for Turkish courts in order to restore its damaged reputation with regard to the application of public policy exception.

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such as England, the term public policy is used. Within the extend of this paper, both terms are deemed as having the same meaning.

CHAPTER II
GENERAL OVERVIEW OF RECOGNITION AND ENFORCEMENT OF NEW YORK CONVENTION AWARDS UNDER ENGLISH AND TURKISH LAW

1. Developments on Recognition and Enforcement of Foreign Awards in Turkey

1.1 Recognition and enforcement via judgments

There is no provision in the Turkish Civil Procedure Act concerning the enforcement of foreign arbitral awards. Before the former International Law on Private Law and Procedural Law dated 1982[2], there was only 'the Treaty of Mutual Commitment in the Legal and Commercial Situation signed between the Republic of Turkey and the Republic of Austria' dated 1930 which had enabled the recognition and enforcement of foreign arbitral awards.[3] Pursuant to the article 20 of the ratification act of this treaty, 'the awards made by the arbitrators in the territory of one of the Contracting Parties shall be enforced in the territory of the other Contracting Party' within the territorial reservation. Turkey also had not ratified the 1923 Geneva Protocol and the 1927 Geneva Convention containing provisions on arbitration. Essentially, they were abolished by Article VII/2 of the New York Convention on the Recognition and Enforcement of the Foreign Arbitral Awards dated 1958 (here and after: New York Convention). For this reason, the gap that arises in the field of international arbitration in practice, until the PLCPC Code periods, has been filled with the case law of the Supreme Court of Appeal.

It is possible to distinguish between the case law:

In the first period, until 1949, the supreme court adopted a view that foreign arbitral awards would not be enforced under the provision for the enforcement of foreign court judgements, however, it would be enforced under the provisions for domestic arbitral awards -presumably, since the given guarantee that the Turkish courts would not consider a distinction between Turkish citizens and foreigners pursuant to Lausanne Peace Agreement.[4]

In the second period, the decision of the supreme court shed light on the following written decision of the General Assembly of the supreme court of appeal dated 7.11.1951, E.126/K.109:

[2] Law No. 2675 of 20 May 1982, published in the Official Gazette dated 22 May 1982, no. 17701.
[3] This treaty has been replaced by new treaty on 1991. Birsel, Mahmut T. 'Türkiye'de Yabancı Hakem Kararlarının Tenfizinin Anayasal ve Küresel Boyutları'(International and Constitutional Aspects of Enforcement of Foreign Awards In Turkey) <http://hukuk.deu.edu.tr/dosyalar/dergiler/DergiMiz7-ozel/PDF/birsel1.pdf> accessed on 11 November 2016, p.7
[4] Ibid.

"Even though the nationality of the arbitrators and the place where the arbitral award is made cannot make an award foreign, It was decided by the majority of votes that it would not be possible to enforce the foreign award in Turkey on the grounds that: the nationality award may be disputed with respect to the law governing arbitration agreement and substantive contract; further, it is a fact that if the arbitral award is given under a foreign legal authority, the award may be deemed to be a foreign arbitral award (if there is no reference to the Turkish laws and the place of the arbitration and the place where the awards is made is in Argentina, at that point this award is considered foreign); by taking into account that the provisions of arbitration in the Turkish Code of Civil Procedure[5] is exclusively devoted to arbitral awards rendered under the authority of the Turkish law; and unless it is decided that it would be probable to examine the award in the Turkish judicial authorities with regard to enforcement proceedings."[6]

The Chamber of Commerce of the Supreme Court of Appeals has adopted and maintained the principles set forth in its decision date 7th November 1951 of the Supreme Court of Appeals General Assembly in its subsequent decisions concerning the enforcement of foreign arbitral awards.

The two main ideas adopted during this period can be summarized as (i) an arbitral award given under a foreign legal authority is a foreign arbitral award, (ii) The foreign arbitral award shall be executed in Turkey only after they have been enforced in accordance with the provisions for the enforcement of foreign judgments. Both principles summarized above were adopted by the General Assembly of the Supreme Court of Appeals in its decision on 7th November 1951.[7] The first of these principles, that is the arbitral award under a foreign legal authority, still remains valid even today. In contrast, the fact that foreign arbitral awards are subject to enforcement as foreign court decisions has made it extremely difficult for foreign arbitral awards to be recognized and enforced in Turkey until the entry into force of the New York Convention date 1991.

In the third period, a quarter of a century before the New York Convention entered into force in Turkey, the Territorial Principle was adopted, when determining whether the award

[5] Law No. 1086 of 18 June 1927, published in the Official Gazette dated 2,3,4 July 1927, no. 622,623,624.
[6] Birsel, Mahmut T. 'Milletlerarası Ticari Tahkim ve Türkiye' (International Commercial Aritration and Turkey), Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi, (1980) C1/S1, 98-128, p.111
[7] Ibid.

is domestic or foreign, with the decision of the supreme court 15th civil division dated 10 March 1976, E. 75/1617, K. 76/1052 as follows:

> "Examinations of the Supreme Court of Appeal on the awards are within the area of judicial discretion. However, the judicial discretion of the Turkish court is limited to the borders of the country. In other words, the supreme court may be in control of the awards made by arbitrator who adjudicates, examines and solve the disputes within the sovereignty of the state. If so, it is impossible for the awards (rendered by arbitrators who gathered in the Lausanne City of Switzerland, adjudicated and examined the dispute there, even if they apply Turkish Law and respect the provisions of the Turkish public policy) to be under the Turkish courts' judicial control, which is limited to the sovereignty of the State. For the purpose of the territorial principle, the awards made in arbitrations conducted in the foreign country, should be described as foreign arbitral awards. Therefore, as there is no domestic award in accordance with Article 536 or 537 of the Code of Civil Procedures, … the recognition and enforcement of foreign arbitral award in Turkey ought to be discussed in present case."[8]

1.2 Recognition and enforcement via PLCPC Codes

In this Period, the first PLCPC Code entered into force as of 22nd November 1982. The former PLCPC had organized the enforcement of foreign arbitral awards on the basis of the provisions of the New York Convention (former PLCPC, articles 43-45). Nevertheless, in Article 44 of the code, the enforcement of foreign arbitral awards has been brought very close to the enforcement of foreign judgements. The international arbitration considerations of the Turkish legislator did not fall within the field of private law (commercial law), but rather remained as a matter of procedural law (Jurisdictional Theory) until the ratification of the New York Convention.[9]

The recognition and enforcement of foreign awards which do not fall within the scope of New York Convention are currently directed under the new Private International Law and International Civil Procedure Code (PLCPC Code).[10] The article 1/2 of the PLCPC Code expresses that 'The provisions of bilateral or multilateral treaties, conventions to which the Turkey is a party, are reserved.' These treaties or convention takes place of the regulations of domestic law when the enforcement of the awards falls within their scope. Currently, Turkey has signed and ratified ICSID Convention, New York Convention, Geneva Convention 1967.

[8] Kalpsüz, Turgut. 'Yabancı Hakem Kararı Kavramı' (The term of Foreign Award) Yabancı Hakem Kararlının Tanınması ve Tenfizi, II Tahkim Haftası, (25-26th November 1983) Ankara, Banka ve Ticaret Hukuku Araştırama Enstititüsü, 44-45, p.44

[9] Birsel, Mahmut T. International and Constitutional Aspects of Enforcement of Foreign Awards In Turkey, p.9

[10] Law No. 5718 of 27 November 2007, published in the Official Gazette dated 12 December 2007, no. 26728.

According to the Constitution of Republic of Turkey, these treaties are equal to domestic laws and part of the Turkish legislations.

1.3 International Conventions

1.3.1 New York Convention

Although the New York Convention was signed in 1958, Turkey had not ratified the Convention for a long period. On the contrary, the great obstacles created in the enforcement of foreign arbitral awards have continued to be in Turkish legal system. With the United Nation General Assembly Resolution[11] calling for "the possibility of participating in the Convention to reconsider the States that have not yet ratified the convention" at the New Delhi Congress of the International Arbitration on 10 January 1975, upon the announcement made by UNCITRAL, the National Committee of the International Chamber of Commerce of Turkey passed the European Commercial Arbitration Convention and the New York Convention for the purpose of enactment. However, these initiatives have not yielded any results.[12]

Finally, in 1989-1990, With the efforts of Professor Dr. Ali Bozer who is the President of the Istanbul Bar Association and the member of the International Court of Arbitration of the International Chamber of Commerce (ICC) Selahattin Sulhi Tekinay, the New York Convention has entered into force on 1991.[13]

With the adoption of the convention following principles have gained validity in Turkish Law:[14]

i) The nationality of the arbitral awards is subject to the place of arbitration – under the authority of the State in which the arbitration took place on its territory,

ii) Each of the member States shall enforce the international (foreign) awards defined in the convention, pursuant to the relevant provisions of the, in the same way for the judgments issued by the Turkish courts, and execute enforcement decisions by the Turkish Execution and Bankruptcy Departments.

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[11] A/Res/3108 (XXVIII) http://www.un.org/documents/ga/res/28/ares28.htm accessed on 13 November 2016

[12] Birsel, Mahmut T. International and Constitutional Aspects of Enforcement of Foreign Awards In Turkey, p.10

[13] Ratification by the Law No. 3731 of 8 May 1991, published in the Official Gazette dated 21 May 1991, no.20877.

[14] Şanlı, Cemal. Esen, Emre. Ch. 8: Recognition and Enforcement of Foreign Arbitral Awards in Ismael Esin, Ali Yesilirmak (eds), Arbitration in Turkey, (Kluwer Law 2015), 211-240, p. 211

iii) The application of the enforcement proceedings of foreign arbitral awards in the convention and the application of the supplementary rules such as the enforcement provisions of other relevant treaties, private and procedural international law, to the extent permitted by the Convention,

iv) And finally, the non-application of any other provisions contrary to the New York Convention was adopted by the Republic of Turkey.

It is seen that with the entry into force of the convention, the contractual theory has replaced the jurisdictional theory in the field of recognition and enforcement of convention awards in Turkey.[15]

1.3.2 Geneva Convention

The European Convention on International Commercial Arbitration 1961(Geneva Convention) was entered into force by the Law No. 3730[16] and published in the Official Gazette with the original text of the English language

Geneva Convention contains provisions on arbitration agreements, arbitration procedures, and the applicable law where arbitration disputes, originates from international commercial law, commenced between the real or legal persons in the different countries of the commercial residence and business centers.[17]

Furthermore, the convention is an auxiliary resource complementing the New York Convention. It is because the article VII the convention provides that the parties cannot be deprived of the opportunity to take advantage of the provisions of the legislation and duties of the country in which the enforcement action took place.

1.3.3 ICSID Convention

The International Center for Settlement of Investment Disputes is established within the World Bank in 1965, to settle investment disputes. The Republic of Turkey has ratified the

[15] Birsel, Mahmut T. International and Constitutional Aspects of Enforcement of Foreign Awards in Turkey, p.11
[16] Law No. 3730 of 8 May 1991, published in the Official Gazette dated 21 May 1991, no. 20877.
[17] Şanlı, Cemal. "21 Nisan 1961 Tarihli Avrupa Anlaşması ve Türk Tahkim Hukuku" (Geneva Convention 1961 and Turkish Arbitration Law) Tartışmalar Bölümü, Avrupa New York Sözleşmeleri ve Türk Tahkim Hukuku Sempozyumu (1990) Ankara, Batider, p.49

ICSID Convention by Law No. 3460 on 1988.[18] The ICSID convantion has its own enforcement provision and will be applied to the awards render pursuant to it.

The Geneva Convention and the ICSID Convention are not within the scope of this work, therefore, recognition and enforcement of the New York Convention Awards will be discussed in the following chapters.

