

**“ CAN ARBITRAL AWARDS BE ANNULLED BECAUSE OF
VERY HIGH ARBITRATOR FEES? EVALUATIONS REGARDING
GROUNDS FOR ANNULMENT OF ARBITRAL AWARDS
SPECIFIED IN TURKISH AND SWISS LAW**

*(HAKEM ÜCRETİNİN ÇOK YÜKSEK OLMASI SEBEBİYLE HAKEM KARARI İPTAL
EDİLEBİLİR Mİ? TÜRK VE İSVİÇRE HUKUKUNDA ÖNGÖRÜLEN HAKEM
KARARLARININ İPTAL SEBEPLERİ KAPSAMINDA DEĞERLENDİRMELER)*

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ÖZ

Tahkim, tarafların üzerinde serbestçe tasarruf edebilecekleri ve özel hukuktan kaynaklanan bir uyuşmazlığın kendi iradeleriyle, devlet mahkemeleri yerine hakemlerin önünde çözümlenmesini ifade eden bir yargı yoldur. Tahkim yargılamasında hakem mahkemesince verilen kararlar kesin hüküm teşkil eder ve icra edilebilir niteliktedir. Görüldüğü üzere, hakem kararları devlet mahkemelerinden verilen kararlarla eşit kabul edilmiştir. Bu sebeple hakem kararlarının da devlet mahkemelerinden verilen kararlar gibi yargılama hukukunun temel ilkelerine uygun olması gerekmektedir. Hakemlerce verilen kararların denetiminin sağlanabilmesi amacıyla, Türk Hukukunda “iptal davası” yoluna başvurulabileceği öngörülmektedir. Bununla birlikte 4686 sayılı Milletlerarası Tahkim Kanunu’nda ve 6100 sayılı Hukuk Muhakemeleri Kanunu’nda iptal sebepleri sınırlı sayıda düzenlenmektedir. Hakem kararlarının ancak kanunda öngörülen sebeplerin varlığı halinde iptal edilebileceği hükme bağlanmaktadır. Türk Hukukunda tahkim yargılamasında hakem ücretinin oldukça yüksek bir miktar olarak hükmedilmesi hususu bir iptal sebebi olarak düzenlenmemiştir. Diğer taraftan, İsviçre Federal Medeni Usul Kanunu’nun Art. 393 (f) bendinde, hakem ücretlerinin çok yüksek tespit edilmesi durumunda, bu halin bir iptal sebebi teşkil edeceği ifade edilmektedir. Türk hukukunda, açıkça bir iptal sebebi olarak öngörülmeyen bu hususun gerek Milletlerarası Tahkim

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Kanunu'nda (MTK m. 15/A/II) gerekse de Hukuk Muhakemeleri Kanunu'nda öngörülen iptal sebepleri (HMK m. 439/f. 2) çerçevesinde iptal davasına konu edilmesinin mümkün olup olmadığı doktrinde tartışılabilecektir. Bu sebeple çalışmamızda, hakem ücretlerinin çok yüksek olması sebebiyle hakem kararının iptal edilip edilemeyeceği hususu Türk milli ve milletlerarası tahkim mevzuatında öngörülen iptal sebepleri kapsamında değerlendirilerek ortaya konulmaya çalışılacaktır.

Anahtar Kelimeler: *Hakem Kararları, Hakem Ücretlerinin Çok Yüksek Olması, Hakem Kararlarının İptali, İptal Davası, Hakem Kararlarının İptal Sebepleri*

ABSTRACT

Arbitration is a judicial process which means the resolution of a dispute, arising from private law and upon which the parties can freely decide before the arbitrators instead of the state courts with the will of the parties. Decisions regarding arbitration proceedings rendered by the arbitral tribunal are final and can be executed. As is seen, the arbitral awards are accepted as equal with the decisions given by the state courts. Therefore, similar to the decision given by the state courts, arbitral awards must also comply with the fundamental principles of procedural law. In order to ensure the supervision of the arbitral awards, it is regulated in Turkish Law that "action for annulment" can be applied. The number of grounds for annulment, which are regulated both in the International Arbitration Law and in the Code of Civil Procedure, is limited. It has been decided that arbitral awards can only be annulled in the presence of the grounds specified in the law. The fact that the arbitrator's fee is determined as a very high amount in arbitration proceedings is not regulated as a ground for annulment in Turkish Law. On the other hand, in the paragraph (f) of Article 393 of the Swiss Federal Civil Procedure Code, in case the arbitrator's fees are determined to be too high, it is regulated that this will constitute a ground for annulment. Whether this issue, which is not expressly regulated as a ground for annulment in Turkish law, can be subject to the action for annulment within the framework of the annulment grounds specified in both the International Arbitration Law (Article 15/A/II) and the Code of Civil Procedure (Article 439 para 2), can be discussed in the doctrine. For this reason, in our study, the issue of whether the arbitral award can be annulled due to the very high arbitrator fees will be tried to be identified by evaluating them within the scope of the grounds for

annulment specified in the Turkish national and international arbitration legislation.

Keywords: *Arbitral Awards, Very High Arbitrator Fees, Annulment of Arbitral Awards, Action for Annulment, Grounds for Annulment of Arbitral Awards*

I. INTRODUCTION

Arbitration (*l'arbitrage, Schiedsgerichtsbarkeit*)¹ is a judicial process which can be defined as the resolution of a dispute, arising from private law and upon which the parties can freely decide before the arbitrators instead of the state courts with the will of the parties². In order to ensure the

¹ For terminology on the word arbitration, *see*: SAREIKA Wieland, **Die Gültigkeit von Schiedsgerichtsvereinbarungen nach kanadischem und deutschem Recht**, in *Bürgerliches Recht, Handels- und Verkehrsrecht*; Bd. 5 (Hrsg. Prof. Dr. Edgar Ruhwedel), Frankfurt am Mein; Bern; Las Vegas, Peter Lang Verlag, 1978, p. 7.

² For various definitions and explanations of arbitration, *see*: GÖKSU Tarkan, **Schiedsgerichtsbarkeit**, Zürich, Dike Verlag AG, 2014, N. 14, p. 9; REDFERN Alan / HUNTER Martin / [BLACKABY Nigel / PARTASIDES QC Constantine]: **Redfern And Hunter On International Arbitration (Student Version)**, 6th Edition, United States Of America, Oxford University Press, 2015, § 1. 04, p. 2; JEMIELNIAK Joanna, **Legal Interpretation in International Commercial Arbitration**, in *Law Language and Communication*; Farnham, England, Ashgate Publishing Limited, 2014, p. 15; ALANGOYA Yavuz, **Medeni Usul Hukukumuzda Tahkimin Niteliği ve Denetlenmesi**, İstanbul, Fakülteler Matbaası, 1973, p. 4; KALPSÜZ Turgut: “İnşaat Sözleşmelerinde Tahkimin Genel Esasları”, **Yönetici, İşletmeci Mühendis ve Hukukçular İçin Ortak Seminer**, Ankara, 1996, (pp. 341-379), p. 363 ff.; YILDIRIM Mehmet Kâmil, “İhtilafların Mahkeme Dışı Usullerle Çözülmesi Hakkında”, **Prof. Dr. Yavuz Alangoya İçin Armağan**, İstanbul, 2007, (pp. 337-360), p. 340; YILMAZ Ejder, “Tahkim Hukukuna Genel Giriş ve Ülkemizdeki Gelişimi, Yargı Reformu 2000 Sempozyumu”, **Konuşmalar, Bildiriler, Tartışmalar, Belgeler**, İzmir Barosu, 5-6-7-8 Nisan 2000, (pp. 268-286), p. 268; PEKCANITEZ Hakan, “Alternatif Uyuşmazlık Çözümleri”, **Hukuki Perspektifler Dergisi**, Kasım 2005, (pp. 12-16), p. 15-16; YEĞENGİL Rasih: **Tahkim (L'arbitrage)**, İstanbul, Cezaevi Matbaası, 1974, p. 94; DEREN-YILDIRIM Nevhis: **Uncitral Model Kanunu ve Milletlerarası Tahkim Kanunu Çerçevesinde Milletlerarası Tahkimin Esaslı Sorunları**, 1th Edn, İstanbul, Alkım, 2004, p. 17; SAREIKA, p. 7; RUTLEDGE Peter B., **Arbitration and the Constitution**, First Published, New York, Cambridge University Press, 2014, p. 6; BORN Gary B., **International Arbitration: Law and Practice**, First Edition, Kluwer Law International (Wolters Kluwer Law & Business), 2012, §1.01, p. 4; BELLIG Jan-Frederik, **Die Jurisdiktion rationae materiae der ICSID-Schiedsgerichte: Unter besonderer Berücksichtigung des Investitionsbegriffes des Weltbankübereinkommens vom 18.03.1965**, in *Hamburger Studien zum Europäischen und Internationalen Recht*; Herausgegeben von Thomas Bruha, Meinhard YUHFD Vol. XIX No.2 (2022)

supervision of the arbitral awards, it is regulated in Turkish Law that "*action for annulment*"³ can be applied⁴. The number of grounds for annulment,

