



School of International Arbitration

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International Arbitration Case Law

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International Arbitration Case Law

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Decision Name and Date: The Czech Republic Ministry of Health v. Diag Human S.E. Cassation Court of the Grand Duchy of Luxembourg, Case 3987– 29 June 2018

Case Report by: Celine Lange**, Editor Diego Luis Alonso Massa***

Summary: The judgment concerns an award rendered in Prague on 4 August 2008 (“the Award”) in favour of Diag Human S.E. (“Diag Human”), a corporation organized under the laws of the Principality of Liechtenstein, against the Czech Republic Ministry of Health (“CRMH” or “the Czech Republic”). Diag Human sought enforcement of the Award in Luxembourg and obtained an Exequatur Order by the *Tribunal d’arrondissement* of Luxembourg (“the district court”) on 10 August 2011. CRMH’s appeal against the Exequatur Order was dismissed on 27 April 2017 by the Luxembourg Court of Appeal (“the Court of Appeal’s Judgment”). CRMH lodged an appeal on points of law before the Luxembourg Cassation Court (“the Cassation Court”).

In its judgment dated 29 June 2018, the Cassation Court dismissed CRMH’s appeal. CRMH alleged that Diag Human had committed fraud and deceit on the court by submitting an exequatur request for an award that had not yet become binding on the Parties because of an ongoing review process which was permitted under Czech Law. CRMH contended that the Court of Appeal’s Judgment on this issue lacked a legal basis. The Cassation Court was satisfied that the judges of the Court of Appeal had delivered a sufficiently reasoned decision and found that, at the time the request for the Award’s enforcement was made, CRMH’s contention that the Award could not be enforced on public policy grounds (procedural fraud) could not stand as the Award had been rendered enforceable as a result of the Decision on review that had concluded the review proceedings (2. and 3. below). The Cassation Court also dismissed CRMH’s allegations that the Court of Appeal had failed to address whether the Award was *res judicata* under Czech arbitration law. The Cassation Court found that the Court of Appeal had comprehensively addressed the Czech Republic’s submissions that it was not (4. below). The Cassation Court then dismissed the remainder of CRMH’s submissions on the ground that they concerned questions that were outside of the jurisdiction of the Cassation Court (5 to 8 below).

Main Issue: What is the effect on an arbitral award of a Resolution issued pursuant to the review process available under Czech arbitration law?

Key words: Binding award – Enforcement – Exequatur – Fraud – Partial award – Public Policy – Review – *Res judicata* – Termination of arbitral proceedings

Composition of the Court: Jean-Claude Wiwinius (President), Romain Ludovicy, Nico Edon, Carlo Heyard, Eliane Eicher, John Petry, Viviane Probst.

Arbitrators in the underlying arbitration (Award of 4 August 2008): Kvetoslav Ruzicka (President), Monika Pauknerová, Zdeněk Rusek.

Counsel for The Czech Republic Ministry of Health: François Kremer, Arendt & Medernach.

Counsel for Diag Human S.E.: Rémi Chevalier.

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Digest:

1. Relevant Facts

Pursuant to the arbitration agreement signed by Diag Human and The Czech Republic Ministry of Health (CRMH) on 18 September 1996, they submitted to ad-hoc arbitration the dispute which had arisen between them concerning the alleged damages suffered by Diag Human S.E. in connection with the award of a blood plasma contract. “The then-Minister of Health allegedly violated unfair competition laws by sending to Novo Nordisk, a Danish company and Diag Human’s major business partner, a letter accusing Diag Human of ethical violations. This led Novo Nordisk to cease work with Diag Human, which was fatal to the latter’s business in the Czech Republic”.¹

In January 2014 both Parties submitted an application for review of the Award that had been rendered on 4 August 2008. Pursuant to the provisions of Article 27 of the Czech Arbitration Act,² parties may agree in the arbitration agreement that the arbitral award may be reviewed by other arbitrators upon a request of either of them or both of them. The review panel has “the power to uphold, nullify or modify [the award]. If the award is not to be issued, the arbitration review panel issues a Decision, which terminates the proceedings”.³ On 23 July 2014, such a

¹ Opinion of the US Court of Appeals for the District of Columbia Circuit dated 26 October 2018, Appeal from *Diag Human, S.E. v. Czech-Ministry of Health*, 279 F. Supp. 3d 114, 121 (D.D.C. 2017).