2. New York Convention Awards

2.1 In General

The system regulated by the New York Convention on recognition and enforcement of awards has been accurately addressed as 'the single most important pillar on which the edifice of international arbitration rests' and 'perhaps … the most effective instance of international legislation in the entire history of commercial law.'[19] Parallel to the growth in development and popularity of arbitration, its importance has expanded as well as its implementation into domestic legislations.

The Convention is now accomplished the board acknowledgment[20] and gives a straightforward and efficient system for recognition and enforcement. The arbitral awards made in the domain of any state other than the state where the recognition and enforcement of such awards is looked for are fall within the scope of the convention. Member states are obliged to recognise the awards as binding -not final-, and to enforce them as per the procedural law of the enforcing state, under the provision of the convention. A very limited and exhaustive list for refusal grounds of recognition and enforcement is provided in the convention. It also provides that the onus of proving the presence of those grounds is on the party trying to resist recognition and enforcement.

2.2 Under the English Arbitration Act 1996

The New York Convention is ratified by the United Kingdom in 1975. At the present, the provisions of the convention are applied in England, Wales and Northern Ireland via the

[18] Law No. 3460 of 27 May 1988, published in the Official Gazette dated 2 June 1988, no. 19830.
[19] N Blackaby & C Partasides & A Redfern & M Hunter, Redfern and Hunter on International Arbitration, Student Version, (sixth Edition, Oxford University Press, 2015) para. 11.40.
[20] There are 156 states parties to the New York Convention for the time being. The current list of parties and signatories of Convention are published online in the UN Treaty Collection website. <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en> accessed 15 November 2016

English Arbitration Act 1996. It is said that arbitration-friendly approach of England can be drawn straightforwardly from its meticulous application of the Convention.[21]

The sections 100–104 of the English Arbitration Act are regulating the recognition and enforcement of New York Convention Awards in line with the convention's provision. The section 100/1 characterized a convention Award as 'an award made, in pursuance of an arbitration agreement, in the territory of a state (excluding UK) which is a party to the New York Convention'. As a result of reciprocity declaration of England, it is limited to the awards rendered in other states which have signed and ratified the Convention.[22]

According to section 100/2, for the purposes of section 100/1, arbitration agreement is defined as agreement in writing. Furthermore, regardless of where it was signed, despatched or delivered to any of the parties, an award is treated as made at the seat of the arbitration. It is provided that the meaning of both "agreement in writing" and "seat of the arbitration" are same as the definitions in section 5 and 3, respectively. [23]

It is stated that the wording in section 100/2 removed the ambiguity that had surrounded the accurate interpretation of the broad language of Article I/1 of the convention regarding which awards fall within the scope of the convention. It is because, section 100/2 provides that when deciding where an award is made, the judicial seat of the arbitration is determinative.

2.3 Under the Turkish Law

According to the Turkish constitution, duly signed and ratified treaties are equal as the national laws of Turkey. [24] As a result, Turkish courts directly apply the New York Convention without the need of implementing it in any code.

The scope of the convention set forth in Article I is for the 'arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards

[21] Craig Tevendale and Andrew Cannon, Ch. 26: Enforcement of Awards in Julian D. M. Lew, Harris Bor, et al. (eds), Arbitration in England, with chapters on Scotland and Ireland, (Kluwer Law International, 2013), 563-594, p.568

[22] Audley Sheppard, English Arbitration Act, Ch. 23, Part III, Recognition and Enforcement of New York Convention Awards, Section 100 [New York Convention awards] in Loukas A. Mistelis (ed), Concise International Arbitration (Second Edition), 2nd edition (Kluwer Law International 2015), 1118-1121

[23] Craig Tevendale and Andrew Cannon, Ch. 26: Enforcement of Awards in Julian D. M. Lew, Harris Bor, et al. (eds), Arbitration in England, with chapters on Scotland and Ireland, (Kluwer Law International, 2013), 563-594, p.569

[24] Article 90 of the Constitution states that 'International agreements duly put into effect have the force of law.'

are sought'. Therefore, the state in which awards made is not necessarily to be a party the Convention without prejudice the article I/3 provides the reciprocity declarations as both England and Turkey ratified the convention with this reservation. As a result, the convention will be applied in both states where the foreign awards made in a member state.

There are two types awards considered as being foreign as per the article I/3 the convention, and which are in this manner inside the extent of the convention. Firstly, when the awards are made in a jurisdiction which is different from the jurisdiction of the enforcement place. Accordingly, the award has to be rendered in a state other than Turkey without taking into account the parties' or arbitrators' nationality or the applicable laws during the course of arbitration.[25] As a result of this provision, an arbitral award is inside the extent of the convention, even if all parties to the arbitration are Turkish citizens, so long as the award is made in another Member State.

Secondly, an award made in the enforcing state but it is considered as foreign -not domestic- according to the law of that state. The convention is also applicable to the enforcement of such awards. Therefore, under the Turkish law, provided that an award is not characterized as domestic, it falls within the scope of the convention, regardless of it is rendered in Turkey.[26]

When the seat of the arbitration which contains foreign elements, designated or determined in Turkey, the Law on Internatıonal Arbitration[27] 2001 dated and 4686 numbered (here and after: IAL Code) will be applicable. Inside the extent of party autonomy, parties may decide the applicable procedure of the arbitration in the arbitration agreement or via reference to rules of arbitration institutions or via reference to the procedural laws of any states so long as the mandatory articles of IAL Code are followed. In this respect, regardless of the procedural law applied to arbitration proceedings, these awards would be considered as domestic, therefore, subject to IAL Code. However, provided that parties expressly stated that the arbitration is not subject to IAL Code, even though the seat is in Turkey, the awards

[25] Şanlı, Cemal. Esen, Emre. Ch. 8: Recognition and Enforcement of Foreign Arbitral Awards in Ismael Esin, Ali Yesilirmak (eds), Arbitration in Turkey, (Kluwer Law 2015), 211-240, p.211
[26] Ibid.
[27] Law No. 4686 of 8 June 1991, published in the Official Gazette dated 5 July 2001, no. 24453. The non-official English version of IAL Code is avaliable from <http://www.wipo.int/wipolex/en/details.jsp?id= 11028> accessed on 13 November 2016.

made in this arbitration will not be deemed as domestic.[28] In this case, the recognition and enforcement of such awards is subject to New York Convention (or PLCPC Code as applicable).

3. Proceedings of Enforcement of New York Convention Awards in Turkey

As regards to the proceedings for the enforcement of the award, article III of the Convention refers to the procedural law of the enforcing states. In this manner, lex fori – the procedural law enforcing state- is applicable on the issues occurred during the course of the enforcement action of New York Convention awards [29] i.e. substantive and territorial jurisdiction of court, the security to be stored by the plaintiff, fees of the court and the cost[30] the form of the trial procedures, or resisting the enforcement and challenging the enforcement decision.

The procedural law of the enforcing state, is applicable at every stage of the lawsuit during the enforcement of convention awards, as there are not any provisions in the convention with regard to proceeding before the courts. Thus, under the Turkish law, the applicable law is PLCPC Code. As indicated by Article 60 of PLCPC Code, the court of first instance has the substantive jurisdiction. As regards the separation between the courts of first such as commercial law, family law, civil law, the competent court is the commercial court of first instance among these courts[31] pursuant to the Code 2004 dated and 5235 numbered.[32]

The competent court in respect to territorial jurisdiction will be determined according to the parties' agreement in writing; if there is no such agreement, the place of domicile of the respondent in Turkey. In the absence of such place in Turkey, the court located in the residential place of the respondent in Turkey. If there is no such place, the court will have the competence if it is located in the place of the assets may be subject to execution of the

[28] Şanlı, Cemal. Milletlerarası Özel Hukuk (International Private Law), (second edition, Vedat Kitapçılık, 2014) Istanbul, p.597

[29] Akıncı, Ziya. Milletlerarası Ticari Hakem Kararları ve Tenfizi (International Commercial Arbitral Awards and Enforcement), (1994, 9 Eylül Üniversitesi Yayıncılık) Izmir p.181-182

[30] As a pro-arbitration regulation, according to the Code on Fees, Law No. 492 of 2 July 1964, published in the Official Gazette Numbered 11756 and dated 17 July 1964, the proportional fee in the recognition and enforcement of arbitral awards lawsuits are subject to a fifty per cent reduction compared to judgements. However, there are decisions which demonstrate that the enforcement of arbitral awards is subject to fixed fees which is clearly a correct interpretation of the code.

[31] Ertekin, Erol. Karataş, İzzet. Uygulamada İhtiyari Tahkim ve Yabancı Hakem Kararlarının Tenfizi-Tanınması (Voluntary Arbitration and Recognition and Enforcement of Foreign Arbitral Awards in Practice), (Yetkin Yayınevi 1997), p.417.

[32] Law No. 5235 of 26 September 2004, published in the Official Gazette dated 7 October 2004. no. 25606.

respondent.[33] If none of the above-mentioned locations are in Turkey, Turkish courts are lack of national or international territorial jurisdiction. Being said that, as the objection on territorial jurisdiction has to be raised by the defendant in the early stage of the action, the court will not consider this issue ex officio. Therefore, even though none of above-mentioned locations are not located in Turkey, the court will become competent if the respondent does not raise the issue.

According to PLCPC Code, there is no additional requirements to submit to the courts by the party seeking enforcement of convention awards. Article IV of the New York Convention provides that, in order to obtain the recognition and enforcement of convention awards, the party applying for recognition and enforcement shall, at the time of the application, supply the duly authenticated original award or a duly certified copy thereof, the original arbitration agreement or a duly certified copy thereof. In case the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

The claimant who is foreigner (pursuant to PLCPC Code) or Turkish citizen who is non-resident in Turkey (pursuant to Turkish Code on Civil Procedures)[34] has to pay security for commencement of the action for obtaining enforcement of foreign awards as this action is considered a lawsuit due to Turkish procedural law. However, any exemptions from this duty provided in bilateral or multilateral treaties between the nation of the plaintiff and Turkey remain applicable.[35]

Article 55 of PLCPC Code indicates that the simple trial procedure, which is shorter and more straightforward compared to other trial concepts, will be adopted when resolving the enforcement claims. Furthermore, the respondent will be notified of statement of claim alongside with the hearing dates. The respondent has right to object to the action as indicated by Article 55/2 of the PLCPC Code, if the present awards is satisfied completely or partially.[36]

[33] Kuru, Baki. Medeni Usul Hukuku (Law of Civil Procedure), (24th edition, Demir Yayınevi, 2013), p.764
[34] Law No. 6100 of 11th January 2004, published in the Official Gazette dated 4th February 2011, no. 27836.
[35] Şanlı, Cemal. Esen, Emre. Ch. 8: Recognition and Enforcement of Foreign Arbitral Awards in Ismael Esin, Ali Yeşilırmak (eds), Arbitration in Turkey, (Kluwer Law 2015), 211-240, p.214
[36] Ibid, p.213

Turkish courts may accept or refuse the enforcement request of the awards fully or partially. The rejection judgement of the enforcement of the award is binding and final, therefore, the res judicata effect of this judgement come into effect within the Turkish legal system.[37] If a second case regarding the enforcement of the same award is commenced before Turkish courts, it will be rejected because of the res judicata effect of the former non-enforcement judgement.

Pursuant to the article 57 of PLCPC Code, challenging or appealing of the judgement of the court of first instance regarding the rejection or approval of the enforcement of the convention awards is subject to the provision of Turkish Code on Civil Procedures.[38] As per the article 57/2 of PLCPC, a successful challenge or appeal will suspend the execution of the enforcement decision of the convention award.