Hilf; Hans Peter Ipsen, Rainer Lagoni, Gert Nicolaysen, Stefan Oeter; Band 47, Berlin, Duncker & Humboldt GmbH, 2008, p. 71; ERDEM H. Ercümet, "Resolving International Trade Disputes Through Arbitration", *in: Prof. Dr. Fırat Öztan'a Armağan*, I. Cilt, Ankara, Turhan Kitabevi, 2010, (pp. 839-909), p. 839; BOSCH Wolfgang, **Rechtskraft und Rechtshängigkeit im Schiedsverfahren**, *in* Veröffentlichungen zum Verfahrensrecht Bd. 5, (Herausgegeben von Rolf Stürner und Gerhard Walter), Tübingen, J. C. B. Mohr (Paul Siebeck), 1991, p. 3; REAL Gustav K. L., **Der Schiedsrichtervertrag: Inhalt und rechtliche Regelung im deutschen Recht mit rechtsvergleichenden Ausblicken**, *in* Internationales Wirtschaftsrecht Bd. 3 (Hrsg. Prof. Dr. Karl-Heinz Böckstiegel), Köln; Berlin; Bonn; München, Carl Heymanns Verlag KG, 1983, pp. 8-9.

³ Annulment action is a legal way accepted by the legislature within the scope of the control of arbitral awards (TANRIVER Süha, **Medenî Usûl Hukuku, C. II, Üst Derece Yargılamaları, Kesin Hüküm ve Bertaraf Edilmesi, Diğer Hukuki Çareler, Geçici Hukuki Korumalar, Alternatif Uyuşmazlık Çözümleri ve İç Tahkim**, Ankara, Yetkin, 2021, § 6, p. 451. For similar definitions, *see*: PEKCANITEZ Hakan / YEŞİLIRMAK Ali, **Pekcanitez Usul Medeni Usul Hukuku, C. III, 15th Edn.**, İstanbul, On İki Levha, 2017, p. 2733; ÖZBAY İbrahim / KORUCU Yavuz, **Hukuk Muhakemeleri Kanunu Çerçevesinde Tahkim, HMK m. 407-444**, Ankara, 2016, p. 217; For the other definitions of annulment action, *see*: SCHILKEN Eberhard, **Zivilprozessrecht**, (Academia Iuris lehrbücher der Rechtswissenschaft), 7., neu bearbeitete Auflage, München, Verlag Franz Vahlen GmbH, 2014, § 25, N. 854; KRUGER Wolfgang / RAUSCHER Thomas: **Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz**, Band 3, §§ 946-1117, EG ZPO, GVG, EGGVG, UKlaG, Internationales und Europäisches Zivilprozessrecht, 5. Aufl.-München, C. H. Beck, 2017, § 25, N. 854; § 1059, Rdn. 1; MüKoZPO, *Münch*, ZPO § 1059, Rdn. 1; KESSLER Joachim, **Schiedsgerichtsvertrag und Schiedsverfahren**, (Das Wissenschaftliche Taschenbuch) München, Wilhelm Goldmann Verlag, 1970, p. 105; LANGKEIT Jochen, **Staatenimmunität und Schiedsgerichtsbarkeit: Verzichtet ein Staat durch Unterzeichnung einer Schiedsgerichtsvereinbarung auf seine Immunität?**, *in* Abhandlungen zum Recht der internationalen Wirtschaft; Herausgeber: Professor Dr. Otto Sandrock unter Mitwirkung von Professor Dr. Bernhardt Großfeld, Reinhold Trinkner; Band 12, Heidelberg, Verlag Recht und Wirtschaft GmbH, 1989, p. 265. For an evaluation on an example in terms of annulment action against arbitral awards in German law, *see*: BERGER Klaus Peter, **Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration**, Second Edition Volume I: Case Study and Interactive DVD-ROM, Alphen aan den Rijn, The Netherlands: Kluwer Law International BV, Center for Transnational Law (CENTRAL); Wolters Kluwer Law & Business (Firm), 2009, N. 28. 1-28.7, pp. 137-139).

⁴ EKŞİ Nuray, **Hukuk Muhakemeleri Kanunu'nda Tahkim (6100 sayılı HMK md. 407-444)**, 2th Edn., İstanbul, Beta, 2019, p. 11; ERSEN PERÇİN Gizem, "MTK Tahkiminde İptal Davalarına İlişkin Bir Değerlendirme", **Public and Private YÜHFD Cilt: XIX Sayı:2 (2022)**

which are regulated both in the International Arbitration Law and in the Code of Civil Procedure, is limited.

In paragraph (f) of Article 393 of the Swiss Federal Civil Procedure Code (*Schweizerische Zivilprozessordnung- SchwZPO*), it is regulated that in case of the arbitrator's fees are determined to be too high, this will constitute a ground for annulment⁵. In case of an application to the court by the parties based on this annulment ground specified in the SchwZPO, the court will decide to reduce the arbitrator's fee to an appropriate amount instead of the annulment of the arbitrary award⁶.

This regulation, which is specified by the legislator in Swiss law, does not exist in Turkish law. Similarly, a provision similar to this regulation brought by the legislator in the SchwZPO regarding domestic arbitration is not included in the Swiss Law on Private International Law⁷ (*Bundesgesetz über das Internationale Privatrecht-SchwIPRG*), which stipulates the rules on international arbitration⁸.

International Law Bulletin (PPIL), Prof. Dr. Cemal Şanlı'ya Armağan, Volume 40 Issue 2, 2020, (pp. 1053-1087), p. 1056.

⁵ **BERNER KOMMENTAR / STACHER Marco (Hrsg.): Kommentar zum schweizerischen Privatrecht, Schweizerische Zivilprozessordnung**, Band III Art. 353-399 ZPO, Art. 407 ZPO, Bern, Switzerland, Stämpfli Verlag AG, 2014, N. 127. Swiss Federal Code of Procedure (SchwZPO) in the German text of provision Art. 393 (f), this point is expressed as follows: “f. die vom Schiedsgericht festgesetzten Entschädigungen und Auslagen der Mitglieder des Schiedsgerichts offensichtlich zu hoch sind”. For detailed information on fees for arbitrators, see: BORK Reinhard, “Einigungsgebühr für Schiedsrichter?”, **Neu Juristische Wochenschrift (NJW)**, 2. Halbband, 61. Jahrgang 2008, Heft 27, (pp. 1918-1921).

⁶ **BK-MARRUG / CHANEY, SchwZPO, Art. 393**, N. 127 ff.

⁷ In Swiss Law, “*Bundesgesetz über das Internationale Privatrecht (IPRG)*” in German in terms of “*Swiss Federal Law on Private International Law*”, which regulates the rules regarding international arbitration; In English, the terms “*Private International Law Statute (PILS)*” are used. In our study, we will prefer the abbreviation “schwIPRG”, which is used to refer to the term “*Bundesgesetz über das Internationale Privatrecht*” when appropriate to express the Swiss Federal Law on Private International Law.

⁸ In Swiss Law, an action for annulment of arbitral award is regulated in IPRG Art. 190 in terms of international arbitration (SONNAUER Heinz, **Die Kontrolle der Schiesgerichte durch die staatlichen Gerichte**, Internationales Wirtschaftsrecht (IWR); Herausgegeben von Prof. Dr. Karl-Heinz Böckstiegel; Band 10, Köln; Bonn; München, Carl Heymanns Verlag KG, 1992, p. 54). However, there is no regulation on arbitrator's fees among the cancellation grounds stipulated IPRG Art. 190 Abs 2.

Whether the issue of which the arbitrator's fee⁹ is determined as a very high amount in arbitration proceedings and which is not expressly regulated as a ground for annulment in Turkish law, can be subject to the action for annulment within the framework of the annulment grounds specified in both the International Arbitration Law (Article 15/A/II) and the Code of Civil Procedure (Article 439 para 2), can be discussed in the doctrine. Thus, if the arbitrator's fee is determined by the parties according to a certain tariff, non-compliance with this tariff may be considered within the scope of other grounds of annulment (CCP Article 439 para 2; IAL Article 15/AII) specified in the laws. In other words, in the event that even though the parties have referred to a certain tariff regarding the arbitrator's fee (or counsel's fee with litigation costs) but do not comply with it and the arbitral court has decided on a fee that is higher than the one specified in the tariff and very different; then it can be evaluated within the scope of the "numerus clausus" of annulment grounds expressed in the Code of Civil Procedure Article 469 para 2.