² Czech Arbitration Act no. 216/1994 on arbitration proceedings and on enforcement of arbitration awards, https://is.muni.cz/el/1422/jaro2008/SOC026/um/216-1994_EN.pdf

³ Ibid.

Decision was issued (“the Decision on review”) and the arbitrators discontinued the arbitration between Diag Human and CRMH.⁴

The appeal lodged by CRMH against the Exequatur Order for the enforcement of the Award was dismissed by the Luxembourg Court of Appeal on 27 April 2017. CRMH lodged an appeal on points of law before the Cassation Court. The judgment of the Cassation Court was delivered on 29 June 2018 and is summarised below.

2. Czech Republic’s submission that the Court of Appeal’s Judgment lacked a legal basis (First and Second grounds of appeal)

2.1 The Court of Appeal’s Judgment

The Court of Appeal found that CRMH’s allegations, referring to the situation on the date of or before the Exequatur Order (10 August 2011), that the enforcement of the Award was contrary to public policy could not stand as the review proceedings had been terminated by the Decision on review issued on 23 July 2014.

A court deciding on an appeal against an exequatur order examines whether, at the time of its decision, any condition warranting the refusal of the exequatur is established, and under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“the New York Convention”), it is for the party seeking the enforcement refusal to furnish proof to the competent authority that one or more conditions provided for under Article V of the New York Convention is/are established, in the present case that the award had not yet become binding on the Parties (Article V, 1. (e)). The binding character of an award is a *sine qua non* to obtain an exequatur order and the New York Convention could not be interpreted as permitting a party to obtain an exequatur order for an award that has not yet become binding on the parties and to hence have the effect of an enforceable decision, which it is not.

2.2 The position of the Czech Republic

CRMH alleged that the Court of Appeal’s Judgment lacked a legal basis for the purposes of Article V 2. (b) of the New York Convention, which reads as follows:

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(...)

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

CRMH alleged that Diag Human had committed fraud and deceit on the court by submitting an application for exequatur concerning an award that had not yet become binding on the Parties due to ongoing review proceedings. Diag Human failed to inform the president of the

⁴ Resolution of the Review Arbitration Panel dated 23 July 2014 at [99].

district court that the Award was not *res judicata* under the Czech Arbitration Act⁵ and the Court of Appeal ought to have discerned that the Exequatur Order was obtained based on false and incomplete information. But the Court of Appeal, CRMH submitted, however dismissed the appeal, based on the mere reference to post-exequatur elements, without consideration for elements pre-dating the Decision on review, and in particular without examining whether the procedural fraud was already material at the time of the Exequatur Order. The Court of Appeal also failed to examine whether the refusal of CRMH's public policy argument was still valid, notwithstanding the Decision on review, considering that what constituted the procedural fraud, in contravention to public policy, was the fact that an exequatur order had been sought and granted for a non-binding award.

For these reasons, CRMH submitted, the Court of Appeal's Judgment lacked a legal basis for the purposes of Article V 2. (b) of the New York Convention.

2.3 The decision of the Cassation Court

The Cassation Court found that the judges of the Court of Appeal had delivered a sufficiently reasoned decision. It is at the time an application for the enforcement of an award is submitted to the judge that she is to determine whether there are any grounds to refuse the enforcement. And at such time in the present case, CRMH's contention that the Award could not be enforced on public policy grounds (procedural fraud) could not stand as the Award had been rendered enforceable as a result of the Decision on review. Appeal on this ground was therefore dismissed.

3. Czech Republic's submission that the Court of Appeal's Judgment was contrary to the New Code of Civil Procedure of the Czech Republic (Third ground of appeal).

3.1 The Court of Appeal's Judgment

The Court of Appeal rejected CRMH's argument that the Award had been replaced by the Decision on review: as the outcome of the review proceedings was not a revision or a replacement of the Award but a decision to close the review proceedings, and as there was no pending request for review, the Award had become *res judicata*.