4. Recognition and Enforcement of Convention Awards Under the English Arbitration Act 1996

The recognition and enforcement of New York Convention Awards as the application of the New York Convention provisions are regulated in sections 101 to 104 of the English Arbitration Act 1996. Recognition of convention awards regulated by section 101/1. It provides that a convention award 'shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, setoff or otherwise in any legal proceedings in England and Wales.'

Section 101/1 entitled English courts to recognise the awards automatically when a party rely upon the award as a defence against any claims, in order to set off the sum of the award against the amount brought up in a new claim.[39]

There are two methods by which the convention award may be enforced according to section 101. In the first place, 101/2 states that 'a New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect'. The other method provided in section 101/3 is a 'judgment to be entered in terms of the award' prior to an application for approval from court. It is stated that the wording and effects of section 101 is indistinguishable from the sections 66/1 and 66/2 which regulates the

[37] Ergin Nomer, Nuray Ekşi, Günseli Öztekin Gelgel, Milletlerarası Tahkim Hukuku (International Arbitration Law), Cilt:1, (3rd edition, Beta Yayınları 2008) Istanbul, p.145
[38] Law No. 6100 of 11th January 2004, published in the Official Gazette dated 4th February 2011, no. 27836.
[39] Craig Tevendale and Andrew Cannon, Ch. 26: Enforcement of Awards in Julian D. M. Lew, Harris Bor, et al. (eds), Arbitration in England, with chapters on Scotland and Ireland, (Kluwer Law International, 2013), 563-594, p.570

enforcement awards which do not fall within the scope of New York Convention.[40] According to section 102, the party seeking recognition and enforcement must produce the duly authenticated original award or a duly certified copy of it, and the original arbitration agreement or a duly certified copy of it. If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

Section 104 provides that nothing in the preceding provisions of this part affects any right to rely upon or enforce the convention award at common law or under section 66 of this act. In conclusion, a convention awards may be enforceable via action at common law, under the section 66 or under the section 101.

In the case of Yukos Oil Company v Dardana Limited, the scheme of the English Arbitration Act 1996 is presented as follows:

> "I consider that the scheme of the Act is reasonably clear. A successful party to a New York Convention award, as defined in s.100(1) has a prima facie right to recognition and enforcement. At the first stage, a party seeking recognition or enforcement must, under s.102(1), produce the duly authenticated award or a duly certified copy and the original arbitration agreement or a duly certified copy. The arbitration agreement means an arbitration agreement in writing, as defined in s.5. Once such documents have been produced, recognition or enforcement may be refused at the second stage only if the other party proves that the situation falls within one of the heads set out in s.103(2)"[41]

5. Difference Between Recognition and Enforcement

Since the wording of New York Convention and provision in the national laws refer to recognition and enforcement in the same manner, much of the time, the two terms show up as if they were embrangled. It is a fact that a award is also recognised as a result of its enforcement. However, a distinction should be made when an award is recognisable but not enforceable.

A mere recognition will allow parties to use the award a shield in order to stop commencing a second action on the same cause of action and in regard to the same subject matter of the arbitration before the municipal courts. In that case, the second action will be

[40] Ibid.
[41] Yukos Oil Company v Dardana Limited, [2002] EWCA Civ 543, <http://newyorkconvention1958.org/doc_num_data.php?explnum_id=1387> accessed on 2nd December 2016, para.10

dismissed on the ground of res judicata.[42] For instance, a party may demand to have recognition of an arbitral award in order to use it as and proof of receivables when tax or financial matters are at stake.

Parallel to this statement, section 101/1 of English Arbitration Act 1996 expresses that 'A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off otherwise in any legal proceedings in England and Wales of Northern Ireland'.[43]

On the other hand, enforcement of an award is a judicial process which enables the actual execution of the award. Where an award is enforced, it is also recognised. In case the losing party of arbitration does not satisfy the award voluntarily, the prevailing party may use the enforcement as a sword [44] in which the help of the court and its authority is available to apply all possible sanctions such as seizure of the losing party's assets or freezing of bank account.

6. Reservations Under New York Conventions

Article I/3 of the New York Convention contains two types of declaration that is available to member states.[45] Article I/3 states that when signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. The member state may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

6.1 Reciprocity Declaration

Both England and Turkey made the reciprocity declaration, which has limited the application of the New York Convention to awards only rendered in other member states.

[42] Dirk Otto, Article IV in Herbert Kronke, Patricia Nacimiento, et al. (eds), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, (Kluwer Law International, 2010), 143 204, p.148-149
[43] Mousa D, L.Mohammad. 'Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law)' (PhD The University of Leeds 2005), p.17-18
[44] Julian D. M. Lew, Loukas A. Mistelis, Comparative International Commercial Arbitration, (Kluwer Law International, 2003), p.689
[45] Ibid. p.701

Therefore, the foreign arbitral awards fall within the scope of the convention may be enforced only if the reciprocity condition is fulfilled.

Under the terms of the convention, it is necessary and sufficient for the award to be granted in a state which is a party to the Convention. For this reason, the state (provided being party to the Convention) in which the arbitral award is made will not constitute a problem in terms of reciprocity in the enforcement of the convention awards in Turkey.[46] The reciprocity requirement in the convention is geographical. Accordingly, even though the award is not subject to a particular national law, as long as rendered in a member state' territory, the condition specified in Article I/3 will be realized.[47]

Considering the number of the member states who are party to the convention, the reciprocity declaration is losing its meaning. A decision of the Turkish supreme court concerning the reciprocity declaration is as follows:

> "In order for the enforcement of foreign arbitral awards to be demanded in Turkey, the award has to be binding and enforceable. In the concrete case, it is understood that the award is binding and enforceable, that it is not contrary to our public policy, that the defense right is not restricted, the arbitration condition is valid and there are no irregularities in the notifications. As Turkey and England where award rendered party to the New York Convention, requirement regarding the reciprocity reservation is fulfilled."[48]

If Turkey waves the reciprocity reservation, a separate legislation on recognition and enforcement issues for the foreign awards render in the countries not parties to the New York Convention will not be needed. On the other hand, since the provisions in PLCPC Code is parallel to the convention, it does not pose any problem for Turkey using its right to make a reservation for reciprocity.

6.2 Commercial Declaration

New York Convention I / 3 States that any contracting states may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration. Turkey has used the right to make reservations in this regard. Accordingly, the enforcement of non-commercial foreign awards is outside the scope of the

[46] Akıncı, Ziya. Milletlerarası Tahkim (International Arbitration), (second edition, Seçkin Yayınevi, 2007) Ankara, p.291
[47] Akıncı, Ziya. Milletlerarası Ticari Hakem Kararları ve Tenfizi (International Commercial Arbitral Awards and Enforcement), (9 Eylül Üniversitesi Yayıncılık, 1994) Izmir p.180
[48] Y. 19. HD. 17.12.1998, 6099/7735 cited in Akıncı, Ziya. Milletlerarası Tahkim (International Arbitration), (second edition, Seçkin Yayınevi, 2007) Ankara, p.292

New York Convention. It should be keep in mind that the meaning of Commercial matters under Turkish Commercial Law is extremely wide that this reservation is not limiting the application of the convention. However, England did not make this declaration, which would have limited the scope of the convention to awards concerning commercial matters.

CHAPTER III

PUBLIC POLICY AS A GROUND FOR REFUSING RECOGNITION AND ENFORCEMENT IN ENGLAND

1. Public Policy Definition

It is provided in the Article V/2-b of the New York Convention that the recognition and enforcement of the awards may be declined where it would violation of enforcing states' public policy. This provision is enforced under English Arbitration Act 1996 (here and after: EAA 1996) in section 103/3.

The EAA 1996 has entered into force in England on 1st January 1997. The Act is established on Model Law[49] which proved to be the facilitator in the act's promulgation.[50] The EAA 1996 is effective on both the International and domestic (English) awards. "Recognition and Enforcement of Certain Foreign Awards" was dealt under the Part III. Following is a direct quote from the section 103/3 regarding the public policy grounds: 'Recognition or enforcement of the award may also be refused ... if it would be contrary to public policy to recognise or enforce the award.'

It seems obvious from the above provision that the EAA 1996 does not act in deviation with the provision of "public policy" exception under the Model Law or the New York Convention.

As a basis for refusing enforcement, the public policy exception is one of the most debated grounds since the national courts have the capacity and discretion to interpret it in a broad manner. It is quite justifiably stated that the article V/2-b of the convention has occasionally been adversely exploited by national courts to bypass the repercussions of the wholly valid foreign awards.[51] However, as it can be seen in the decisions in following chapter, this exploitation has not been observed in England Courts' decision where a concise interpretation has been adopted in relation to the "public policy".

Public policy has not been explicitly defined in the Model Law, New York Convention or the EAA 1996. In 1853, it had been defined by Lord Truro as:

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[49] Halsbury's Laws of England/Arbitration (2008) Volume 2, Consultant Ed.: Robert Merkin, < http://www.lexisnexis.co.uk/en-uk/products/halsburys-statutes-of-england-and-wales.page> accessed on 14th December 2016, para.1202; It is also worth mentioning that Turkish international arbitration rules are also based on UNCITRAL Model Law on International Commercial Arbitration (1985).

[50] Tackaberry JA and Marriott AL Bernstein's Handbook of Arbitration and Dispute Resolution Practice (fourth edition, Sweet and Maxwell 2003) Volume 1, p.30.

[51] Craig Tevendale and Andrew Cannon, Ch. 26: Enforcement of Awards in Julian D. M. Lew, Harris Bor, et al. (eds), Arbitration in England, with chapters on Scotland and Ireland, (Kluwer Law International, 2013), 563-594, p.578

"...That principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law."[52]

The description of the public policy has also had a colourful rendition, which has been cited on numerous occasions in order to demonstrate the mutable aspects of the public policy defence. This rendition provides that the "public policy" is '… a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.'[53]

In the judgment by the English Court of Appeal in *Deutsche Schachtbau v. National Oil,* the precise context of the enforcement of arbitral awards was noted as follows:

"It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.[54]

The observation holds true that the English courts have consistently approached the interpretation of the public policy in a restricted manner. As pertaining to the applicability of a certain public policy, the Article V/2-b of the convention has been construed to be taken that it is the English public policy should be effectuated as it is the policy of the enforcing state under the section 103/3 of Act. As it has been stated by Gross J in IPCO v. NNPC:

"Considerations of public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution. The reference to public policy in s. 103/3 was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards. Instead, the public policy exception in s.103/3 is confined to the public policy of England (as the country in which enforcement is sought) in maintaining the fair and orderly administration of justice."[55]

Another approach implemented in the case of *Minmetals v. Ferco Steel* by the English Court can also be enlightening. Enforcement of the award was resisted on the grounds of

[52] Egerton v. Earl of Brownlow (1853) 4 HL Cas 1, p.196 cited in Ibid. p.578

[53] Richardson v. Mellish (1824) 2 Bing 229, p.252. cited in A G Tweeddale, 'Enforcing Arbitration Awards Contrary to Public Policy in England' ICLR 2000, 159-174, p.160 < http://corbett.co.uk/wp-content/uploads/Enforcing-Arbitration-Awards-Contrary-to-Public-Policy-in-England.pdf> accessed on 25th November 2016.

[54] Deutsche Schachtbau und Tiefbohrgesellschaft mbH v. R'as AlKhaimah National Oil Co and another appeal [1987] 3 WLR 1023 cited in Craig Tevendale and Andrew Cannon, Ch. 26: Enforcement of Awards in Julian D. M. Lew, Harris Bor, et al. (eds), Arbitration in England, with chapters on Scotland and Ireland, (Kluwer Law International, 2013), 563-594, p.578.