In this study, it is also aimed to evaluate whether the arbitral award can be annulled due to the high fee of the arbitrator within the scope of the grounds for annulment stipulated in the Turkish National and International Arbitration regulations.

II. Grounds for Annulment of Arbitral Awards in General

The annulment of the arbitral award is possible only when the grounds for annulment are stipulated in the law¹⁰. In many countries that have adopted the system of annulment action, the grounds for the annulment of the arbitral award has been prepared by taking into account both the grounds for annulment in Article 34 of the UNCITRAL Model Law¹¹, which was

⁹ For arbitrator fees in Turkish law, *see*: KALPSÜZ Turgut, "Milletlerarası Tahkim Kanununun Hakem Ücretine İlişkin Hükümleri İle Milletlerarası Tahkim Ücret Tarifesi Yönetmeliği ve Milletlerarası Tahkim Ücret Tarifesi Hakkında Bazı Mülahazalar", **Yargıtay Dergisi**, 2002/7, (pp. 451-459), p. 451 ff.; DAYINLARLI Kemal, "İhtiyarî Tahkimde Hakem Ücreti", *in*: **Prof. Dr. Ali Bozer'e Armağan**, Ankara, Banka ve Ticaret Hukuku Araştırma Enstitüsü, 1999, (pp. 539-564), p. 539 ff.

¹⁰ IŞIK Serpil, **MTK ve HMK Kapsamında Hakem Kararlarına Karşı İptal Davası**, On İki Levha Yayıncılık, İstanbul, 2022, p. 149.

¹¹ For more information about *see*: ROTH Marienne, **The UNCITRAL Model Law on International Commercial Arbitration in Practitioner's Handbook on International Arbitration**, Edited by: Frank-Bernd Wiegand, 2002, pp. 1198 ff.; SANDERS Pieter, "UNCITRAL Model Law on International and Commercial *YÜHFD Cilt: XIX Sayı:2 (2022)*

prepared by the United Nations and recommended for member states, and the grounds stipulated in Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹² issued in New York on June 10, 1958¹³. At the same time, the New York Convention of 10 June 1958,

Arbitration: Present Situation and Future”, **21 Arbitration International (Arb Int’l)**, no. 4, 443 (2005), p. 1 ff.

¹² Published in the Official Gazette dated 25 September 1981, and numbered 21002. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted in New York on 10 June 1958 (UNGEHEUER Christina, **Die Beachtung von Eingriffsnormen in der internationalen Handelsschiedsgerichtsbarkeit**, (Europäische Hochschulschriften: Reihe 2, Rechtswissenschaft; Bd. 1857), Frankfurt am Main; Berlin; Bern; New York; Paris; Wien, Peter Lang Europäischer Verlag der Wissenschaften, 1996, p. 28; WALKER Hans Peter, **Die freie Gestaltung des Verfahrens vor einem internationalen privaten Schiedsgericht durch die Parteien**: (unter Berücksichtigung des Genfer Protokolls über die Schiedsklauseln vom 24. September 1923, der Abkommens von New York über die Anerkennung und Vollstreckung ausländischer Schiedssprüche vom 10. Jun. 1958 und des europäischen Übereinkommens über die internationale Handelsschiedsgerichtsbarkeit vom 21. April 1961, Zurich, Verlag P. G. Keller, 1968, p. 59).

¹³ KRONKE Herbert / MELIS Werner / KUHN Hans (Hrsg.): **Handbuch Internationales Wirtschaftsrecht**, 2. neu bearbeitete Auflage, Köln, Verlag Dr. Otto Schmidt KG, 2017, p. 2127; IŞIK, İptal, pp. 149-150. For the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, see: HAAS Ulrich, “Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York June 10, 1958”, in **Practitioner’s Handbook on International Arbitration**, Edited by Frank-Bernd Wiegand, 2002, p. 399 ff.; YILMAZ Ejder, “Hakem Kararlarının Denetimi”, (Milletlerarası Tahkim Semineri, Ankara, 2009), in **Makaleler (1973-2013)**, C. 2, İstanbul, Yetkin 2014, (pp. 1805-1828), p. 1812; SATMER Franz, **Verweigerung der Anerkennung ausländischer Schiedssprüche wegen Verfahrens mangeln**, in Schweizer Studien zum Internationale Recht (Etudes Suisses de Droit International); Herausgegeben von der Schweizerischen Vereinigung für Internationales Recht; Fortsetzung der «Zürcher Studien zum Internationalen Recht» Band/Volume 89, Zurich, Schulthess Polygraphischer Verlag AG, 1994, p. 5, fn. 19; KERN Carsten, **Schiedsgericht und Generalklausel; zur Konkretisierung des Gebots des fair and equitable Treatment in der internationalen Investitionsschiedsgerichtsbarkeit**, in Studien zum ausländischen und internationalen Privatrecht, (Herausgegeben von Max-Planck-Institut für ausländisches und internationales Privatrecht; Direktoren: Holger Fleischer und Reinhard Zimmermann), Tübingen, Mohr Siebeck, 2017, p. 243; STEGER Christian, **Die Präklusion von Versagungsgründen bei der Vollstreckung ausländischer Schiedssprüche: eine Untersuchung im Rahmen des New Yorker Übereinkommens**, in Studien zum ausländischen und internationalen Privatrecht, StudIPR 344, (Herausgegeben von Max-Planck-Institut für ausländisches und internationales Privatrecht, Direktoren: Jürgen Basedow, Holger Fleischer und Reinhard Zimmermann), Tübingen, Mohr Siebeck, 2015, pp. 47-48; KRONKE / MELIS / KUHN, N. 351, p. 2126; SCHWAB Karl Heinz / WALTER Gerhard,

which was accepted by 157 countries around the world, has a wide application area in the international arena¹⁴.

The grounds that will result in the annulment of the arbitral award in the International Arbitration Law No. 4686, which is based on article 34 of the UNCITRAL Model Law; are stipulated in Article 15 of the Law¹⁵. The annulment grounds listed in this article are subject to “numerus clausus” and the parties will not be able to file an action for annulment based on any grounds, other than those listed in the Article¹⁶.

The grounds for annulment in the International Arbitration Law, are regulated in line with the UNCITRAL Model Law, and in this context, expressed in two parts¹⁷.

Schiedsgerichtsbarkeit: Systematischer Kommentar zu den Vorschriften der Zivilprozeßordnung, des Arbeitsgerichtsgesetzes, der Staatsverträge und der Kostengesetze über das privatrechtliche Schiedsgerichtsverfahren, 7., überarbeitete Auflage, Verlag C.H. Beck Helbing & Lichtenhahn, 2005, Kap. 24, N. 3.

¹⁴ GÜL Mehmet Akif, **New York Sözleşmesi Bağlamında Usuli Tenfiz Engelleri**, 1th Edn., İstanbul, On İki Levha, 2016, p. 1.

¹⁵ IŞIK, **İptal**, p. 152. The grounds for annulment of arbitral awards; as stipulated both in the UNCITRAL Model Law and in other laws that adopt arbitration regulations based on the UNCITRAL Model Law, are in fact formal and procedural grounds that do not require any evaluation on substantive law, which are superficial and can be understood after brief examination (KALPSÜZ Turgut, **Türkiye’de Milletlerarası Tahkim**, 2th Edn., Ankara, Yetkin, 2010, p. 127; IŞIK, **İptal**, p. 153).

¹⁶ BAYATA CANYAŞ Aslı, **UNCITRAL Model Kanunu Temelinde Uluslararası Ticari Hakem Kararlarına Karşı Başvuru Yolu**, Ankara, Adalet, 2016, p. 23; IŞIK, **İptal**, p. 152.