3.2 The position of the Czech Republic

CRMH alleged that the Court of Appeal failed to address its allegation that the Award was not *res judicata* under Article 28 (2) of the Czech Arbitration Act, on the ground that the *res judicata* nature of an Award is conditional on the absence of a request for review.⁶

Article 28 (2) of the Czech Arbitration Act reads as follows: “(2) *An arbitration award that is not possible to review under § 27 [of the Czech Arbitration Act] or as for that the period for submission of request for revision under § 27 [of the Czech Arbitration Act] has elapsed in*

⁵ Article 28 (1) and (2) of Czech Arbitration Act no. 216/1994 on arbitration proceedings and on enforcement of arbitration awards

⁶ Article 28 “(1) *The written arbitration award shall be delivered to the parties with a clause affixed proving that it has become final and conclusive after the delivery to the parties.*

(2) An arbitration award that is not possible to review under § 27 or as for that the period for submission of request for revision under § 27 has elapsed in vain shall, after at the moment of its delivery, acquire effects of a final and conclusive judgment of a court and shall be judicially enforceable”.

vain shall, after at the moment of its delivery, acquire effects of a final and conclusive judgment of a court and shall be judicially enforceable”.

3.3 The decision of the Cassation Court

Recalling that a court’s decision is considered lawful if it is implicitly or explicitly motivated, the Cassation Court noted that the Court of Appeal had found as follows:

- (a) Experts in Czech arbitration law did not agree as to whether or not review proceedings are an indivisible part of the arbitral proceedings and as to whether an award can be replaced by a review resolution.
- (b) The Review Resolution did not indicate that the termination of proceedings concerned proceedings other than the review proceedings.
- (c) Under Article 27 of the Czech Arbitration Act, review proceedings are part of arbitration proceedings and are governed by Czech arbitration law but the review panel has the power to modify the award.
- (d) The review panel in this case had no other choice but to terminate the arbitration proceedings as it had no jurisdiction over the issues of the dispute that had been brought before the courts.
- (e) There was no indication that the review scheme provided for the replacement of the Award by the Decision on review.

The Court of Appeal therefore comprehensively addressed CRMH’s submissions. It did not directly refer to Article 28 of the Czech Arbitration Act as the expert opinions that the Court of Appeal examined in its judgment did refer to this provision. Appeal on this ground was therefore dismissed.

4. Czech Republic’s submission that the Court of Appeal’s Judgment was contrary to Czech arbitration law (Fourth ground of appeal).

4.1 The position of the Czech Republic

CRMH alleged that the Court of Appeal, by concluding that the Award was *res judicata*, misinterpreted the Czech Arbitration Act.

The Court of Appeal’s Judgment was also contrary to Article V. 1 (e) of the New York Convention and Article 27 of the Czech Arbitration Act.

Article V. 1 (e) of the New York Convention reads as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(...)

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Article 27 of the Czech Arbitration Act reads as follows:

The arbitration agreement may stipulate that the arbitration award may be reviewed by other arbitrators upon request of any of or both parties. Unless the arbitration agreement stipulates otherwise, the request for revision shall be delivered to the other party within 30 days from the day of the delivery of the arbitration award to the requesting party. The revision of the arbitration award shall be a part of the arbitration proceedings and shall be regulated by provisions of this Act.

4.2 The decision of the Cassation Court

The interpretation and application of foreign law are questions of fact falling within the jurisdiction of inferior courts and outside the Cassation Court's jurisdiction. Appeal on this ground was therefore dismissed.

5. Czech Republic's submission that the Court of Appeal's Judgment was contrary to the Constitution of Luxembourg (Fifth ground of appeal).

5.1 The position of the Czech Republic

CRMH alleged that the Court of Appeal's Judgment was contrary to Article 89 of Luxembourg's Constitution - which provides that "Every judgment is substantiated" - for the following reasons.

The Court of Appeal made contradictory findings in different sections of its judgment, first on whether, under Article 27 of the Czech Arbitration Act, the review proceedings were part of the arbitration proceedings or were separate proceedings (limb 1 of the Fifth ground of appeal). Secondly, the Court of Appeal's judgment also contradicted itself on the *res judicata* issue with regards to the award dated 25 June 2002 ("the Partial Award") (limb 2 of the Fifth ground of appeal). On the one hand, the Court of Appeal noted that the review panel had not found that the Award was delivered in contravention to the *res judicata* character of the Partial Award. On the other hand, the Court of Appeal noted, the review panel had underlined that it could not be said that this award was a partial award and not in fact a complete final decision. These contradictions, CRMH alleged, amounted to a lack of reasons.

In addition, the Court of Appeal failed to consider a letter dated 3 October 2014 by the review panel ("the review panel's letter") confirming that as the arbitration proceedings had been terminated in their entirety, the only *res judicata* and enforceable decisions were the Partial Award dated 25 June 2002 and the Review Resolution concerning the closing of the whole arbitration proceedings. This failure, the Czech Republic submitted, also amounted to a lack of reasons (limb 3 of the Fifth ground of appeal).

