

**ICC DECISION ON LIABILITY IN CASE OF PURSUING ACTION IN COURTS  
NOTWITHSTANDING A VALID ARBITRATION CLAUSE**

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**1. Introduction**

In Turkey, parties of a dispute tend to resort to courts even if they have a valid arbitration clause for the respective dispute. In the Final Award in Case 8887 (“**Case**”), International Chamber of Commerce (“**ICC**”) ruled that the defendant Turkish company (“**Defendant**”), by pursuing an action in the Turkish Courts despite the existence of a valid arbitration clause, breached its agreement to arbitrate and therefore it is liable for damages which the claimant Italian company (“**Claimant**”) might suffer due to this breach. In this article, we will briefly share the details of the Case and touch upon the reasoning of the ICC for deciding that Defendant is liable for the damages that the Claimant might suffered due to this breach.

**2. Summary of the Final Award issued by the ICC in Case 8887 (“Award”)**

The Case involved a claim brought by the Claimant against the Defendant relating to civil engineering works that the Claimant was to perform on a liquid petrochemical trans-shipment facility in Romania. As per the agreement executed between the Claimant and the Defendant, contractual obligation of the Claimant was to carry out preparatory studies before the implementation of the project and the Claimant would have been retained as a consultant and supervisory engineer for the execution of the civil engineering and technical works in the case the Defendant decides to implement the project.

During the preparatory studies conducted by the Claimant, the Defendant informed the Claimant regarding the changes to the project and requested the Claimant to complete certain parts and postpone the others. The Claimant concluded the parts requested by the Defendant and stopped working for the others. At the end, the project was suspended.

The Claimant filed an application for arbitration and asserted that the Defendant breached the agreement by failing to pay for the services rendered. After the initiation of the arbitration by the Claimant, Defendant initiated a lawsuit in Turkey alleging that the Claimant had no valid claim against it. Also, Defendant alleged that the arbitration clause was null and void and the case at hand must be investigated by the state court. During the course of the arbitral proceedings, the arbitrator requested Defendant to refrain from pursuing the lawsuit in court and not to take any further action. However, Defendant did not abide by the anti-suit injunction and continued to argue that the arbitration agreement was invalid, and that the arbitration should stay under *lis pendes* during the arbitral proceedings since the arbitration and the lawsuit involved the same parties and subject matter.

As a result, the arbitrator ruled that Claimant was entitled to receive payment for the work performed, corresponding to half of the amount claimed by the Claimant. In light of the foregoing and due to the Defendant’s lack of collaboration for obtaining an expert opinion on the work performed by the

Claimant and due to Defendant's continuation of the proceedings in Istanbul Court despite the anti-suit injunction of the arbitrator, the arbitrator ruled Defendant to indemnify Claimant and to bear 75% of the arbitration costs.

### **3. Examination of and Evaluations regarding the Award**

As mentioned above, during the arbitral proceeding, Defendant alleged that the arbitration clause is not valid based on the Turkish doctrine and judicial precedents and that ICC arbitration violates Turkish public policy because of the specificities of ICC procedure. As it is also stated in the decision of the ICC regarding the Case, a minority of the Turkish doctrine was of the opinion that the ICC violated Turkish public policy. However, having reviewed the Case, it is understood that the arbitration clause clearly shows the intent of both parties (i.e., Claimant and Defendant) on choosing arbitration for dispute resolution and the arbitration clause meets the formal requirements.

In addition to the foregoing, the Defendant also alleged that the agreement was superseded by a tri-partite agreement which did not have an arbitration clause. However, the arbitrator indicated that the parties and subject of the tri-partite agreement were different and there were no provisions indicating that the tri-partite agreement superseded the prior agreement. On the contrary, the tri-partite agreement referred to the prior agreement as an existing undertaking. Also, having reviewed the correspondence between the parties, the arbitrator noted that Defendant did not notify Claimant that the prior agreement was cancelled and superseded by the tri-partite agreement despite its allegations. Defendant requested Claimant to execute an agreement to cancel the agreement. However, this request was rejected by the Claimant.

As per the *lis pendens* objection, since there is a valid arbitration clause in the case at hand, the arbitrator determined that there is no need for the arbitration proceeding to be stayed pending and to wait for the outcome of judicial proceeding initiated by Defendant in Istanbul Court. On the contrary, according to Article II of New York Convention, “*the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*” Since the New York Convention has been ratified by Turkey, the Turkish courts were required by Article II of the New York Convention to refer the matter at hand arbitration. In light of the foregoing, in the course of arbitration, the arbitrator requested Defendant not to take any further action in the court of Istanbul. However, despite the anti-suit injunction of the arbitrator, Defendant insisted on continuation of the lawsuit initiated before Istanbul Court and did not abide with the injunction.

As a result, the arbitrator ruled that “*the lis pendens objection is admissible and Defendant is in breach of its agreement to arbitrate*”. Therefore, Defendant is liable for the damages of Claimant which are in direct causation with the breach of the arbitration agreement. Since the Claimant had to instruct counsel in representing it in the Turkish proceedings (due to the Defendant’s breach of the agreement to arbitrate); the ICC decided that the amount to paid by the Claimant to Turkish counsel within the scope of the proceedings before the Turkish courts must be paid by Defendant to Claimant.

### **4. Conclusion**

As seen in the Case, the arbitrator is able to punish the party initiating or continuing litigation in breach of the valid and existing arbitration agreement by awarding compensation. The Case constitutes a great importance since it shows that the damages arising from judicial measures that are

incompatible with arbitration agreement must be recovered by the breaching party as they arise from a breach of arbitration agreement.

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