¹⁷ BUDAK Ali Cem / KARAASLAN Varol, **Medenî Usul Hukuku**, Genişletilmiş ve Gözden Geçirilmiş 4th Edn, Ankara, Adalet, 2020, § 23, N. 66, p. 460; KALPSÜZ, **Milletlerarası Tahkim**, s. 129; YEŞİLIRMAK Ali, **Doğrudan Görüşme, Arabuluculuk, Hakem-Bilirkişilik ve Tahkim: Sorunlar ve Çözüm Önerileri (Türkiye’de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde)**, 1th Edn., İstanbul, On İki Levha, 2011, N. 254, p. 122; IŞIK, **İptal**, pp. 153-154. In the German Civil Procedure Code, the grounds for annulment of arbitral awards (*Die Aufhebungsgründe*), under § 1059 dZPO, are also regulated in accordance with the UNCITRAL Model Law, by making a dual distinction (MüKoZPO, *Münch*, ZPO § 1059, Rdn. 6; ADEN Menno, **Internationale Handelsschiedsgerichtsbarkeit: Kommentar zu den Schiedsverfahrensordnungen ICC - DIS - Wiener Regeln – UNCITRAL - LCIA**, 2. Auflage, München, Verlag C. H. Beck oHG, 2003, p. 42; SCHIFFER K. Jan, **Wirtschaftsschiedsgerichtsbarkeit: die erfolgreiche außergerichtliche Streitlösung; Praxishinweise, Bewertungshilfen, Schiedsordnungen Checklisten und Muster**, Köln, Berlin, Bonn, München, Carl Heymanns Verlag KG, 1999, p. 137; EHRICKE Ulrich, “Die Beschleunigung der Finalität von Schiedssprüchen nach dem neuen deutschen Schiedsverfahrensrecht”,

The legislator makes the distinction between the grounds for annulment as the ones "to be proved by the parties" and the ones "to be taken into account by the court ex officio"¹⁸. The grounds for annulment listed in Article 15/A/II of the International Arbitration Law, (1) and (2), must be proved by the relevant party, except for the two grounds stated as "non-arbitrability" and "contrary to public order"¹⁹

Therefore, the party seeking the annulment of the arbitral award, based on one of the seven grounds for annulment as specified in Article 15/A/II (1) of the International Arbitration Law, bears the burden of proving the existence of the ground for annulment²⁰. On the other hand, the existence of two grounds for annulment, mentioned in the Article 15/A/II, (2) of the International Arbitration Law, will be taken into account by the court ex officio²¹.

If the dispute between the parties is not within the scope of the International Arbitration Law²² by its nature but falls within the scope of the

Zeitschrift für Zivilprozess (ZZP), 113. Band, Heft 4, 2000, (pp. 453-465), p. 457; ALEXANDER Martin, **Gerichtsstands- und Schiedsvereinbarungen im E-commerce sowie außergerichtliche Streitbeilegung**, in Schriftenreihe Studien zum internationalen Privat- und Zivilprozessrecht sowie zum UN-Kaufrecht; Band 14, Hamburg, Verlag Dr. Kovač GmbH Fachverlag für Wissenschaftliche Literatur, 2006, p. 376; ZÖLLER Richard [Begr.] / ALTHAMMER Christoph, **Zivilprozessordnung: mit FamFG (§§ 1-185, 200-270, 433-484), und Gerichtsverfassungsgesetz, den Einführungsgesetz, mit Internationalem Zivilprozessrecht, EU-Verordnungen, Kostenanmerkungen: Kommentar**, 32. neu bearbeitete Auflage, Köln, Verlag Dr. Otto Schmidt KG, 2018, §§ 1059, Rdn. 30).

¹⁸ SARITAŞ Hatice, "4686 Sayılı Milletlerarası Tahkim Kanununa Göre Hakem Kararlarına Karşı Kanun Yolları", **Sayıştay Dergisi**, Volume 16, Issue 59, 2005, (pp. 141-157), p. 144; EHRICKE, p. 457; YEŞİLIRMAK, **Tahkim**, N. 254, p. 122; IŞIK, **İptal**, p. 154.

¹⁹ ERDOĞAN Celal, **Açıklamalı ve İçtihatlı Hukuk Usulü Muhakemeleri Kanunu**, Ankara, 1973, p. 216; BUDAK / KARAASLAN, § 23, N. 66, p. 460; IŞIK, **İptal**, p. 154; ERSEN PERÇİN, p. 1068.

²⁰ IŞIK, **İptal**, p. 154.

²¹ ŞANLI Cemal / ESEN Emre / ATAMAN-FİGANMEŞE İnci, **Milletlerarası Özel Hukuk**, 9th Edn, İstanbul, Vedat, 2020, p. 795; IŞIK, **İptal**, p. 154; ERSEN PERÇİN, p. 1068.

²² In order for the arbitration to be subject to the International Arbitration Law, it has been clearly stated that the dispute between the parties must have an element of foreignness in the sense stipulated in the Law and that the place of arbitration must be Turkey (IAL Art. 1 para 2). What is meant by the element of foreignness is clearly stated in Article 2 of the International Arbitration Law (ŞANLI Cemal, **Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları**, 7th Edn., İstanbul, Beta, 2019, p. 340; ŞANLI Cemal, "4686 Sayılı Milletlerarası Tahkim Kanununun Yürürlük

Code of Civil Procedure, **grounds** for annulment specified in the Code of Civil Procedure will be applied²³. As such, the grounds for annulment are regulated in Article 439 of the Code of Civil Procedure²⁴. The grounds for annulment regulated in the Code of Civil Procedure and in the International Arbitration Law are almost the same²⁵. Unlike the International Arbitration Law, Code of Civil Procedure does not make a distinction between the grounds of annulment as the ones "to be proven by the parties" and "to be taken into account by the judge ex officio"²⁶.

The grounds for annulment specified by the legislator are consecutively listed, without making any distinction between them, in the Article 439 para 2 of the Code of Civil Procedure. It is regulated that determination of the existence of a ground for annulment will cause the arbitral award to be annulled²⁷.

Tarihinden Evvel Yapılmış Sözleşmelerden Doğan Tahkimlere Uygulanıp Uygulanmayacağı Sorunu”, **Prof. Dr. Gülören Tekinalp’e Armağan, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni**, 2003, Volume 23, Issue 1-2, (pp. 687-712), p. 689; ÖZTEKİN GELGEL Günseli, “Milletlerarası Tahkim Kanununun Uygulama Alanı ve Getirmiş Olduğu Önemli Yenilikler, *in: Bilgi Toplumunda Hukuk Ünal Tekinalp’e Armağan*, C. II, İstanbul 2003, (pp. 1081-1093), p. 1084-1085; ERGÖNEN Onur, “10. Yılında Milletlerarası Tahkim Kanunu’nun Uygulama Alanı”, **Legal Medeni Usul ve İcra İflas Hukuku Dergisi**, Volume 7, Issue 20, Year 2011/3, (pp. 151-205), p. 157; EKŞİ Nuray, “Milletlerarası Tahkim Kanunu Hakkında Genel Bir Değerlendirme”, **Prof. Dr. Gülören Tekinalp’e Armağan, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni**, 2003, Volume 23, Issue 1-2, (pp. 295-338), pp. 304-305; EKŞİ Nuray, “Yargıtay Kararlarında Milletlerarası Tahkim Kanunu’nun Zaman İtibariyle Uygulanması”, **Prof. Dr. Ali Güzel’e Armağan**, Cilt: II, İstanbul, Beta 2010, (pp. 1373-1388), p. 1375).

²³ IŞIK, **İptal**, pp. 154-155.

²⁴ Code of Civil Procedure Art. 439 para 2.

²⁵ AKINCI Ziya, **Milletlerarası Tahkim**, 5th Edn, İstanbul, Vedat, 2020, p. 330; SÜRAL Ceyda, Hakem Kararlarının İcrası ve İptal Davası, **DEÜHFD 2014, Volume XVI, Special Issue: Prof. Dr. Hakan Pekcantez’e Armağan**, Cilt II, İzmir, 2015, (pp. 1377-1411), p. 1378.

²⁶ AKINCI, **Milletlerarası Tahkim**, p. 330; ULUKUŞ BULUT Şaziye Tuba, **MTK ile Karşılaştırmalı Olarak HMK Hükümlerine Göre Hakem Kararlarının İptali**, Ankara, Yetkin 2018, p. 104; IŞIK, **İptal**, p. 155.

²⁷ BUDAK / KARAASLAN, § 23, N. 66, p. 460; IŞIK, **İptal**, p. 155. In case it is determined that one of the grounds for annulment, referred in Article 439 para 2 of the Code of Civil Procedure, exists, the arbitral award will be annulled by the court examining the annulment of the arbitral award (AKINCI, **Milletlerarası Tahkim**, p. 330; BUDAK / KARAASLAN, § 23, N. 66, p. 460; ULUKUŞ BULUT, p. 104; SELÇUK Seyhan, **Hukuk Muhakemeleri Kanunu’na Göre Hakem Kararlarının İptali**, Ankara, Yetkin, 2018, p. 76; IŞIK, **İptal**, p. 155).