[55] IPCO (Nigeria) Limited v. Nigerian National Petroleum Corporation [2005] EWHC 726 (Comm) See para. 11 of the judgment of Gross J. cited in Ibid. p.579

public policy, owing to the procedural inconsistencies in the said case, An assistive list of considerations was presented by Colman J which would be accounted for by the court:

> "In summary, therefore, in a case where an enforce alleges that a New York Conventıon award should not be enforced on the grounds that such enforcement would lead to substantial injustice and therefore be contrary to English public policy the following must normally be included amongst the relevant considerations:
> (1) the nature of the procedural injustice;
> (2) whether the enforcee has invoked the supervisory jurisdiction of the seat of the arbitration;
> (3) whether a remedy was available under that jurisdiction;
> (4) whether the courts of that jurisdiction have conclusively determined the enforcee's complaint in favour of upholding the award;
> (5) if the enforcee has failed to invoke that remedial jurisdiction; for what reason and in particular whether he was acting unreasonably in failing to do so."[56]

Reluctance is, therefore, evident as pertaining to the refusal of the enforcement of foreign awards on the basis of "public policy" by English courts.[57] In England, the enforcement-friendly approach in the New York Convention is perceived as an issue of public policy. English courts have implicitly embraced the international public policy principle by upholding a constricting interpretation of the exception of public policy. Under the English law, therefore, the "public policy" that is applied to the enforcement of foreign arbitral awards is a limiting concept as opposed to the "public policy" being applied to domestic awards.

2. Violation of public policy in the English Courts' Decisions

2.1 In General

The absence of definition pertaining to the public policy in the Model Law, EAA 1996 or the New York Convtion allows for a potential excuse for the denial of recognition and enforcement of arbitral awards because some of the international courts might conduct the public policy interpretation so as to shield an entirely local interest.[58] If a party prefers to bypass the foreign award's enforcement on the basis of the public policy before the English Courts, there arises a set of rules, which will result in non-enforcement if they have been

[56] Minmetals Germany Gmbh v Ferco Steel Ltd [1999] CLC 647, p.661 <http://newyorkconvention1958.org/index.php?lvl=notice_display&id=456> accessed on 03 December 2016

[57] N Blackaby & C Partasides & A Redfern & M Hunter, Redfern and Hunter on International Arbitration, Student Version, (sixth Edition, Oxford University Press, 2015). para. 11.106

[58] However, public policy exceptions have been perceived restrictively by most of the other courts. Moses Margaret L. The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2008) p.218

infringed, regardless of the governing law of the substantive contract and regardless of the place in which this contract is to be performed.[59] It was held by the court in Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd[60] that if the domestic public policy of the performance place and the English law does not agree with the award or the contract, then the English courts will enforce neither the award nor the substantive contract. Moreover, if the contract is in contradiction to the public policy of the performance place only, then no notice will be taken of that contradiction by the English courts.

There is still certain reluctance within the English courts to refuse the enforcement of the award on the basis of public policy. Such a reluctance is so pronounced that one scholar has mentioned that there is not any case in which the English courts which have applied such an exception.[61] However, it seems a bit ironic that such a case which applied an exception for the non-enforcement of the awards happened right after this statement was made; this exception was made in Soleimany v Soleimany (here and after: Soleimany)[62]. As will be discussed later, such an exception was also made in other modern cases.

The most recurrent context where the English courts have accounted for the exception under "public policy" as pertaining to the enforcement of convention awards seems to be where the basic contract has been compromised through illegality. There are, however, some cases which have been taken by the English courts and where the foreign arbitral awards were founded on illegal contracts but the courts were urged to decline their enforcement since these awards were contrary to the English public policy. The courts were not seen to uphold a consistent approach in these cases. Their stances were established on a case-by-case basis.[63]

2.2 The case of Soleimany v Soleimany[64]

The Court of Appeal in Soleimany case had to ascertain whether the enforcement of the award which authorised an illegal contract.[65] Further, they had to determine the law

[59] Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd [1988] 1 All ER 513. For instance, terrorism, drug trafficking, prostitution, paedophilia, anything short of corruption or fraud in international commerce fall within this category.
[60] Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd [1988] 1 All ER 513.
[61] Kerr, Michael. 'Concord and conflict in international arbitration' (1997) 13(2) Arb Intl 121-144, p.140.
[62] Soleimany v Soleimany [1999] 3 All ER 847
[63] Mousa D, L.Mohammad. 'Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law)' (PhD The University of Leeds 2005), p.188.
[64] Soleimany v Soleimany [1999] 3 All ER 847, p.853
[65] N Blackaby & C Partasides & A Redfern & M Hunter, Redfern and Hunter on International Arbitration, Student Version, (sixth Edition, Oxford University Press, 2015). para. 11.106

which relates to the issue of the enforcement of foreign arbitral award and which also related to the illegality of such contracts.

The said case is related to the smuggled carpets being sold in United Kingdom by a son and his father and this was carried out in violation of Iranian export control and revenue law. The father lived in Iran whereas his son lived in England. A dispute arose between them regarding the dissemination of the proceeds resulting from the sales. When this dispute was not resolved by mediation, it was agreed that both the parties would file their argument to arbitration by Beth Din (arbitrator), Court of the Chief Rabbi in London which applies the Jewish Law.[66] The award was made by the Beth Din, which favoured the son. This award was made in cognition of the illegality of the contract [67], but owing to the applicability of the Jewish Law, the illegal contractual purpose had no consequences in relation to the rights and duties and, hence, arbitrator has advanced to make an award.[68]

The son applied to the High Court, under the section 26 of the English Arbitration Act dated 1950, and consequently, leave was granted for the enforcement of the award. This leave for the enforcement was resisted by the father and he applied to set aside the order on the basis that the illegality caused the claim of the son as unenforceable or void in the English court and the contract/award was in contradiction with the English public policy. The application made by the father was refused by the judge on the ground that an unenforceable contract for illegality becomes enforceable if the arbitration's procedural law associates no value to its illegality.[69]

This decision was appealed by the father before the English Court of Appeal; the court held that an English court will not enforce an award which violate the public policy of England owing to the illegality of the underlying contract as per the English law along with the performance law. [70]

The court decision on the refusal of the enforcement on the grounds that the illegality of underlying contract is a violation of public policy as follows:

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[66] A G Tweeddale, 'Enforcing Arbitration Awards Contrary to Public Policy in England' ICLR 2000, 159-174, p.163-164

[67] Soleimany v Soleimany [1999] 3 All ER 847, p.854

[68] N Blackaby & C Partasides & A Redfern & M Hunter, Redfern and Hunter on International Arbitration, Student Version, (sixth Edition, Oxford University Press, 2015). para. 11.106

[69] Mousa D, L.Mohammad. 'Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law)' (PhD The University of Leeds 2005), p.189.

[70] A G Tweeddale, 'Enforcing Arbitration Awards Contrary to Public Policy in England' ICLR 2000, 159-174, p.164

> "An English court exercises control over the enforcement of arbitral awards as part of the lex fori, whatever the proper law of the arbitration agreement or the place where the arbitration is conducted. If a claimant wishes to invoke the executive power in this country to enforce an award in his favour, he can only do so subject to our law. For the purposes of the present dispute, that means s 26 of the 1950 Act." [71]

Furthermore, it was held by the court that the enforcement of an English domestic award would be in contrary to public policy if the award was established on illegal English contract.[72] Following conclusion was presented by the court:

> "The court declines to enforce an illegal contract, as Lord Mansfield said in Holman v Johnson (1775) 1 Cowp 341, [1775-1802] All ER Rep 98 not for the sake of the defendant, nor (if it comes to the point) for the sake of the plaintiff. The court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it. In the present case the parties were, it would seem, entitled to agree to an arbitration before the Beth Din. It may be that they expected that the award, whatever it turned out to be, would be honoured without further argument. It may be that Abner can enforce it in some place outside England and Wales. But enforcement here is governed by the public policy of the lex fori." [73]

It was admitted by the court that there was required a balancing act between the public interest that request the non-enforcement of illegal contracts and the public interest where awards should be given due consideration.[74] It was stated at this point by the court that:

> "It may, however, also be in the public interest that this court should express some view on a point which has been fully argued and which is likely to arise again. In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide whether it is proper to give full faith and credit to the arbitrator's

[71] Soleimany v Soleimany [1999] 3 All ER 847, p.857-858
[72] Soleimany v Soleimany [1999] 3 All ER 847, p.858
[73] Ibid. p.859
[74] Ibid

award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality." [75]

A conclusion can be reached in relation to the Soleimany case that the court ascertained that a foreign arbitral award which sanctions an illegal contract under English law, law of the performance place, and also as regards to the proper law, would be held as a violation of international public policy of England. Moreover, it could be said that contract for smuggling, such as in Soleimany case, comes under the set of contracts that could not be enforced regardless of the proper law or the law of performance place. A contract's illegality under the above mentioned situations is, thus, a rule of international "public policy" in England that would consequentially causes refusal of the enforcement of foreign awards on the public policy basis.

2.3 The case of Westacre v Jugoimport[76]

English Court of Appeal was faced with another occasion to ponder the public policy ground in relation to the refusal of enforcement of the foreign awards. In the case of Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd (here and after: Westacre), it was about a consultancy agreement pertaining to the obtaining contracts for the sales of military gears in Kuwait. Westacre performed as a consultant to obtain contracts for sale, principally, with the Ministry of defence of Kuwait for the Jugoimport. A proportion of the value of sales would be given to the Westacre as a payment for their procurement services. A dispute arose when the consultancy agreement was rescinded by Jugoimport without paying the consultancy fees to Westacre. Consequently, Westacre initiated proceedings for arbitration against Jugoimport. The arbitration was to be regulated by Swiss law and as per the ICC arbitration rules.[77]

The claim was objected by Jugoimport on the basis that in order to carry out their part of the contract, Westacre was engaged in the bribing numerous officials to be able to enter in sales contracts with Jugoimport, and hence were in violation of the Kuwaiti public policy and its law.[78] Allegations for corruption and bribery were made, however, the "arbitral tribunal" discovered that there lack of evidence of either form of allegations and that lobbying conducted by private organisations to obtain public contracts was not seen as illegal as per

[75] Ibid
[76] Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd [1999] 3 All ER 864
[77] Ibid. p.867
[78] Ibid.

the Kuwaiti law or Swiss law.[79] The tribunal also found that the enforcement of the consultancy agreement had no such aspect that would contradict the "public policy" of the place of performance.[80] The award was appealed in the Swiss Federal Court, which is denied on the grounds that it was previously negated by the tribunal. The Court of Appeal in England also refused the public policy defence in relation to the enforcement of the award. Lord Justice Waller states:

> "What in my view the Lemenda case decided was (1) there are some rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance, but others are based on considerations which are purely domestic (see [1988] 1 All ER 513 at 521, [1988] QB 448 at 459); (2) contracts for the purchase of influence are not of the former category; thus (3) contracts for the purchase of personal influence, if to be performed in England, would not be enforced as contrary to English domestic public policy; and (4) where such a contract is to be performed abroad, it is only if performance would be contrary to the domestic public policy of that country also, that the English court would not enforce it. There is also an implied recognition as it seems to me that if all that can be said of a contract is that performance in a foreign country will be contrary to the domestic public policy of that state, enforcement will only be refused if performance would be contrary to the domestic public policy in England. If that was not so, consideration of English public policy would not in fact have been necessary or relevant.
>
> It must also follow, as it seems to me, that an English court would take notice of the fact that different courts and different tribunals might have different views as to the enforceability of contracts for the purchase of personal influence depending on the proper law of the contracts and where they were to be performed. It would be for example legitimate for a foreign tribunal to take the view (indeed consistent with the English court's own view if I am right on the above implication), that albeit performance was contrary to domestic public policy in its place of performance, since it was not contrary to the domestic public policy either of the country of the proper law and/or the curial law, enforcement should be allowed."[81]

Hence, it was concluded by the court that, irrespective of the proper law of the performance place, the current contract for lobbying or the buying of public sway did not come under any rule that would permit the English courts to refuse the enforcement.[82] Pursuant to the Swiss law, it was not considered contrary to public policy to make contracts

[79] A G Tweeddale, 'Enforcing Arbitration Awards Contrary to Public Policy in England' ICLR 2000, 159-174, p.165; See also N Blackaby & C Partasides & A Redfern & M Hunter, Redfern and Hunter on International Arbitration, Student Version, (sixth Edition, Oxford University Press, 2015). para. 11.107
[80] Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd [1999] 3 All ER 864, p.875
[81] Ibid, p.876-877.
[82] Ibid

on lobbying.[83] Consequently, although English domestic public policy might have different approach, provided that the foreign award enforcing a contract which is not a domestic public policy violation, there is nothing contrary to English public policy regarding its enforcement.[84]

Even if it might be contrary to English domestic public policy, under the proper law or the law of performance place -which was Kuwaiti law in the case-, the foreign award was legal and, therefore, it is enforced by English court. Hence, it has again been demonstrated by the decision in Westacre case that the concept of domestic public policy is rather encompassing as opposed to the international public policy.

