Diag Human v Czech Republic: Issue estoppel prevents enforcement of arbitral award

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Summary

When a foreign court decides that an arbitral award is not binding, there is no reason in principle why that decision should not give rise to an issue estoppel between the parties provided that the other conditions for establishing issue estoppel are satisfied.

Headnote

In Diag Human v Czech Republic it was held that, where a foreign court decides that an arbitral award is not binding, there is no reason in principle why that decision should not give rise to an issue estoppel between the parties provided that the other conditions for establishing issue estoppel are satisfied.

Facts of the Case

Diag commenced proceedings against the Czech Republic for damages and other relief in the Czech courts. The dispute was referred, by agreement, to arbitration.

Article V of the arbitration agreement provided for an additional arbitral review process within 30 days from the date of receipt of the award. It was common ground that the review process in Article V of the arbitration agreement was in the nature of “ordinary recourse” and that, provided a party submitted an application for review within the stipulated deadline, the award would not become binding on the parties until the review process was determined.
On 4 August 2008, the arbitral tribunal made an award in favour of Diag which held that the Czech Republic was to pay £135m in damages and £140m in interest (the “Award”).

Following the publication of the Award, both parties sought to invoke the review process set out in the arbitration agreement.

Diag subsequently withdrew its review request. There was a dispute as to the effect of the withdrawal and Diag also argued that the Czech Republic’s requests for review were not valid as they were sent without proper authority of a Minister of the Czech Republic.

Diag sought to enforce the Award in France, Luxembourg, the U.S. and Austria. On 16 April 2013, the Supreme Court of Austria delivered a judgment stating that the Award had not yet become binding on the parties within the meaning of article V(1)(e) of the New York Convention.

Diag sought to enforce the Award in the English courts pursuant to s103 of the Arbitration Act 1996 (the “Act”). On 21 July 2011, Burton J made an order giving Diag leave to enforce the Award and entering judgment against the Czech Republic in terms of the Award. The Czech Republic sought to set that order aside.

**Question in Dispute**

Whether the decision of a foreign court that the Award was not binding gave rise to an issue estoppel between the parties.

Whether the Award was binding under s103(2)(f) of the Act.

**Arguments of the Parties**

**Issue estoppel**

The Czech Republic submitted that the decision of the Supreme Court of Austria that the Award had not yet become binding created an issue estoppel that the Award was not binding.

Diag submitted that in proceedings to enforce under the New York Convention issue estoppel cannot arise from decisions in other states on enforcement itself as different states may apply different tests as to the meaning of “binding”.
Whether the Award was binding under s103(2)(f) of the Act

It was common ground that the review process in Article V of the arbitration agreement was in the nature of “ordinary recourse” and that, provided a party submitted an application for review within the stipulated deadline, the award would not become binding on the parties until the review process was determined.

Diag submitted that the Czech Republic's requests for review were sent without proper authority of a Minister of the Czech Republic and that they were a nullity and ineffective to trigger the review process (the “authority point”).

The Czech Republic submitted that the requests for review were duly authorised.

Diag also submitted that the withdrawal of its application for review brought the review process automatically to an end (the “withdrawal point”).

The Czech Republic submitted that the review process remained extant and would not come to an end until the review tribunal published its own award or determined that the process had come to an end.

The Czech Republic submitted that there was a process of ordinary recourse pending, as the Austrian Supreme Court had concluded, so the Award was not binding.

Diag submitted that this was the wrong approach because the effect of the authority point was that the Czech Republic had not triggered the review process and Diag had withdrawn its own application for review. In such circumstances, in order to determine whether the Award was binding, it was necessary for the English court to determine whether the authority point and/or the withdrawal point were valid as a matter of Czech law.

Judgment of the court

Issue estoppel

Mr Justice Eder held that where a foreign court decides that an award is not “binding” there is no reason in principle why that decision should not give rise to an issue estoppel between the parties provided that the other conditions for establishing issue estoppel are satisfied.

The Good Challenger sets out four conditions that must be satisfied in order to establish an issue estoppel:
1. The judgment must be given by a foreign court of competent jurisdiction;

2. The judgment must be final and conclusive and on the merits;

3. There must be identity of parties; and

4. There must be identity of subject matter, which means that the issue decided by the foreign court must be the same as that arising in the English proceedings.

This finding determined the application in favour of the Czech Republic, but Mr Justice Eder went on to consider whether the Award was binding for the purposes of s103(2)(f) of the Act.

**Whether the Award was binding under s103(2)(f) of the Act**

The question of whether an award is binding on the parties is a question for the English Court as the enforcing court. Article V(1) of the New York Convention provides that refusal can only occur if the challenging party “furnishes to the competent authority where the recognition and enforcement is sought, proof of the existence of the ground relied on.”

Mr Justice Eder agreed with the analysis and conclusion reached by Burton J in *Dowans Holding SA v Tanzania Electric Supply Co Ltd* that the relevant test as to an award being binding fell to be decided by reference to the autonomous interpretation of the New York Convention as opposed to the local law.

In that context, there was an important distinction between “extraordinary recourse”, which will not prevent an award being binding, and “ordinary recourse” which will prevent an award from being binding.

It was common ground that the review process in the arbitration agreement was properly categorised as being in the nature of “ordinary recourse”.

Mr Justice Eder rejected the submissions of Diag and held that the authority point and the withdrawal point were matters to be resolved by the review tribunal and, therefore, the Award was subject to a process of “ordinary recourse” and, for that reason, not binding for the purpose of s103(2)(f) of the Act.

Mr Justice Eder also concluded that the review process was properly triggered by the Czech Republic and that, on this basis, the Award was subject to “ordinary recourse” and was not binding for the purpose of s103(2)(f) of the Act.