The grounds for annulment that needs to be proven by the party requesting annulment in Turkish Law are listed as follows:

- When one of the parties to the arbitration agreement is incapacitated or the arbitration agreement is invalid [IAL Article 15/A/II, 1, (a) and CCP Article 439 para 2 a)];
- Failure to comply with the procedure specified in the contract or specified in the law about the selection of the arbitrator or arbitral tribunal [IAL Article 15/A/II, 1 (b); CCP Article 439 para 2, (b)];
- When the arbitrator's decision is not given within the arbitration period. [IAL Article 15/A/II, 1, (c); CCP Article 439 para 2, c];
- Unlawfully deciding on the competency of the arbitrator or arbitral tribunal [IAL Article 15/A/II/ 1 (d); CCP Article 439 para 2, ç];
- When the arbitrator exceeds his powers, fails to decide on all of the claims or decides on claims that are not included in the arbitration agreement;
- When the arbitration procedure is not conducted in accordance with the provisions of the agreement or the law and this has an effect on the merits of the decision [IAL Article 15/A/II, 1 (f); CCP Article 439 para 2, (d)];
- In case the principle of equal treatment of the parties is not followed and the legal right to be heard is not respected (IAL Article 15/A/II 1 (g); CCP Article 439 para 2, (f)).

In Turkish Law, there are two grounds for annulment to be taken into account ex officio by the court²⁸:

1) When the dispute is not subject to arbitration according to Turkish Law (IAL article 15/A/II, 2 (a); CCP article CCP article 439 para 2 g)),

2) When The arbitrator's decision violates public order (IAL article 15/A/II, 2 (b); CCP article 439 para 2, (ğ)).

The grounds for annulment, which are regulated both in the International Arbitration Law and in the Code of Civil Procedure, is limited²⁹. The fact

²⁸ ŞANLI Cemal, **Uluslararası Ticari Akitlerin Hazırlanması ve Uyuşmazlıkların Çözüm Yolları**, 7th Edn., İstanbul, Beta, 2019, p. 377.

²⁹ AKINCI, **Milletlerarası Tahkim**, p. 330. In the period when the Code of Civil Procedure No. 1086 was in force, the reasons foreseen by the legislator in terms of appealing against arbitral awards were limited; The Supreme Court accepted many reasons not listed in the law as grounds for appeal. It can be stated that the same issue should not arise about the grounds for annulment foreseen in terms of annulment against arbitrator's decisions (AKINCI, **Milletlerarası Tahkim**, p. 350).

that the arbitrator's fee in arbitration proceedings determined as a very high amount is not regulated as a ground for annulment in Turkish Law.

Whether the issue of which the arbitrator's fee is determined as a very high amount in arbitration proceedings and which is not expressly regulated as a ground for annulment in Turkish law, can be subject to the action for annulment within the framework of the annulment grounds specified in both the International Arbitration Law (Article 15/A/II) and the Code of Civil Procedure (Article 439 para 2), can be discussed in the doctrine.

In the next part of our work, the issue of whether the arbitral award can be annulled due to the very high fee of the arbitrator will be evaluated within the scope of the *grounds* for annulment, and whether it will lead to the annulment of the arbitral awards will be discussed.

IV. Whether the Arbitrator Fees Determined Too High Will Be a Grounds for the Annulment of the Arbitrator's Decision

A. In General

Although arbitrator fees being too high is not regulated as one of the grounds for annulment in Turkish Law; in subparagraph (f) of Article 393 of the SchwZPO, it has been clearly stated that if the fees of the arbitrators are determined to be too high, this will constitute a ground for annulment³⁰.

Therefore, in the following sections, there will be explanations that the fees of the arbitrators determined to be too high will constitute a ground for annulment according to the Article 393 (f) of the SchwZPO and primarily the Swiss Arbitration legislation. Afterwards, evaluations will be made within the scope of Turkish arbitration law.

B. Regulation in Swiss Law

First of all, it is necessary to discuss the arbitration regulations in Switzerland. As it is known to all, Switzerland has become one of the most popular countries in terms of national and international arbitration in the last century³¹. Until the new Swiss Federal Code of Civil Procedure³², adopted

³⁰ BK-MARRUG / CHANEY, SchwZPO, Art. 393, N. 127. Swiss Federal Code of Procedure (SchwZPO) Art. in the German text of provision 393 (f), this point is expressed as follows: “f. die vom Schiedsgericht festgesetzten Entschädigungen und Auslagen der Mitglieder des Schiedsgerichts offensichtlich zu hoch sind”. For detailed information on fees for arbitrators, see: BORK Reinhard “Einigungsgebühr für Schiedsrichter?”, *Neu Juristische Wochenschrift (NJW)*, 2. Halbband, 61. Jahrgang 2008, Heft 27, (pp. 1918-1921).

³¹ WIEBECKE Martin, “Switzerland” in: Carter, James H. (Ed.), *The International Arbitration Review, Seventh Edition*, United Kingdom, Law Business Research Ltd., 2016, (pp. 500-516), p. 509; HOFBAUER Simone, “Chapter 1, Part I: History of *YÜHFD Cilt: XIX Sayı:2 (2022)*”

on December 19th 2008, came into force on January 1st 2011, the rules for arbitration at the cantonal level (internal arbitration) were regulated by the "Concordat", which was approved on March 27, 1969³³ and gradually adopted in all 26 cantons of Switzerland³⁴.

Arbitration", in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (Kluwer Law International; Kluwer Law International 2013), (pp. 3-16), p. 3. When we look at the international commercial life, it is seen that in the majority of the contracts concluded by the parties, in the arbitration clause in the contract, it is preferred that the headquarters of the arbitral tribunal will be located and the place where the arbitration proceedings will be held is Switzerland. The fact that Switzerland has a developed banking system, an economic structure that is intertwined with international trade life, and providing a comfortable for those who will be arbitrators in the country are the main factors in Switzerland being a country that is highly preferred by the parties (TURHAN M. Turgut, "İsviçre Devletler Hususi Hukuku Federal Yasa Tasarısı ve Milletlerarası Tahkim", *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni*, 1984, Year 4, Issue 1, (pp. 32-39), p. 33).

³² SR. 272.

³³ Concordat (*Concordat Suisse sur l'arbitrage*) was approved by the "Swiss Federal Council" on 27 March 1969 (GULDENER Max, *Schweizerisches Zivilprozessrecht*, Dritte verbesserte und vermehrte Auflage, Zurich, Schulthess Polygraphischer Verlag AG, 1979, p. 597; HAAS Ulrich, "Die (neue) ZPO und die Sportschiedsgerichtsbarkeit", in *ASA Bulletin, (Association Suisse de L'Arbitrage)*, 2012, Volume 30, Issue 2, (pp. 312-348), p. 312; BRINER Robert, "National Report for Switzerland (1978- 1982-1984) [ARCHIVED]", in Pieter Sanders (ed), *Yearbook Commercial Arbitration 1978 - Volume III, Yearbook Commercial Arbitration, Volume 3* (Kluwer Law International; Kluwer Law International 1978) (pp. 181 – 206), p. 181; BRINER Robert, "National Report – Switzerland", in: Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 1989 - Volume XIV, Yearbook Commercial Arbitration*, Volume 14 (Kluwer Law International; Kluwer Law International 1989), (pp. 1-44), p. 1; RUEDE Thomas / HADENFELDT Reimer, *Schweizerisches Schiedsgerichtsrecht: nach Konkordat und IPRG*, 2. Auflage, Zürich, Schulthess Polygraphischer Verlag, 1993, p. 6; SIEHR Kurt, *Das Internationale Privatrecht der Schweiz*, Zurich-Basel-Genf, Schulthess Juristische Medien AG, 2002, p. 710).

³⁴ HAAS, *Sportschiedsgerichtsbarkeit*, p. 312; BERGER Klaus Peter, *Internationale Wirtschaftsschiedsgerichtsbarkeit: Verfahtrens- und materielle rechtliche Grundprobleme im Spiegel moderner Schiedsgesetze und Schiedspraxis*, in *Recht des internationalen Wirtschaftsverkehrs*; Band 103, (Herausgegeben von Norbert Horn), Berlin; New York, Walter de Gruyter, 1992, § 3, p. 28; IŞIK Serpil, "İsviçre'de Hukuk Uyuşmazlıklarının Alternatif Yollarla Çözümlemesi Kapsamında Tahkim ve Arabuluculuk ile İsviçre Odaları Tahkim Kurumunun Önerdiği İsviçre Ticari Arabuluculuk Kurallarına Genel Bir Bakış", *İnönü Üniversitesi Hukuk Fakültesi Dergisi (İNÜHFD)/Inonu University Law Review (InULR)*, Volume 10, Issue 2, 2019, (pp. 452-469), p. 455; IŞIK, *İptal*, pp. 66-67. However, the Swiss legislator, who foresees that the arrangements foreseen in the procedural law of each of the cantons