2.4 The case of *Omnium v* Hilmarton[85]

In the case of Omnium de Traitement et de Valorisation SA v Hilmarton Ltd (here and after: Hilmarton), it was applied by the claimant to get and refusal for the enforcement of ICC award in England on the grounds that, pursuant to the section 103 of the EAA 1996, such enforcement would be public policy violation. The reason for such violation was that the agreement was illegal at its place of execution.[86]

It was claimed in Hilmarton case that the enforcement of the award is contrary to the English public policy since such enforcement would constitute the enforcement of an illegal contract under the law of performance place.[87] Algerian law provides that it is illegal for a middle-man to approach government official so as to acquire a state contract within the domain of foreign trade. Hilmarton was used by the applicant to approach public servants in order to procure an agreement.[88]

Nevertheless, it was held by the court that the parties expressly agreed that the governing law would be Swiss law. The governing law was not breached since there was a complete lack of evidence as for the corruption or bribery. It is worth remembering that Swiss courts decided that the agreement was valid according to the Swiss Law, although it would be illegal if English law was applicable. Consequently, the enforcement of the award

[83] N Blackaby & C Partasides & A Redfern & M Hunter, Redfern and Hunter on International Arbitration, Student Version, (sixth Edition, Oxford University Press, 2015). para. 11.108
[84] Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd [1999] 3 All ER 864, p.876-877.
[85] Omnium de Traitement et de Valorisation SA v Hilmarton Ltd [1999] 2 All ER (Comm) 146.
[86] Ibid, p.148.
[87] Ibid, p.148-149.
[88] Ibid

should be considered rather than the substantive contract by the courts.[89] It stated by the English court by referring Westacre case as:

> "It is in this context, in my view, that albeit the award is not isolated from the underlying contract, it is relevant that the English court is considering the enforcement of an award, and not the underlying contract. The English court takes cognisance of the fact that the underlying contract, on the facts as they appear from the award and its reasons, does not infringe one of those rules of public policy where the English court would not enforce it whatever its proper law or place of performance. It is entitled to take the view that such domestic public policy considerations as there may be, have been considered by the arbitral tribunal. *It is legitimate to conclude that there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view*."[90]

As it seen from the decision in Hilmarton, it was coherent with the rationale presented in Westacre case and it was, in numerous aspects, same as the case of Westacre case. It was stated by the court that the case did not pertain to the direct enforcement of the substantive contract, rather it related to the enforcement of the award which was legal under the Swiss law.[91] Moreover, this case was distinct from the Soleimany case since neither the aspect of unlawful practice nor corruption was not involved in this case[92] and the contract was legal under the governing law of the underlying contract. Consequently, the award was enforced by the English court.

2.5 The case of R v V[93]

In the case of R v V, the facts of the case were very much the same as in Hilmarton and Westacre cases[94] as in it had a consultancy agreement which was illegal according to Libyan law (law of the performance place). However, the case differed from the former ones in a single aspect, that is, the English law would govern the agreement and the arbitration was to be in London and under ICC Rules.[95] The agreement was not found to be in contradiction to the Libyan law and there was no violation as to the performance under the public policy of

[89] Omnium de Traitement et de Valorisation SA v Hilmarton Ltd [1999] 2 All ER (Comm) 146, p.150.
[90] Ibid
[91] Ibid, p.151-225.; see also A G Tweeddale, 'Enforcing Arbitration Awards Contrary to Public Policy in England' ICLR 2000, 159-174, p.165-166
[92] Omnium de Traitement et de Valorisation SA v Hilmarton Ltd [1999] 2 All ER (Comm) 146, p.151
[93] R v V [2009]1 Lloyds Rep 97.
[94] Craig Tevendale and Andrew Cannon, Ch. 26: Enforcement of Awards in Julian D. M. Lew, Harris Bor, et al. (eds), Arbitration in England, with chapters on Scotland and Ireland, (Kluwer Law International, 2013), 563-594, p.580
[95] R v V [2009]1 Lloyds Rep 97, p.100.

England .[96] However, it was argued that the tribunal' decision was not in respect to the matter of law and of fact.[97] Hence, the court was implicitly urged to go behind the conclusions made by the tribunal[98] and to determine the illegality of underlying contract and the violation of public policy of England.

Agreeing with both the judgements of the Westacre and Soleimany cases, the court determined that, pertaining to contracts for buying of personal sway, the award would not be enforced in England, if only the contract's performance was in contradiction to domestic public policy of the performance place. It was found that such performance was not against the Libyan law[99] and the related facts did not allow for the reopening of the case to conduct a large-scale inquiry into the merits of the dispute (revision au fond). The facts which were considered by the court for this were that it was not contrary to "Libyan Law"; that the arbitration tribunal explicitly ascertained that the contract was legal; that the arbitrators had competence, and finally, that there was no illegal involvement for acquiring the award.[100] Therefore, enforcement of the award was granted.

3. The Interaction between the Decisions and Conclusion

English courts acknowledge the notion of international public policy in relation to the recognition and enforcement of the foreign arbitral awards as it is apparent from the above-mentioned judgements. Compared to the domestic public policy, the international public policy in English law is a rather constricted notion. Such a constriction is apparent in the decision made in Hilmarton case, where it was conceded by the court that English courts might not have enforced the award under the domestic public policy of England. There are limited cases where the English courts will not recognise or enforce the foreign awards owing to the violation of public policy.[101] This is a manifestation of the arbitration-friendly approach that is held by English courts in relation to the recognition and enforcement of foreign arbitral awards.[102]

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[96] Ibid.
[97] Ibid. p.101.
[98] Ibid.
[99] Scherer, Maxi. 'The Public Policy Exception under Article V(2)(b) – Methodological Approaches Country Report England' International Bar Association (IBA 2014), p.15-16 <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DB68248A-6EC4-45A7-8324-EF6266C699EE> accessed on 25th December 2016
[100] Ibid. p. 104
[101] Westacre Investments Inc v Jugoimport SPDR Holding Co Ltd [1999] 3 All ER 864
[102] ibid

It is also evident from the above study of the cases that the English courts will not allow the enforcement of foreign awards that are apparently illegal or are based on illegal contracts. It has been explicitly stated by the Soleimany case judgment that the English courts will not enforce any award, regardless of it being domestic or foreign, which includes payments based on a contract concerning the purpose of conducting an illegal business in the place where the contract is performed. This approach on refusal of the recognition and enforcement of arbitral awards which are established under illegal contracts is based on both the international and domestic public policy consideration of England. [103]

Both of the cases of Westacre and Soleimany dealt with the contract's illegality as a basis for the public policy grounds for refusing enforcement of a foreign award. In the case of Soleimany, the enforcement was rejected, while, in the case of Westacre the award was ordered to be enforced. The major reason for the dissimilarity in judgements was that in the former case, the tribunal came up with the fact that the contract was illegal as per the Jewish law which was the governing law the contract; however, this fact was of no significance to the rights and duties of the parties that were engaged the terms of Jewish law.[104] Although the tribunal associated no worth to the illegality of the contract, it was held by the enforcement court that it is not possible to enforce such a contract which was illegal as per the proper law. Consequently, it can be contended that the agreement in Soleimany case falls within the domain of the award which will be rejected, whether the proper law or the law of performance place allows for it or not. It can also be contended, on the other hand, that owing to the fact that substantive contract was constitute a violation of English public policy and also to the public policy of the country of performance, the award should be held as unenforceable.

In the case of the Westacre, the consultancy contract was found legal as per the governing law of the contract by the tribunal and also by the Swiss court during the appeal proceeding in Switzerland. Although, Jugoimport raised several allegations of corruption and bribery, however the enforcement court denied any ruling against the Swiss Court decision, where the later determined an absence of evidence regarding the corruption and bribery allegations. It is stated in that enforcement courts shall not make revision au fond, as it will be done either by arbitral tribunal or the courts in the seat of the arbitration unless there are

[103] Mousa D, L.Mohammad. 'Recognition and Enforcement of Foreign Commercial Arbitral Awards Relating to International Commercial Disputes: Comparative Study (English and Jordanian Law)' (PhD The University of Leeds 2005), p.195
[104] Ibid. p.191

allegations of corruption or bribery. In such case, by applying the test in Soleimany case, the English court will decide on examining the substance of the dispute. Nevertheless, since it is decided by both tribunal and Swiss court that there was not any evidence of corruption and bribery, the Soleimany test-whether enforcing court investigate further the dispute concerning fraud, bribery or corruption allegations- failed in Westacre case.

Moreover, the case of the Hilmarton was identical to Soleimany case, as in the latter, the illegality of the contract was found by the tribunal as per the Iranian law which was the law of the performance place, however, the contract was found legal as per the Jewish law, namely curial law.[105] In Hilmarton case, it was also found by the arbitrator that by agreeing to the contract, the contracting parties were anticipating an activity that would be in violation of the Algerian law, which was the law of performance place; however, under the Swiss law, namely curial law, and the governing law of the contract, the contract was found to be legal.

In conclusion, some particular foreign awards and contracts will not be ordered by English court to be enforced, regardless of their proper law or the performance place. A contract would not fall under this category, such as the buying of personal sway, even though it does provide rationale for the refusing recognition and enforcement of the awards according to the English domestic public policy. However, English court will not enforce an award where the underlying contract will be performed abroad and its performance is contrary to the domestic public policy of that place.[106]But still, English courts will enforce a foreign award if the substantive contract is legal according to the governing law of contract and procedural law of arbitration regardless whether the contract violates English public policy.

The English courts would conduct a balancing act when deciding for the enforcement of the award. This act would be between the public policy considerations of recognition and enforcement of foreign arbitral awards and the public policy considerations of refusing the enforcement of the unlawful -substantive- contracts.[107] The award will be enforced when the alleged illegality does not reach to a significant level of offensiveness.[108]

[105] Ibid. p. 192
[106] See the decision in Westacre case.
[107] A G Tweeddale, 'Enforcing Arbitration Awards Contrary to Public Policy in England' ICLR 2000, 159-174, p.174; See also Scherer, Maxi. 'The Public Policy Exception under Article V(2)(b) – Methodological Approaches Country Report England' International Bar Association (IBA 2014), p.24-25
[108] See the decision in Westacre case.

