

**ENGLISH COMMERCIAL COURT DECLINES TO ENFORCE FOREIGN
ARBITRATION AWARD AGAINST CZECH REPUBLIC**

Diag Human Se v Czech Republic [2014] EWHC 1639 (Comm)

Introduction

On 22 May 2014, the English Commercial Court handed down its decision in *Diag Human Se v Czech Republic* [2014] EWHC 1639 (Comm) in which it declined to order the enforcement of a foreign arbitration award against the Czech Republic under the New York Convention.

New York Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the "New York Arbitration Convention" or the "New York Convention") is one of the key instruments in international arbitration, and provides for the recognition and enforcement of foreign arbitral awards.

The New York Convention has effect in English law pursuant to sections 100-103 of the Arbitration Act 1996, which provide that an award made in a state which is a party to the New York Convention shall be recognised and enforced by the English courts upon production of the original award and the original arbitration agreement (or certified copies of both documents). Section 103 sets out an exhaustive list of circumstances in which the courts may refuse to recognise or enforce such an award.

Background

The claimant, Diag Human Se, was one of the world's largest blood plasma suppliers. In 1989, it was asked to undertake work on the modernisation of the Czech blood transfusion system; however, the relationship between Diag Human and the Czech Republic broke down in the early 1990s.

Initially, Diag Human commenced legal proceedings in 1996 claiming damages and other relief in the Czech courts against the Czech Republic. However, by agreement, those court proceedings were subsequently abandoned and the disputes were referred to arbitration pursuant to an ad hoc arbitration agreement dated 18 September 1996 under the Czech Arbitration Act.

Two interim arbitration awards were rendered in 1997 and 2002, which were subject to the review process set out in the Czech Arbitration Act. The arbitral tribunal issued its final award on 4 August 2008 which is the subject of these proceedings. The value of the final award was approximately £135m in damages and £140m in interest plus further interest accruing daily. Following the publication of the final award, both the Czech Republic and

Diag Human sought to invoke the review process (although Diag Human later withdrew its application).

Diag Human brought a claim in the English courts to enforce the final arbitral award of 4 August 2008. The Czech Republic challenged this, predominantly on the grounds that the final award was not binding.

In the alternative, Diag Human submitted that it was entitled to at least partial recognition and enforcement of the final award.

Decision

The Commercial Court upheld the Czech Republic's objections to recognition and enforcement of the arbitral award, and further dismissed Diag Human's request for partial enforcement. In particular, the Court found in favour of the Czech Republic on the grounds that:

- in a decision in April 2013, the Supreme Court of Austria had held that the Final Award was not binding and this decision created an "issue estoppel" in favour of the Czech Republic; and
- the Final Award was subject to the review process set out in the Czech Arbitration Agreement applied (which the Czech Republic had invoked following the handing down of the Final Award), and therefore the Final Award was not binding within the meaning of s103(2)(f) of the Arbitration Act 1996.

In his judgment, Mr Justice Eder emphasised the "*pro-enforcement bias*" of the New York Convention, noting that a party "*has a prima facie right to recognition and enforcement*" in England. In particular, he noted:

- under the Convention, the grounds for refusing enforcement are restricted and construed narrowly: enforcement may be refused only if one of the listed grounds, which are exhaustive, is satisfied;
- in line with the pro-enforcement bias, the burden of proof is "firmly" on the party resisting enforcement;
- whether an award is binding on the parties is a question for the English Court, as the enforcing court.

In the circumstances of the case, the Czech Republic had succeeded in proving that the claim for recognition and enforcement of the final award should be declined.

Mr Justice Eder further noted that it was possible, in line with the decision of the Court of Appeal in *Nigerian National Petroleum Corp v IPCO (Nigeria) Ltd (No 2)* [2009] 1 Lloyd's Law Rep 89, that a foreign arbitral award could be upheld on a partial basis.

However, in the present circumstances, as he had found that the final award itself was not binding, there could be no question of partial enforcement.

10th June 2014