The “*Swiss Federal Law on Private International Law*” was adopted by the parliament on December 18, 1987 and came into force on January 1, 1989 to regulate international arbitration in Swiss Law; due to the fact that the provisions of the Inter-Cantonal Arbitration Agreement, which is at the federal level and stipulates the arrangements for arbitration between the cantons³⁵ was not responding to the needs of international arbitration in terms of Swiss Law any longer³⁶. Thus, in Swiss Law, matters pertaining to

with regard to arbitration will create some unfair results, signed the “*Konkordat*” (SchKonK) arbitration agreement between the cantons on March 27, 1969, in order to eliminate the inconveniences caused by the different laws between the cantons has ensured uniformity (BRINER, **National Report**, p. 1; JERMINI Cesare / BERNARDONI Nicola, “Domestic Arbitration under the New Swiss Code of Civil Procedure”, in [Arroyo, Manuel (Edit.)], **Arbitration in Switzerland: The Practitioner’s Guide**, Kluwer Law International, (Wolters Kluwer Law & Business), 2013, (pp. 17-23), N. 1, p. 17. *See also*: HAAS Ulrich / BROSI Jeffrey, “Einseitige, insbesondere Testamentarische Schiedsklauseln nach der (geplanten) Reform zur Internationalen Schiedsgerichtsbarkeit”, **Zeitschrift für Zivilprozess International (ZZPInt)**, Jahrbuch des Internationalen Zivilprozessrechts 21. Band 2016, (pp. 323-349), p. 324). In Swiss Law, the “*Konkordat*”, that is, the “*Intercantonal Arbitration Agreement*” (SchKonK), which was adopted in order to prevent confusion as a result of the adoption of different laws in different cantons, was accepted by all cantons, with the Canton of Lucerne being the last one (1995) of the 26 cantons of Switzerland has been done (JERMINI / BERNARDONI, N. 1, p. 17). Concordat on 1 July 1997; Bern, Schwyz, Obwalden, Nidwalden, Friborg, Basel-Stadt, Basel-Landschaft, Schaffhausen, it was originally adopted by sixteen cantons: St. Gallen, Graubünden, Ticino, Vaud Valais, Neuchâtel and Genève. Later, Konkordat was accepted by nine other cantons named Zürich, Lucerne, Uri, Glarus, Zug, Appenzell-Ausserrhoden (BRINER, **Switzerland**, p. 181; BRINER, **National Report**, p. 1).

³⁵ HAAS, **Sportschiedsgerichtsbarkeit**, p. 312; BLESSING Marc, “The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism”, **Journal of International Arbitration**, (Kluwer Law International; Kluwer Law International 1988, Volume 5 Issue 2), (pp. 9-82), p. 12; IŞIK, **İsviçre**, p. 455.

³⁶ KRONKE / MELIS / KUHN, p. 2355; BOCKSTIEGEL Karl-Heinz (Herausgegeben von/Edited by), **Die Internationale Schiedsgerichtsbarkeit in der Schweiz (II): Das neue Recht ab 1. Januar 1989**, in Schriftenreihe des Deutschen Instituts für Schiedsgerichtswesen/German Institute of Arbitration; Band 1/II; Köln; Bonn; München, Carl Heymanns Verlag KG, 1989, p. 5; HAAS, **Sportschiedsgerichtsbarkeit**, p. 312; JERMINI / BERNARDONI, **a.g.e.**, N. 1, p. 17; BLESSING, p. 9; LALONDE Marc, “The Post- arbitral Phase in North America and Western Europe”, in Albert Jan van den Berg (ed), **International Arbitration in a Changing World, ICCA Congress Series**, Volume 6 (Kluwer Law International; Kluwer Law International 1994) (pp. 127- 164), p. 139; WIEBECKE, **Switzerland**, p. 500; HABSCHIED Walter J., “Das neue schweizerische Recht der internationalen Schiedsgerichtsbarkeit nach dem Bundesgesetz über das Internationale Privatrecht”,

international arbitration are regulated by Swiss Federal Law on Private International Law, in the 12th Chapter³⁷.

The Swiss legislator has included the rules on domestic arbitration, regulated in the Concordat, in the SchwZPO³⁸, which came into force on January 1, 2011³⁹. Thus, the legislator included provisions regarding domestic arbitration in Part 3 (Art. 353-399) of the Swiss Code of Civil Procedure, which entered into force on January 1, 2011⁴⁰.

Today, in Swiss Law, while the international arbitration is regulated according to the rules (Art. 176-194) in Chapter 12 of the "*Swiss Federal Law on Private International Law*"⁴¹; domestic arbitration proceedings are

Recht der Internationalen Wirtschaft (RIW), Heft 10, 34. Jahrgang, 1988, (pp. 766-772), p. 766; RUEDE / HADENFELDT, p. 10; KARRER, Pierre A / ARNOLD, Karl W. / PATOCCHI, Paola Michele, **Switzerland's Private International Law: Introduced, Translated and Annotated**, Second Edition, Deveter/Zurich, Kluwer Law and Taxation Publisher/Distribution of Schulthess Polygraphischer Verlag, 1994, p. 10; NUSSBAUM Werner, **Das schweizerische internationale Insolvenzrecht gemäss dem Bundesgesetz vom 18. Dezember 1987 über das internationale Privatrecht und sein Umfeld in Europa**, in *Schweizer Studien zum Internationalen Recht/Études Suisses de Droit International*; Herausgegeben von der Schweizerischen Vereinigung für Internationales Recht/Publiées Par la Société Suisse de droit international; Fortsetzung der – Zürcher Studien zum Internationalen Recht-; Band/Voluma 63, Zürich, Schulthess Polygraphischer Verlag AG, 1989, p. 6; WALDER Hans Ulrich, **Einführung in das internationale Zivilprozessrecht der Schweiz: Anerkennung und Vollstreckung ausländischer Entscheidungen Zuständigkeit der schweizerischen Gerichte Schiedsgerichtsbarkeit und weitere Fragen nach IPRG und Staatsverträgen**, Zurich, Schulthess Polygraphischer Verlag, 1989, § 1, N. 9, p. 4.

³⁷ JERMINI / BERNARDONI, N. 1, p. 17; HAAS, **Sportschiedsgerichtsbarkeit**, p. 312; BLESSING, p. 9; BERGER, **Wirtschaftsschiedsgerichtsbarkeit**, § 3, p. 24; GÖKSU, **Schiedsgerichtsbarkeit**, p. 73; İŞIK, **İptal**, p. 68.

³⁸ WIEBECKE, **Switzerland**, p. 500; HOFBAUER, N. 7, p. 5; WAGNER Jürgen / PLUSS Adrian, "Neue Entwicklungen im schweizerischen Wirtschafts- und Steurrecht", **Recht der Internationalen Wirtschaft (RIW)**, Heft 4, 2013, (pp. 196-205), p. 201.

³⁹ JERMINI / BERNARDONI, N. 2, p. 17. For the rules on international arbitration stipulated in the Swiss Code of Civil Procedure (SchwZPO) (Art. 353-399), *see*: BK-PFISTERER, **SchwZPO, Art. 356-399**, pp. 1-838.

⁴⁰ JERMINI / BERNARDONI, N. 2, p. 17; WIEBECKE, **Switzerland**, p. 500; BK-STACHER, **SchwZPO, Art. 356-399**, pp. 1-838; HOFBAUER, N. 7, p. 6; İŞIK, **İsviçre**, p. 455; İŞIK, **İptal**, pp. 69-70.

⁴¹ KOSTKIEWICZ Jolanta Kren / MARKUS Alexander R. / RADRIGO Rodriguez, **Internationales Zivilprozess 2011: Zusammenspiel des revLugÜ mit dem revSchKG und der schweizerischen ZPO**, in *Institut für Internationales Privatrecht und Verfahrensrecht, CIVPRO 1*, Bern, Stämpfli Verlag AG, 2010, p. 113. In Swiss

regulated in accordance with the provisions (Art. 353-399) of Chapter 3 of the Swiss Code of Civil Procedure⁴².

The article 393 of the SchwZPO consists the grounds for which an action for annulment can be filed against arbitral awards. According to SchwZPO Art. 393, an action for annulment can only be filed against an arbitral award for the following grounds:

a. If the sole arbitrator is wrongfully appointed or the arbitral tribunal is formed unlawfully;

b. If the arbitral tribunal has misjudged its jurisdiction or otherwise lacks jurisdiction;

c. If the arbitral tribunal has decided outside of its jurisdiction or on the points of dispute without evaluating the requested matters;

d. If it has acted on contrary of the principle of equal treatment of the parties or the legal right to be heard,

e. If it has acted clearly against the facts that are clearly contrary to the file or against the law or equity;

f. If the fees and expenses of the arbitral tribunal determined by the arbitral tribunal are clearly too high⁴³.