CHAPTER IV
PUBLIC POLICY AS A GROUND FOR REFUSING RECOGNITION AND ENFORCEMENT IN TURKEY

1. Public Policy Definition

In order to recognise and enforce a New York Convention award in Turkey, pursuant to the article V/2-b of New York Convention, it should not be contrary to the public policy of Turkey. The extent of the public policy must be determined in the first place so as to detect whether or not there is any violation of public policy as a result of enforcement. As it is the case in Model Law, New York Convention and EAA 1999, there is no definition, or an attempt to define it, in Turkish legislation. Therefore, the focus will be on the doctrinal definition and the definition provided in the judgements of Turkish courts.

In the words of one leading commentator in Turkey:

> "The term public policy refers to the fundamental rules and institutions of the legal, social, political and moral system. A foreign award will be disregarded by the court if it violates the purpose of existence of the said rules and institutions. The courts operate in line with the fundamental legal, social, political, economic and moral principles that exist in the society of the country where they are located or, more generally, in the world and dismiss awards that contravene such principles."[109]

A very recent decision of Turkish supreme court, dated 2012, provides a comprehensive definition of the public policy based on Turkish arbitration doctrine and the former Turkish and foreign court decisions as follows:

> "…In that case; It is necessary to explain and discuss the concept of the public policy upon which the decision of the local court is based. The entire legal order arising from the provisions protecting the interests of society can be expressed as public policy. In doctrinal works, the public policy is generally defined as 'it is the set of institutions and rules that define the basic structure of political, social, economic, moral and legal aspects of society within a given time frame and protect its fundamental interests'.[110]… From the meaning of public policy, it is necessary to understand the

[109] Şanlı, Cemal. Esen, Emre. Ch. 8: Recognition and Enforcement of Foreign Arbitral Awards in Ismael Esin, Ali Yeşilırmak (eds), Arbitration in Turkey, (Kluwer Law 2015), 211-240, p.211.
[110] Tanrıver, Süha. Yabancı Hakem Kararlarının Türkiye'de Tenfizinde Kamu Düzeninin Rolü (The Role of Public Policy in The Enforcement of Foreign Arbitral Awards), Ankara- 1988. cited in the decision.

rules of private law, which are considered to be of great benefit to society.[111] The public policy is a specific set of rules with the consideration of public interest. ... With the public policy being the two main sources, such as written texts and court case law, as Schwarz pointed out, 'Public policy is a discretionary concept, and there is no way to precisely limit this'.[112] ... Indeed, as the well-known French lawyer Niabe explains, the concept of public policy is hearable and perceivable rather than can be expressed. In the words of the Swiss Federal Court decision, 'in order for a rule to be regarded as a public policy, the violation of this rule must be in conflict with one of the basic principles of the legal system of the country, or it must be severely damaged the general sense of law of that country'.[113]

The concept of public policy has also been the subject of judicial decisions. In a decision of the Turkish Constitutional Court dated 1964, It has come to the conclusion that the public order means ensuring the peacefulness of the society and aiming at the preservation of the state and the state organization; in other words, public policy encompasses all the rules that form the basis of society's order in every field. In a decision of the General Assembly of the Supreme Court of Appeals in 1990, it was stated that the relation of a rule with public policy should be determined according to the social, economic, cultural and historical realities of the country; It is stated that only if the mentioned facts determined the indispensability of that rule and its relation with public interest, then it can be said that that rule is a rule of public policy. ... When the above opinions are examined, and combined, the following conclusion can be drawn: A rule related to the public policy should be determined according to the social, economic, cultural and historical facts of the country. In other words, provided that the facts implied proves the indispensability of the rule, its social interest and its aim of the protection of the legal order, the rule should be regarded as part of the public policy."[114]

Furthermore, the court stated that there are various definitions of public policy depending on the enforcing state's considerations. Therefore, one might say that there are the same number of various understandings of the term of public policy as the quantity of states that exist on the planet. In the words of Turkish judge:

"… the concept of public policy, with similarities, has a unique meaning for each country shaped by the historical, social, economic and other conditions peculiar to that country. ... In doctrinal works, it is accepted that public policy differs according

[111] Andreas von Tuhr, Borçlar Hukukunun Umumi Kısmı (Law of Obligations, Private Principles), Çev. Cevat Edege, Ankara, 1983, Yargıtay Yayını No: 15, p. 258 cited in the decision
[112] Schwarz, Andreas, B: Borçlar Hukuku Dersleri(Law of Obligations) Çev. Bülent Davran, İstanbul 1948, p.343 cited in the decision
[113] Kaneti Selim, İsviçre Federal Mahkemesi'nin Borçlar Hukuku Kararları (The Decision of Swiss Supreme Court on Law of Obligations) , Ankara, 1968, p.22 cited in the decision
[114] Y.15HD E. 2014/2183, K. 2014/3226 dated 12th May 2014; Unless stated otherwise, all Turkish court decision taken online from <www.kazanci.com.> accessed on 18th November 2016.

to time and place, and it is understood that the indispensable basic principles of that states are evaluated regarding to public policy."[115]

According to article V/2-b of the convention, the public policy of the state where enforcement is sought will be taken into account when examining the enforcement of an convantion award. The examination of public policy violations is left to the discretion of the enforcing court as the convantion do not provide any particular criteria to interpret public policy grounds. Parallel to this statement, although the term public policy is not distinguished as being domestic or international, it is clearly stated by Turkish court that the "Turkish" public policy is applicable when enforcing an New York Convention award:

"It is necessary to investigate whether the outcome of the recognition and enforcement of foreign arbitral awards or judgements will violate Turkish public policy. If the legal consequences arising out of the enforcement of the decision are contrary to the public policy, the foreign decision shall not be enforced ... The criteria to be taken as basis here is not to be merely contrary to the provisions of one or more Turkish Law,[116] but to examine the contradiction with the fundamental values of Turkish Law, with the understanding of Turkish general morality and customs, with the basic understanding of justice and legal policy based on Turkish laws, with the basic rights and freedoms in the Constitution, with the common principles accepted in the international arena and bilateral treaties, with the understanding of morality and justice of advanced civilizations, and finally contradiction with the political and economic regime."[117]

2. Public Policy Expectations under the Turkish Law

2.1 Violation of Public Policy in doctrine

The widely-accepted approach in the modern text books with regard to the interpretation of public policy as a ground for refusing recognition and enforcement of foreign arbitral awards within the scope New York Convention is that the public policy exception must be limited to the international public policy of enforcing state and interpreted narrowly - compared to the enforcement of domestic awards. In line with this statement, two major types of public policy violation are presented by Turkish scholars.

In the first case, there must be serious contradictions with the fundamental legal and moral rules of enforcing state. For example, on the face of the award, it is clear that there are

[115] Y.15HD E. 2014/2183, K. 2014/3226 dated 12th May 2014
[116] Parallel to this conclusion, it is possible to say that where the enforcement of an award is not in breach of Turkish public policy, the court has discretion to enforce it even if the law applied to the arbitral award is considered as a violation of mandatory rule in Turkish law.
[117] Y.15HD E. 2014/2183, K. 2014/3226 dated 12th May 2014

involvement of gambling, bribery or corruption, delivery of goods which are non-exportable or importable, fraudulent, and human or drug trafficking. The second case, arbitrators are not impartial or biased because of the status of the arbitral tribunal and its composition as well as any connection between the arbitrators and disputing parties which is not considered professional.[118] Impartiality and independence of arbitrators is a significant security for the disputing parties. Therefore, any alterations of this security will also be deemed as contrary to the public policy.

2.2 Violation of Public Policy in Turkish Courts' Decisions

Although arbitration has a long-standing past in Turkish legislation, Turkish courts' attitude when interpreting public policy as a ground for refusal was unfair.[119] The so-called Keban Dam decision -dated 1976- which is the milestone decision of the Turkish Supreme Court is one of the cases causing the bad reputation of Turkey. In this case, a dispute arose between a foreign company and a Turkish authority. The submission of the draft award to ICC Arbitration Court deemed as violation of Turkish public policy, as a result, enforcement of the subject award was denied by the Turkish court. The rationale behind this decision was that the review of the award by the ICC Arbitration Court violated the independency of arbitral tribunal.[120] The audit of the ICC grant by the ICC Court was considered as a break of the independency of the mediators.[121] The judgement of the Turkish court in the case of Keban Dam is extremely criticized by the both Turkish and foreign scholars,[122] by saying that it cannot be deemed in no way as a violation of public policy to get the approval of ICC Arbitration Court shall. Having said that, it should be kept in mind that during the date of judgement, New York Convantion was not entered into force in Turkey. Although this approach has been overruled in former judgements, Keban Dam decision has damaged

[118] Şanlı, Cemal. Milletlerarası Özel Hukuk (International Private Law), (second edition, Vedat Kitapçılık, 2014) Istanbul, p.613

[119] Ekşi, Nuray. Yargıtay Kararları Işığında ICC Hakem Kararlarının Türkiye'de Tanınması ve Tenfizi (Recognition and Enforcement of ICC Awards According to Court Decisions), (2009) Ankara Barosu Dergisi Yıl 67, Sayı 1, Kış, 54-74, p.69

[120] Y.15.HD, E. 1975/1617, K. 1976/1052, dated 10th March 1976; Ekşi, Nuray. Yargıtay Kararları Işığında ICC Hakem Kararlarının Türkiye'de Tanınması ve Tenfizi (Recognition and Enforcement of ICC Awards According to Court Decisions), (2009) Ankara Barosu Dergisi Yıl 67, Sayı 1, Kış, 54-74. p. 61-62.

[121] Asli Bayata Canyaş, Enforcement of Foreign Arbitral Awards in Turkey. Further Steps Towards a More Arbitration-Friendly Approach, ASA Bulletin, (Kluwer Law International 2013) 31 (3) 537-557, p.552

[122] Moses Margaret L. The Principles and Practice of International Commercial Arbitration (Cambridge University Press 2008), p.218; Christopher Koch, Hakem Kararlarının Tenfizi Hakkında 1958 Tarihli New York Sözleşmesi, İTO Yayın No: 1996-15, İstanbul 1996, p. 38 cited in Ekşi, Nuray. Yargıtay Kararları Işığında ICC Hakem Kararlarının Türkiye'de Tanınması ve Tenfizi (Recognition and Enforcement of ICC Awards According to Court Decisions), (2009) Ankara Barosu Dergisi Yıl 67, Sayı 1, Kış, 54-74, p.68; See also Born, Gary. International Commercial Arbitration (second edition, Kluwer Law International 2014), p.3715

significantly the reputation of Turkey in the field of international arbitration. At present, one might say that Turkish courts' approach against the enforcement of arbitral awards rendered according to the ICC Rules is no more valid, and ICC awards are being enforced in Turkey.[123] Consequently, Turkish courts has adopted a more flexible and pro-enforcement approach on the recognition and enforcement of the foreign arbitral award in recent years.[124]

2.2.1 The Choice of Turkish law

Another well-known decision of Turkish courts affected the reputation of Turkey in the field of international commercial arbitration was related to the choice of Turkish law between parties. In the case of Osuukanta METEX Andelslag V.S. (METEX) v the General Directorate of The Turkish Electricity Administration (TEK) (here and after: Metex case), Turkish Supreme Court of Appeals interpreted broadly the extent of such choice between the disputing parties. The dispute was about a contract concerning construction of power generation plant in Soma between the Finn company METEX and TEK, and with a choice of Turkish law clause for determining applicable law. METEX commenced two separate arbitrations in Zurich.[125] The issue arose regarding which law was applicable to the arbitration proceedings (lex arbitri) in both arbitrations. As a result of the seat of arbitration was designated in Switzerland by the parties, and there was no clear reference to Turkish Procedure Law, it was concluded that Swiss Procedural Law should be applicable to the arbitration proceedings by the tribunal.