5.2 The decision of the Cassation Court

On limb 1 of the Fifth ground of appeal, the Cassation Court found that the fact that the review proceedings were part of the arbitration proceedings under Czech arbitration law did not

necessary mean that they could not be considered as two successive proceedings. Appeal under this limb was therefore dismissed.

On limb 2 of the Fifth ground of appeal, the Cassation Court found that the Court of Appeal judges had first summarized the theoretical aspects developed by the review panel before concluding that the review panel had failed to specify the consequences of these elements on the Award under review. There was no contradiction to be found in this reasoning. Appeal under this limb was therefore dismissed.

The Cassation Court finally found that limb 3 of the Fifth ground of appeal was simply a way of challenging the Court of Cassation's role as a tribunal of law and not of fact. Appeal under this limb was therefore dismissed.

6. Czech Republic's submission that the Court of Appeal's Judgment did not examine certain elements establishing that the Award was not binding (Sixth ground of appeal)

6.1 The position of the Czech Republic

The Court of Appeal failed to consider the following elements: the review panel's letter and Article 28 of the Czech Arbitration Act, which would have permitted to establish the non-binding character of the Award. In doing so, the Court of Appeal did not allow the Cassation Court to examine whether Article V. 1 (e) of the New York Convention (and Articles 27 and 28 of the Czech Arbitration Act, implementing the New York Convention) had been properly applied. The Court of Appeal's Judgment therefore lacked a legal basis for the purposes of Article V. 1 (e) of the New York Convention.

6.2 The decision of the Cassation Court

With this ground of appeal, CRMH was challenging the assessment, by the judges of the tribunals dealing with matters of fact (inferior courts), of the evidentiary value of the elements that had been submitted to them, as well as of their decisions on the application of Czech law. Appeal under this limb was therefore dismissed.

7. Czech Republic's submission that the Court of Appeal's Judgment was in breach of natural justice's principles and provisions under European law (Seventh ground of appeal)

7.1 The position of the Czech Republic

The Court of Appeal, by failing to produce a sufficiently reasoned decision and to consider certain elements establishing that the Award was not binding, as well as the review panel's letter and Articles 28 and 29 of the Czech Arbitration Act, rendered a decision which was contrary, in particular, to Article 47 (Right to an effective remedy and to a fair trial) of the Charter of Fundamental Rights of the European Union.

7.2 The decision of the Cassation Court

The Cassation Court noted that the provisions of the Charter of Fundamental Rights of the European Union were not applicable to the present case as the Exequatur Order was not in any way connected to the implementation of European law by Luxembourg.

With this ground of appeal, CRMH was in disguise challenging the assessment, by the judges of the tribunals dealing with matters of fact (inferior courts), of the evidentiary value of the elements that had been submitted to them, as well as their decisions on the application of Czech law. The unappealable assessment carried out by the inferior courts fell outside the jurisdiction of the Cassation Court. The appeal under this limb was therefore dismissed.

8. Czech Republic's submission that the review proceedings resulted in nullifying the Award (Eight ground of appeal)

8.1 The position of the Czech Republic

CRMH alleged that the Court of Appeal's Judgment was contrary to Article I 1. and 2. and Article III of the New York Convention. CRMH alleged that the review proceedings resulted in depriving the Award from its legal force as soon as the review proceedings had started and that the Award had been nullified and replaced by the Decision on review. The Award could therefore not be considered as an award under the New York Convention. However, the Court of Appeal's conclusion was that, as the outcome of the review proceedings was a decision to close the review proceedings, and as there was no pending request for review, the Award had acquired legal force and effect.

Articles I 1. and 2. and Article III of the New York Convention read as follows:

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

8.2 The decision of the Cassation Court

The Cassation Court found that, as Article I (1. and 2.) of the New York Convention was silent as to the binding character of arbitral awards, this ground of appeal was to be dismissed.

Regarding Article III of the New York Convention, the Cassation Court found that this ground of appeal concerned a violation of this provision flowing from a misapplication or

misinterpretation of Articles 28 and 29 of the Czech Arbitration Act. The interpretation and application of foreign law are questions of fact that are within the jurisdiction of the inferior courts, and not of the Cassation Court. This ground of appeal was therefore dismissed.

DECISION

For all the reasons above, the appeal on points of law submitted by CRMH was dismissed by the Cassation Court.