Law, Chapter 12, although part of the former “Swiss Federal Law on Private International Law” (SchwIPRG), is stand-alone and autonomous; The provisions contained in other parts of the SchwIPRG do not apply to international arbitration (WIEBECKE, **Switzerland**, p. 501).

⁴² SCHUTZE Rolf A. / KRATZSCH Susanne / SCHUMACHER Hubertus / KULL, Nadja Jaisli *in*: Torggler, Helwig; Mohs, Florian; Schäfer, Friederike; Wong, Venus Valentina (Herausgeber): **Handbuch Schiedsgerichtsbarkeit, Deutschland – Österreich – Schweiz**, 2. Auflage, Nomos Verlag; Verlag Österreich GmbH, Schulthess, Wien, 2017, 6. Kap., N. 850, p. 280, fn. 1139; HOFBAUER, N. 7, p. 5; WIEBECKE, **Switzerland**, p. 500; IŞIK, **İsviçre**, p. 455; IŞIK, **İptal**, p. 70.

⁴³ The original German text of provision SchwZPO Art. 393 is as follows:

“Ein Schiedsspruch kann nur angefochten werden, wenn:

a. die Einzelschiedsrichterin oder der Einzelschiedsrichter vorschriftswidrig ernannt oder das Schiedsgericht vorschriftswidrig zusammengesetzt worden ist;

b. sich das Schiedsgericht zu Unrecht für zuständig oder für unzuständig erklärt hat;

c. das Schiedsgericht über Streitpunkte entschieden hat, die ihm nicht unterbreitet wurden, oder wenn es Rechtsbegehren unbeurteilt gelassen hat;

d. der Grundsatz der Gleichbehandlung der Parteien oder der Grundsatz des rechtlichen Gehörs verletzt wurde;

e. er im Ergebnis willkürlich ist, weil er auf offensichtlich aktenwidrigen tatsächlichen Feststellungen oder auf einer offensichtlichen Verletzung des Rechts oder der Billigkeit beruht;

In Swiss law, in Art. 393 paragraph (f) of SchwZPO, it is regulated that if the fees of the arbitrators are determined to be too high, this will constitute a ground for annulment⁴⁴.

In case of an application to the court by the parties based on this annulment grounds specified in the SchwZPO, the court will decide to reduce the arbitrator's fee to an appropriate amount instead of the annulment of the arbitrary award⁴⁵.

It should be taken into consideration that in SchwZPO Art. 393 the legislator clarifies that expert fees do not fall within the scope of the term "fee"⁴⁶.

C. How Arbitrator Fees Will Be Determined in Turkish Law and How High Are Arbitrator Fees Determined

The arbitrators who are in charge of resolving the dispute between the parties will be entitled to a certain fee in return⁴⁷. Pursuant to article 440 of the Code of Civil Procedure, the parties have the authority to determine the arbitrator's fee⁴⁸.

If the parties cannot agree on the fee of the arbitrator or the arbitral tribunal (if no agreement is reached on the determination of the arbitrators fee in the arbitration agreement or if the parties do not refer to the international rules and institutional arbitration rules on this matter), the fees of the arbitrators are determined every year by the Ministry of Justice by taking the opinions of the professional organizations in the nature of public institutions⁴⁹.

There is no doubt that the possibility of determining the arbitrator's fees to be very high will come to the fore in terms of the parties' will and agreement on this issue. Otherwise, if the parties cannot agree on the arbitrator's fee, this problem will not be encountered since the arbitrator's fee will be paid over the tariff to be determined by the Ministry of Justice.

f. die vom Schiedsgericht festgesetzten Entschädigungen und Auslagen der Mitglieder des Schiedsgerichts offensichtlich zu hoch sind."
(<https://www.fedlex.admin.ch/eli/cc/2010/262/de>).

⁴⁴ BK-MARRUG / CHANEY, SchwZPO, Art. 393, N. 127. For arbitrator fees *see*: BORK Reinhard, "Einigungsgebühr für Schiedsrichter?", *Neu Juristische Wochenschrift (NJW)*, 2. Halbband, 61. Jahrgang 2008, Heft 27, (pp. 1918-1921).

⁴⁵ BK-MARRUG / CHANEY, SchwZPO, Art. 393, N. 127 ff.

⁴⁶ BK-MARRUG / CHANEY, SchwZPO, Art. 393, N. 127 ff.

⁴⁷ AKINCI, *Milletlerarası Tahkim*, p. 435.

⁴⁸ As can be seen, the parties will be able to determine how much the arbitrator's fee will be (EKŞİ, *HMK'nda Tahkim*, p. 154).

⁴⁹ AKINCI, *Milletlerarası Tahkim*, p. 436. EKŞİ, *HMK'nda Tahkim*, p. 154.

D. Review of Whether Too High Arbitrator Fees Will Be a Ground for the Annulment of the Arbitrator's Decision according to Turkish Law

1. In General

In Turkish Law, SchwZPO Art. 393 provision, stipulated by the legislator in Swiss Law, is not similar. Likewise, a provision similar to this regulation stipulated by the legislator in the Swiss Federal Code of Procedure regarding domestic arbitration; is not included in the Swiss Law on Private International Law, in which the rules regarding international arbitration are specified in Swiss Law⁵⁰.

On the other hand, the issue of whether it is possible to annul an arbitration award on the ground of being determined in a very high manner, within the framework of the grounds for annulment specified in both the International Arbitration Law (IAL Art. 15/A/II) and the Code of Civil Procedure (CCP Art. 439 para 2), is discussed in the doctrine.

2. In Doctrine

More than one opinion is put forward in the doctrine on this issue. According to *Akıncı*, in the event that the arbitrators may have assigned a fee contrary to the schedule in their decision, the arbitrator's award should not be canceled just because of the fee⁵¹. In such a case, the part of the arbitrator's fee should be removed and the arbitrator's decision should be considered partially valid⁵².

At this point, in the doctrine, *Akıncı* states that if the arbitrators have assigned a fee contrary to what is stated in the fee schedule, this issue does not concern public order⁵³. However, *Akıncı* argues that only one of the parties can request the annulment of the arbitral award based on the ground for the annulment of the arbitrators' authority⁵⁴.

According to *Pekcanitez*, if the arbitrator's fee is determined by the parties according to a certain tariff; non-compliance with this tariff may be evaluated within the scope of other grounds for annulment specified in the laws⁵⁵ (CCP Art. 439 para 2; IAL Art. 15/A/II). If the parties have referred

⁵⁰ See: SchwIPRG Art. 192.

⁵¹ AKINCI, *Milletlerarası Tahkim*, p 437.

⁵² Ibid p. 437.

⁵³ AKINCI, *Milletlerarası Tahkim*, p. 437.

⁵⁴ Ibid p. 437.

⁵⁵ PEKCANITEZ Hakan, "Tahkim Usulü İle İlgili İptal Sebepleri", *ICC Türkiye XI. Milletlerarası Tahkim Semineri*, 14 Nisan 2014, Ankara, (pp. 85-106), p. 92. If the parties have clearly agreed on a certain tariff according to which the arbitrator's fee or *YÜHFD Cilt: XIX Sayı:2 (2022)*

to a certain tariff on the arbitrator's fee (or attorney's fee with litigation costs); not complying with this tariff, that is; If the arbitral tribunal has decided on a fee that is higher and very different than the one specified in the tariff; may be considered within the scope of the "numerus clausus" of annulment grounds stated in Code of Civil Procedure Art. 439 para 2 (e)⁵⁶.

3. Our Opinion

It is not possible to annul the arbitral award based on a ground other than the grounds for annulment stipulated in the law, as the grounds for annulment against arbitrator's decisions are subject to "numerus clausus". A very high determined arbitrators fee is not explicitly regulated as a ground for annulment in Turkish Law within the framework of the annulment grounds stipulated in both the International Arbitration Law (IAL Art. 15/A/II) and the Code of Civil Procedure (CCP Art. 439 para 2); It should not be dismissed that no grounds other than the ones regulated in the can be created.

Accordingly, in the event of high arbitrators fee, only the ground for annulment stated as "the arbitration proceedings not being conducted in accordance with the provisions of the contract or the Law in terms of procedure" in the Code of Civil Procedure Art. 439 para 2 and International Arbitration Law Art. 15 para II can be applied when the grounds for annulment in Turkish Law considered. Otherwise, it will not be possible to apply for the annulment of the arbitral award because of the high arbitrators fees.