Following to the application of enforcement by METEX in Turkey, Turkish court of first instance rejected the enforcement of the foreign awards on the basis that arbitration agreement was breached by the tribunal since its award concluded that the parties' choice of law clause involved only the substantial law, not the procedural law. Turkish Supreme Court of Appeals held that tribunal's conclusion was in breach of article V/1-d of New York Convention by further adding that the award subject to the METEX's application was not in the scope of article I of the convention since the choice of Turkish law in the contract refers to the procedural law as well as substantive law. The court further added that the tribunal did

[123] As a result of similar supreme court's decision and ICC Arbitration being a way of resolving the disputes in the bilateral investment treaties signed by Turkey, ICC Arbitration Rules can no longer be regarded as a violation of the public policy in Turkey.

[124] Asli Bayata Canyaş, Enforcement of Foreign Arbitral Awards in Turkey. Further Steps Towards a More Arbitration-Friendly Approach, ASA Bulletin, (Kluwer Law International 2013) 31 (3) 537-557, p.552

[125] Ekşi, Nuray. Yargıtay Kararları Işığında ICC Hakem Kararlarının Türkiye'de Tanınması ve Tenfizi (Recognition and Enforcement of ICC Awards According to Court Decisions), (2009) Ankara Barosu Dergisi Yıl 67, Sayı 1, Kış, 54-74, p.62-63

not applied Turkish law to the arbitration proceedings, even though parties chose the applicable law as Turkish law. Therefore, this conclusion of the tribunal was deemed as violation of Turkish public policy, and consequently, the court has rejected enforcement of the award.[126]

Turkish Supreme Court of Appeals has affirmed the judgement in Metex case by another judgement in the next year saying that the choice of Turkish law as applicable law clause covers procedural law as well as substantive law. In the event that the arbitral tribunal applies the choice of Turkish law clause otherwise the award is non-enforceable under the Turkish Law.[127]

Majority of the foreign and Turkish scholar criticised the attitude of Turkish courts being incorrect, unfortunate and unjustified, by saying the choice of procedural law did not affect the outcome of the award at all. Moreover, Turkey has been deemed as an unfortunate example among the contracting parties of the convention as regard to interpretation of article V/2-b.[128] The attitude of Turkish courts towards the public policy exception is deemed as the consequence of the application of domestic public policy and the ambiguity of the public policy exception. That being said, the decision in Metex case has been overruled by recent judgements of the supreme court confirming that the choice of Turkish law clause refers to the law of the substance only, not the procedural law of arbitration unless it is agreed by the disputing parties expressly.[129]

2.2.2 Violation of basic procedural rights

Turkish courts will refuse to recognise or enforce the foreign awards which are in breach of the procedural rights which are classified as indispensable according to Turkish. Therefore, violations of the right of defence, which is one of the basic procedural rights given to the disputing parties under Turkish law, is considered contrary to the Turkish public policy.[130] Accordingly, under the Turkish procedural law, where the procedure applied by the arbitral tribunal is in breach of the right of defence of disputing parties, the enforcement of such award would be deemed as contrary to Turkish public policy.

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[126] Y.15.HD, E. 1995/6209, K. 1996/527, dated 1st January 1996.
[127] Y.15.HD, E. 1997/4213, K. 1997/5603, dated 25th December 1997.
[128] Supra note n.128; See also Bouzarjomehri, Sormeh., Amini, Eisa. 'Public Policy as Ground for Refusal of International Arbitral Awards-A Comparison Between Different Judicial Practices' (2016) Journal of Politics and Law; 9 (10) 81-87, p. 85
[129] Y.15.HD, E. 2000/3992, K. 2000/4704, dated 26th May 2000
[130] Y.19.HD, E. 2001/6576, K. 2002/1513, dated 7th March 2002

As a world-wide accepted practice, Turkish courts has adopted the view that even though the procedural law applied to arbitration proceedings are different from the procedural law provided in enforcing state, foreign awards rendered accordingly are to be recognised or enforced in Turkey, provided that the award is not in breach of the basic-mandatory-principles of the Turkish procedural law. Turkey also ratified the European Convention on Human Rights (ECHR), therefore, the provisions of the convention have to be taken into account when examining the recognition and enforcement of foreign awards by Turkish courts. As accepted within the case law of the article 6 of the convention, it is possible to consider the principles of due process within the context of Turkish public policy.

Another key thing to remember, unfair methods regarding the appointment of arbitrators is also consider contrary to the public policy. Turkish court has accepted that granting one party to choose arbitrators or one party forces the other party to reach an arbitration agreement, this will result the arbitration agreement being invalid and also violation of the Turkish public policy. Within this context, by allowing one party to have superior right to choose arbitrator, the impartiality and objectivity may be jeopardized by the appointment of arbitrators. [131]

2.2.3 Subject matter of the dispute

Arbitrability of the subject matter of the dispute is another ground for refusing recognition and enforcement of the New York Convention awards according to the article V/2-of the convention. Therefore, Turkish Supreme Court of Appeals refuses the enforcement of foreign awards on this basis that subject matter of dispute is non-arbitrable under the Turkish law, such as the matters concerning immoveable properties, annulments of title deeds/land registries, tax issues etc.[132] Therefore, only the state courts have jurisdiction and competence to rule over such issue. Regardless of being domestic or foreign, enforcement of any arbitral awards concerning the settlement of issues that are not arbitrable under Turkish Law, is refused on the public policy grounds.[133]

[131] Günseli Öztekin Gelgel, New York Konvansiyonu'na Göre Hakem Kararının Tenfizinde Yargıtay'ın Bazı Kararlarının Değerlendirilmesi (Assessment of Some Judgments of the Supreme Court in Enforcement of Arbitral Awards under the New York Convention) (2002) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, 22, 1137-1158, p.1156

[132] Asli Bayata Canyaş, Enforcement of Foreign Arbitral Awards in Turkey. Further Steps Towards a More Arbitration-Friendly Approach, ASA Bulletin, (Kluwer Law International 2013) 31 (3) 537-557, p.552-553

[133] Y.18.HD, E. 1996/3347, K. 1996/4735, dated 13th May 1996

Similarly, arbitral awards concerning tax issues are enforceable under the Turkish law on the ground of public policy. In a decision of the supreme court, the foreign award ordering that the payment of value-added tax by the plaintiff to the respondent has been rejected on the basis that that the only competent authority to collect taxes is the Turkish tax office[134]. Taxing issues are considered in relation to the public policy consideration by the General Assembly of the Supreme Court of Appeals in a very recent judgement, therefore, enforcement of the foreign arbitral award ordering tax payment has been refuse.[135] The supreme court approach is to evaluate the issues in question under the scope of article V/2-b of the New York Convantion, not under the article V/2-a concerning arbitrability. In fact, it would be more appropriate for the court to consider the arbitrability of the merits of dispute, taking into account the distinction between article V/2-a and V/2-b.

The supreme court also states that partial examination of the substance, when necessary to do so, cannot be regarded as revision au fond:

> "In some cases it may be necessary to examine partially the merits of dispute when evaluating the allegations of violation of public policy. For example, it is mandatory to investigate partially the merits of the dispute when evaluating the objection of violation of public policy since the substantial contract which is the subject of the foreign award constitutes a fraud and contradiction to the customs and tax legislation of enforcing state. Otherwise, it is not possible to evaluate the objection of violation of public policy. In order to be able to examine the objections in such cases, the necessary and partial investigation of merits cannot be regarded as revision au fond." [136]

2.2.4 Contradiction with a previous judgement

Another violation of the Turkish public policy acknowledged by Turkish courts is where foreign arbitral awards are not consistent with a prior decision made by a Turkish court[137] concerning a legal dispute between the same parties and on the same cause of action. The enforcement of the such awards are refused by the Turkish supreme court on the basis of Turkish public policy.[138]

[134] Y.11.HD, E. 2007/10205, K. 2007/13081, dated 19th May 2007
[135] YHGK E. 2011/13-568, K. 2012/47, dated 8th December 2012
[136] Ibid
[137] Şanlı, Cemal. Esen, Emre. Ch. 8: Recognition and Enforcement of Foreign Arbitral Awards in Ismael Esin, Ali Yesilirmak (eds), Arbitration in Turkey, (Kluwer Law 2015), 211-240, p.238
[138] Y.11.HD, E. 2006/7396, K. 2007/6672, dated 1st May 2007

According to the article 138/4 of the constitution[139] 'Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution.'Parallel to this article, one of the most important contradiction with Turkish public policy is where a foreign arbitral award is inconsistent with or contrary to another judgment made by Turkish courts or a pending case.[140]

There is no regulation in this respect in Turkish legislation but according to the opinion accepted in the doctrine, the recognition and enforcement of the foreign arbitral awards incompatible with the Turkish court decisions is contrary to the Turkish public policy. The main reason for this is the res judicata effect of the Turkish court decision within the legal system of Turkey. According to Turkish law, this issue will be handled within the context of the public policy.[141]

2.2.5 Awards Without Legal Reasoning

Recognition and enforcement of foreign awards without legal reasoning have been argued in Turkish doctrine. An opinion in this respect expresses the fact that the legal reasoning shed light on how the decision is made, and it is also an indispensable right of parties to judge whether or not all the claims are dealt with by the court/tribunal. It is also an essential element in the realization of judicial review of the decision/awards.[142] In contrast, another opinion on this issue states that the requirement of 'the decisions of all courts to be written with a justification' in the article 141/3 of the Constitution of the Republic of Turkey includes is only applicable to domestic court decisions. Therefore, the failure to contain legal reasoning in the awards would not constitute a violation of the public policy.[143]

[139] Constitution of the Republic of Turkey: Law No. 2709 of 7 November 1982, published in the Official Gazette dated 9 November 1982, no. 17863; English version is accessible from Turkish Parliament's website <https://global.tbmm.gov.tr/docs/constitution_en.pdf> accessed on 8 December 2016

[140] GÖKYAYLA, D. Cemile**,** Yabancı Mahkeme Kararlarının Tanınması ve Tenfizinde Kamu Düzeni (Public Policy in Recognition and Enforcement of Foreign Arbitral Awards), (2001) Ankara, p.260

[141] Ibid

[142] Tanrıver Süha, 'Yabancı Hakem Kararlarının Türkiye'de Tenfizi Bağlamında Kamu Düzeninin Etkisi' (Public Policy in Enforcement of Foreign Arbitral Awards), MHB Prof. Dr. Yılmaz Altuğ'a Armağan, (1997-1998) Y. 17-18, S. 1-2, 467-491, p.487.

[143] Şanlı Cemal, Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları (Dispute Resolution and Making International Commercial Contracts), (3rd edition, Beta Basım AŞ. 2005) İstanbul, p.351.

The decisions of the Turkish courts on this issue were not consistent as well[144]. However, with a very recent decision of joint chambers dated 2012 -which is binding upon Turkish Courts- this discussion has been put an end. With this decision, the supreme court has concluded that the absence of legal reasoning in foreign arbitral awards is not contrary to Turkish public policy[145]. This milestone decision of joint chambers of the supreme court put an end to the very broad interpretation of the public policy when recognising and enforcing foreign awards. It will also enable a more arbitration-friendly and pro-enforcement attitude towards the enforcement of New York Convention awards in Turkey. The court stated in the decision that:

> "It should be emphasized that the enforcement judge shall not make revision au fond on the merits of dispute in the foreign decision. In the context of this ban, it is obvious that the enforcement judge also cannot examine and evaluate the justification exists in decisions. ... In other words, the presence or absence of a justification in the decision does not matter in determining the contradiction to the public policy ... It is clear and unquestionable that the principles set forth by Article 141 of the Constitution concerning the procedure law will apply exclusively to the Turkish courts ... It was decided that a mere absence of the justification of the foreign decisions would not prevent the enforcement of binding foreign court decisions and this issue would not be considered to be an obvious contradiction to the public policy in the sense of Article 54/c of PLCPC Code."[146]

The reasoning in this decision clearly is in line with English courts' separation of international and domestic public policy. Although the decision was about foreign court judgement, considering the Turkish supreme court refers it in new decisions when examining recognition and enforcement of the New York Convention Awards, it is clear that recognition and enforcement of the foreign awards is no longer influenced by the absence of legal reasoning. Nevertheless, in order to avoid unnecessary misinterpretation of public policy and to make such highly-debated issue clear, it would be more appropriate to make an amendment to the PLCPC Code in Turkey, which has the civil law system, rather than regulating it via court decisions.