What is meant by the fact that the arbitration proceedings are procedural, is that the arbitrators conduct them in violation of the procedural rules that they must comply with in the arbitration proceedings⁵⁷. In this respect, the arbitrator's decision cannot be annulled in this context, since there is no procedural rule that is violated if the arbitrators misapply the substantive law rules to be applied to the dispute⁵⁸.

the attorney's fee will be regulated, then failure to comply with this tariff may result in the annulment of the arbitral award (PEKCANITEZ, *Tahkim Usulü*, p. 92).

⁵⁶ Ibid p. 92.

⁵⁷ AKINCI, *Milletlerarası Tahkim*, p. 291.

⁵⁸ Similarly, the concept of breach of public order and breach of arbitration procedure are related but different concepts. Because, these two issues, which are the ground for the annulment of the arbitral award, differ from each other in terms of their scope. Even if the arbitration procedure is carried out in accordance with the procedure envisaged in the law, in a situation where the parties have agreed or the parties have not agreed on the arbitration procedure, it may constitute a violation of public order. On other words, although the procedural rules applied by the arbitrators do not constitute a violation of

Examples of situations that frequently occur in arbitration proceedings, which constitute a violation of the arbitration procedure, can be given as examples: “incomplete fulfillment of notification in arbitration in arbitration proceedings”, “suspecting the impartiality and independence arbitrators”, “violation of the right of claim and defence”, procedure regarding the arrangement and bindingness of arbitral awards”.

In order for the irregularities occurring during the execution of the arbitral proceedings to cause the annulment of the decision, this situation must also be effective on the merits of the decision⁵⁹.

In our opinion, considering the grounds for annulment stated in Article 439 para 2 of the Code of Civil Procedure and Article 15 para II of the International Arbitration Law, the fact that the arbitrator’s fee is determined as a very high amount in the arbitration proceedings, which is not clearly regulated as a reason for annulment in Turkish Law, can only be stated in the “arbitration proceedings. It would be more appropriate to accept that it can be canceled based on the reason that it is not carried out in accordance with the provisions of the contract if the Law

V. CONCLUSION

Arbitration is a judicial process which means the resolution of a dispute, arising from private law and upon which the parties can freely decide before the arbitrators instead of the state courts with the will of the parties. Action to arbitral award is a legal way accepted by the legislator within the scope of the control of arbitral awards. The number of grounds for annulment, which are regulated both in the International Arbitration Law and in the Code of Civil Procedure, is limited.

In Turkish Law, there is no ground for cancellation as the arbitrator’s fees are determined to be too high. On the other hand, in Switzerland, which is one of the leading countries in arbitration, it is regulated in subparagraph (f) of Article 393 of the Swiss Federal Procedure Law that if the fees of the arbitrators are determined to be too high, this will constitute a ground for annulment.

the arbitration procedure, they may constitute a reason for violation of public order. For example, in the event that the rules to be applied in arbitration impose an obligation on the parties to make a declaration within a short period of time, this matter does not constitute a violation of the arbitration procedure, but may be expressed as contrary to public order (AKINCI, *Milletlerarası Tahkim*, p. 292).

⁵⁹ YEŞİLIRMAK, *Tahkim*, N. 267, pp. 126-127.

In Turkish Law, if the arbitrator's fee is determined by the parties according to a certain tariff, non-compliance with this tariff may be considered within the scope of other grounds of annulment (CCP Article 439 para 2; IAL Article 15/AII) specified in the laws.

In this direction;

1) In the event that even though the parties have referred to a certain tariff regarding the arbitrator's fee (or counsel's fee with litigation costs), but it does not comply, and the arbitral court has decided on a fee that is higher than the one specified in the tariff and that is very different; then it can be evaluated within the scope of the "numerus clausus" of annulment grounds expressed in the Code of Civil Procedure Article 469 para 2.

2) In our opinion, taking the grounds for annulment as mentioned in the Code of Civil Procedure Art. 439 para 2 and International Arbitration Law Art. 15 para II; it would be more appropriate to accept that the issue of awarding the arbitrator's fee as a very high amount in the arbitration proceedings, which is not expressly regulated as a ground for annulment in Turkish Law, can only be annulled based on the ground that "the arbitration proceedings are not conducted in accordance with the provisions of the contract or the Law in terms of procedure."

3) The legislator clarifies in SchwZPO Art. 393 that expert fees do not fall within the scope of what is meant by the concept of fee, with the expression "*the fees and expenses of the arbitral tribunal determined by the arbitral tribunal are clearly too high.*" This issue should be interpreted in this way in Turkish Law case of conflict.

4) The article 393 of the SchwZPO consists of the grounds for which an action for annulment can be filed against arbitral awards. In paragraph (f) of Article 393 of the SchwZPO in case the arbitrator's fees are determined to be too high, it is regulated that this will constitute a ground for annulment. In case of an application to the court by the parties based on this annulment grounds specified in the SchwZPO, the court will decide to reduce the arbitrator's fee to an appropriate amount instead of the annulment of the arbitrary award.

In summary, it is not possible to annul the arbitral award based on a ground other than the grounds for annulment stipulated in the law, as the grounds for annulment against arbitrator's decisions are numerous. While evaluating whether it is possible to subject the arbitrary fee determined as a very high amount in arbitration proceedings, which is not clearly regulated as a ground for annulment in Turkish Law, to an action for annulment, within the framework of the annulment grounds stipulated in both the

International Arbitration Law (IAL Art. 15/A/II) and the Civil Procedure Law (CCP Art. 439 para 2); It should not be dismissed that no cause other than these causes can be created. Accordingly, considering the grounds stipulated in Turkish Law regarding the annulment of arbitral awards; such a situation, can be considered, in our opinion, within the scope of the ground for annulment, stated as "the arbitration proceedings not being conducted in accordance with the provisions of the contract or the Law in terms of procedure" in the Code of Civil Procedure Art. 439 para 2. Otherwise, it will not be possible to apply for the existence of a conflict within the scope of the grounds of annulment as mentioned both in the Code of Civil Procedure Art. 439 para 2 and International Arbitration Law Art. 15 para II.

LIST OF ABBREVIATIONS

Abs	: Absatz
AG	: Aktiengesellschaft
Aufl.	: Auflage
Arb Int'l	: Arbitration International
ASA	: Swiss Arbitration Association (Association suisse de l'arbitrage)
ASA Bulletin suisse de l'arbitrage)	: Swiss Arbitration Association (Association suisse de l'arbitrage)
Art.	: Artikel
Bd.	: Band
CCP	: Code of Civil Procedure
DEÜHFD Dergisi	: Dokuz Eylül Üniversitesi Hukuk Fakültesi
DIS	: Deutsche Institution für Schiedsgerichtsbarkeit
dZPO	: Zivilprozessordnung
Ed.	: Editor
Edn.	: Edition
EGZPO	: Einführungsgesetz zur Zivilprozessordnung vom 30.1.1877, RGBl. S. 244 (FNA 310-2)
EGGVG	: Einführungsgesetz zum Gerichtsverfassungsgesetz vom 27.1.1877
f.	: Fıkra
f./ff.	: folgende/fort folgende
fn.	: Fußnote

GmbH	: Gesellschaft mit beschränkter Haftung
GVG	: Gerichtsverfassungsgesetz idF d. Beck. vom 9.5.1975 BGBl. S. 1077, (FNA 300-2)
HMK	: 6100 sayılı Hukuk Muhakemeleri Kanunu
Hrsg.	: Herausgeber
IAL	: International Arbitration Law
ICC	: International Chamber of Commerce
ICCA	: International Council for Commercial Arbitration
ICSID	: International Centre for Settlement of Investment Disputes
InULR	: Inonu University Law Review
IWR	: Internationales Wirtschaftsrecht
Kap.	: Kapital
Konkordat	: Concordat Suisse sur l'arbitrage
LCIA	: London Court of International Arbitration
MüKoZPO	: Münchener Kommentar zur Zivilprozessordnung
MTK	: 4686 Milletlerarası Tahkim Kanunu
m.	: Madde
N./Nr.	: Nummer/Numara/Kenar Numarası
NJW	: Neue Juristische Wochenschrift
PPIL	: Public and Private International Law Bulletin
pp./p.	: Page
para	: Paragraph
Rdn.	: Randnummer
RIW	: Recht der Internationalen Wirtschaft
schw	: schweizerisch, -e
SchKonK	: Konkordat
SchwIPRG	: Schweizerisches Gesetz über das internationale Privatrecht
SchwZPO	: Schweizerische Zivilprozessordnung
UKlaG	: Unterlassungsklagengesetz
UNCITRAL	: United Nations Commission for International Trade Law
UNCITRAL MK	: UNCITRAL Model Kanunu
Vol.	: Volume

Y.	: Year
ZZP	: Zeitschrift für Zivilprozess
ZZPInt	: Zeitschrift für Zivilprozess International
§	: Paragraph

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