2.2.6 Fees of arbitrators

It has been stated that where the award contains 'the decision on fees of arbitrator', which is determined by same arbitrator, may be subject to intervention on the public policy

[144] Y.2.HD, E.2006/2612, K.2006/9147, dated 8th June 2006; Y.13.HD, E.2003/6226, K.2001/11095, dated 2nd October 2003
[145] YHGK, E.2010/1, K.2012/1, dated 10th February 2012.
[146] Ibid

grounds in Turkish law.[147] The justification of this is the rule that predicts that no one can be a judge or act as a judge on his personal receivable. This principle has been adopted by the decision[148] of joint chambers of the Supreme Court of Appeals dated 13/5/1964, E.64/1, K.64/3. By referring to the independence of the arbitrators in its decision, the supreme court gave the following statements:

> "The arbitrators being prohibited to rule on their fees in the arbitral awards sought to be enforced is based on the rule that no one can be a judge deciding on his or her personal receivable. Indeed, rendering an arbitral award including their fees by arbitrators is incompatible with the impartiality of the arbitrators. If the arbitrator's fee is indicated by the parties via contract (which can be done in accordance with a aw of obligations and is not subject to formal validity), it is possible to receive this fee as arbitrators; if the fees are not paid voluntarily by the parties, the arbitrators must start an action before the competent courts in accordance with the general provisions."[149]

The decision is also stated that the arbitrator's fee could be taken by arbitrators if it had been specified by the parties' contract, and it does not concern the public policy.[150] There are other decisions made by the supreme court in this regard.[151] This interpretation of the rule has been described as a style of interpretation beyond its purpose. In contrast, it has to be interpreted narrowly such as the rule is applicable only if the one who rule on his or her own personal receivable is party to the dispute as the plaintiff or the defendant.[152] Since the arbitrator is not party to the arbitration in such ways, and only acting as the third party who renders the awards, he or she can decide on the fees of the arbitrators in the same award without regarded as violation of public policy.

Along with the opinion that arbitral awards containing provisions on arbitrators' fees will not concern public policy,[153] where a New York Convention award is sought to be enforced, it is suggested that the part of the award not containing arbitrators' fees may be

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[147] Tanrıver Süha, 'Yabancı Hakem Kararlarının Türkiye'de Tenfizi Bağlamında Kamu Düzeninin Etkisi' (Public Policy in Enforcement of Foreign Arbitral Awards), MHB Prof. Dr. Yılmaz Altuğ'a Armağan, (1997-1998) Y. 17-18, S. 1-2, 467-491, p.476

[148] Turkish Supreme Court of Appeals the decision of joint chambers, E.64/1, K.64/3, dated 13. 5. 1964, <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/11748.pdf&main=http://www.resmigazete.gov.tr/arsiv/11748.pdf> accessed on 11 December 2016

[149] Ibid

[150] Kalpsüz, Turgut., 'Hakem Kararlarının Milliyeti' (Nationality of Arbitral Awards), (1978) Batider, C.IX, 601-651, p.629

[151] For similar decisions see also Ertekin, Erol. Karataş, İzzet. Uygulamada İhtiyari Tahkim ve Yabancı Hakem Kararlarının Tenfizi-Tanınması (Voluntary Arbitration and Recognition and Enforcement of Foreign Arbitral Awards in Practice), (Yetkin Yayınevi 1997), p. 195-196.

[152] Taşkın, Alim. Hakem Sözleşmesi (Arbitration Agreement), (Turhan, 2000) Ankara, p.185-186.

[153] Ibid, p.190.

enforceable under the Article V/1-c of the Convention or pursuant to the article 40 of PLCPC Code.[154]

After the IAL Code[155] entered into force in 2001, it may be argued that arbitral awards on their own fees will not be contrary to public policy. In accordance with Article 16 / B of the International Arbitration Law, which will apply to the international arbitrations where the seat is in Turkey, the fees of arbitrators will be shown in the awards. Moreover, pursuant to the subsection A, the amount of the arbitrators' fee shall be determined via the agreement between parties and arbitrators, or in accordance with the relevant clause in the arbitration agreement; in the absence of such provision, and if no agreement can be reached later on, the fee shall be calculated according to the Ministry of Justice' tariff of legal fees. Accordingly, the arbitrators will be able to determine their wages together with the parties or if there is a clause regarding the fees, they can determine by themselves.

3. Concluding Remarks

Despite the old judgements of the supreme court which resulted in the bad reputation of Turkish arbitration practice, a more arbitration-friendly and pro-enforcement approach towards the foreign arbitral awards is being adopted by the Turkish courts. The fact that arbitration as an alternative to litigation is getting popular when settling disputes in the field of international trade, the practice of international commercial arbitration is developing every day, consequently Turkish courts are updating their attitude. Being said that, there is however, no expert arbitration court or supreme court division in Turkey at the present. The law and practice of the recognition and enforcement of the foreign arbitral awards are mostly shaped by the court of first instance in major cities such as Istanbul, Ankara and Izmir.

Following the liberalisation by the Turkish government in the field of international trade on 1990 onwards, arbitration as mean of dispute resolution has been encouraged in Turkey. Consequently, there have been many legislating reforms in Turkish law such as the enactment of IAL Code which has been based on Model Law and arbitration rules of Switzerland. As a result, current arbitration legislations are internationally-acknowledged rules of international commercial arbitration. Following the ratification of the New York Convention on 1991, a more arbitration-friendly system for recognition and enforcement of

[154] Tanrıver Süha, 'Yabancı Hakem Kararlarının Türkiye'de Tenfizi Bağlamında Kamu Düzeninin Etkisi' (Public Policy in Enforcement of Foreign Arbitral Awards), MHB Prof. Dr. Yılmaz Altuğ'a Armağan, (1997-1998) Y. 17-18, S. 1-2, 467-491, p.489

[155] Law on International Arbitration Law No. 4686 of 8 June 1991, published in the Official Gazette dated 5 July 2001, no. 24453.

foreign arbitral awards has been brought into Turkish legislation. However, many issues are not regulated in the convention and open to wide interpretation by enforcing states, therefore, the success of the system brought by the convention heavily depends on how the provision are implemented by Turkish courts.

As can be seen from the above cases, in the past, the attitude of Turkish courts was mostly against recognition and enforcement of the foreign arbitral awards since there were some issues whether the conduct of arbitration was according to the law. Most of the cases in which the court refused recognition and enforcement of a New York Convention award on the ground that it is contrary to the Turkish public policy are heavily related to Turkish domestic public policy consideration. According to the decisions of the Turkish courts, the issues considered as violation of public policy are mostly based on following grounds:(i) awards containing deeds prohibited in Turkish Law, (ii) awards rendered on the basis of contracts in breach of moral rights (e.g. contracts on gambling or bribery, delivery of a forbidden items for import or export, drug or white woman trade, etc.) (Iii) breach of the independence and impartiality arbitrators, (iv) breach of the fundamental procedural rules.

During the process of recognition and enforcement of the New York Convention awards, the wide interpretation of the public policy via Turkish courts, and the refusal of enforcement in many cases are the results of broad application of many domestic rules. That attitude has been criticized by both Turkish and foreign scholars by stating that such decisions are unfair and unjust, therefore, Turkish courts should re-examine its misinterpretation. As set forth in the previous chapter, arbitration-friendly approach adopted by English courts when interpreting the concept of public policy, would be appropriate for Turkish courts as well. In order to do that, firstly, it would be appropriate for the supreme court to clearly state the separation of international and domestic public policy in the application of foreign arbitral awards, and secondly, the court ought to decide that the public policy can only be violated in limited circumstances alongside with distinguishing the recognition and enforcement of foreign and domestic awards.

CHAPTER V
CONCLUSION

When measuring the success of the international commercial arbitration, the recognition and enforcement of the arbitral award has a significant role to play. If an award cannot be enforced in the place where the losing party has assets, arbitration become meaningless. On this basis, there is a need of effective methods for recognition and enforcement which is applicable worldwide. The New York Convention, being signed by most of the countries across the world, provides this effective and widely-accepted method. However, its success still lies on the interpretation and application by the contracting states of the convention. The past years have shown the need of a uniform approach towards the public policy ground for refusing recognition and enforcement the convention awards as a result of different and unjust interpretations of national courts. In this paper, the principles when applying the public policy exemption by English and Turkish have been set forth and the difference between two legal system has been presented. Finally, the following conclusions have been reached:

First and foremost, it should be kept in mind that the concept of international public policy has been adopted by the English courts, which allows a narrow interpretation of the article V/2-b in accordance with the pro-enforcement purpose of the New York Convention. The English domestic public policy expectations have not been taken into consideration when dealing with the recognition and enforcement of New York Convention. However, this is not the case in the Turkish case-law since there has been no attempt by Turkish Courts to differentiate the principles of international public policy the domestic ones. Turkish domestic rules have been used from the defining stage of the public policy to the determination stage of its extent. As a result, in the past years, many foreign awards have been rejected on the Turkish domestic public policy grounds by Turkish courts.

From the case studies in the third chapter, it is clear that there are limited cases where English courts will refuse the enforcement of foreign award on the public policy grounds. The most recurrent context where the English courts have refused the enforcement seems to be where the basic contract has been compromised through illegality or the enforcement of the foreign awards is apparently illegal. It is explicitly stated in the Soleimany case that the English courts will not enforce any award, regardless of it being domestic or foreign, which

includes payments based on a contract concerning the purpose of conducting an illegal business in the place where the contract is performed. Likewise, English court will not enforce an award where the underlying contract will be performed abroad and its performance is contrary to the domestic public policy of that place. Being said that, English courts will still enforce a foreign award if the substantive contract is legal according to the governing law of contract and procedural law of arbitration, regardless of whether the contract in contrary to the English domestic public policy.

The illegality of the underlying contract and its connection with the enforcement of the foreign awards based on such contract have not been dealt with by the Turkish courts yet. Most of the cases in which the court refused recognition and enforcement of a New York Convention award on the ground that it is contrary to the Turkish public policy are heavily related to Turkish domestic public policy consideration such as: awards containing deeds prohibited in Turkish Law; awards rendered on the basis of contracts in breach of moral rights (e.g. contracts on gambling or bribery, delivery of a forbidden items for import or export, drug or white woman trade, etc.); breach of the independence and impartiality arbitrators, breach of the fundamental procedural rules. Considering the early decisions of Turkish Supreme Court of Appeals such as Keban Dam and Metex, one might argue that a hostile approach towards the foreign arbitral awards were existed since the courts regarded international arbitration has weakened their jurisdiction.

That being said, even though Turkish case-law were historically inconsistent, this negative attitude of Turkish courts has started to change in favour of arbitration, and such decisions have been overruled by recent judgements of the supreme court. Turkish judges acknowledged that reputation of Turkey as a reliable forum for international disputes resolution heavily depends on the success of the enforcement of foreign award. Therefore, a more arbitration-friendly attitude towards the enforcement of foreign awards should be adopted. In order to do that, firstly, Turkish courts should to clearly differentiate the concept of international and domestic public policy with regard to recognition and enforcement of international and non-domestic arbitral awards. Secondly, the court has to create a consistent case-law which determines the limited circumstances in which the international public policy of Turkey has been violated.

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