

Luxembourg—validity of attachments against state assets and jurisdictional immunity (*Diag Human SE v The Czech Republic*)

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Arbitration analysis: Laure-Hélène Gaicio, partner at BSP, examines a recent decision from the District Court of Luxembourg in a longstanding case concerning an attachment to enforce an arbitral award. The decision concerned an award in favour of a company incorporated in Liechtenstein against the Czech Republic. The court found that the Czech Republic had waived its jurisdictional immunity and immunity from enforcement and validated the attachment on assets based in Luxembourg.

Diag Human SE v The Czech Republic, [Case No RSP 06/2003, judgment 7 June 2019](#)

What was the background to the court's June 2019 decision?

A dispute arose between a company incorporated in Liechtenstein, Diag Human, and the Czech Republic concerning the award of a blood contract, which caused damages to Diag Human. As per the arbitration agreement signed by the parties on 18 September 1996, the dispute was submitted to an arbitration panel.

An interim award was handed down on 25 June 2002, ordering the Czech Republic to pay to Diag Human 326,608,334 CZK. A final award was handed down on 4 August 2008, ordering the Czech Republic to pay to Diag Human damages for a total amount of 4,089,716,666 CZK to which late interest was to be added. Each party was to bear its own costs.

According to the arbitration agreement, this final award was to acquire *res judicata* authority once a request for re-examination had been examined. On 23 July 2014, the arbitrators handed down a resolution indicating that the proceedings were terminated, and that the parties did not have a right to obtain a reimbursement of their costs.

Notwithstanding the fact that the decision on re-examination was not yet handed down, the award was declared enforceable by the President of the District Court of Luxembourg on 10 August 2011. The Czech Republic challenged this *exequatur* order requesting it to be set aside. This challenge was rejected by the Court of Appeal on 27 April 2017. The decision of the Court of Appeal was confirmed by the Supreme Court on 28 June 2018.

In parallel, Diag Human proceeded, on 4 October 2011, with an attachment on the Czech Republic's assets held with two banks, by virtue of an authorisation given *ex parte* by the President of the District Court of Luxembourg on 15 September 2011. The decision handed down by the Tenth Chamber of the District Court in June 2019 dealt specifically, and solely, with the validation of this attachment.

What issues were before the court (re the June 2019 decision)?

Despite the fact that the Court of Appeal had declared the award dated 4 August 2008 enforceable in Luxembourg, the Czech Republic raised a certain number of arguments opposing the validation of the attachment.

First of all, the Czech Republic claimed the courts of Luxembourg did not have the territorial jurisdiction to rule on Diag Human's requests. The Czech Republic also claimed that the Luxembourg court did not have jurisdiction to hear state related matters involving the Czech Republic on the basis of both jurisdictional immunity and immunity from enforcement. Diag Human asked the District Court to reject the Czech Republic's immunity pleas.

The Czech Republic argued also that the attachment was null as Diag Human did not have a claim which was certain at the date on which it was carried out. Indeed, the attachment was carried out, on the basis of a judicial authorisation, on 4 October 2011 whereas no decision on the re-examination of the 4 August 2008 award had been handed down as of yet. Diag Human counter argued that at the date of the attachment, the award was enforceable by virtue of the

exequatur order dated 10 August 2011, as the Czech Republic challenged such exequatur order only on 7 October 2011.

According to the Czech Republic, the attachment could not be validated because Diag Human would not have an enforceable title, its claim being neither certain, nor liquid, nor due at that time.

A question was also submitted to the District Court relating to the increase, by Diag Human, of its claim during the proceedings. The Czech Republic argued that an interlocutory decision had been handed down on 22 June 2012 ordering that the attachment would remain in place, until a final decision in the exequatur proceedings, for a total amount of €419,734,449. According to the Czech Republic, such agreement on a limitation of the attachment prevented Diag Human from increasing its requests.

Finally, the Czech Republic referred to the decision of the Supreme Court of the Netherlands dated 15 June 2018 handed down in proceedings between the same parties. According to this decision, the award handed down on 23 July 2014 (re-examination decision) put an end to the arbitration proceedings as a whole. The arbitration award dated 4 August 2008 therefore became irrelevant and could not constitute a final and irrevocable decision for the parties.

The Czech Republic argued that this decision should be recognised in Luxembourg, without any special procedure being required, on the basis of Article 36 (1) of [Regulation \(EU\) No 1215/2012](#) of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

What did the court decide in June 2019?

The District Court of Luxembourg first considered that it had territorial jurisdiction to hear the issue related to the validation of an attachment made on assets that were based in Luxembourg. Indeed, the third-party debtors were domiciled in Luxembourg.

In regard to the immunity pleas, the District Court first recalled the definitions of jurisdictional immunity and immunity from enforcement.

The District Court's decision recalls that jurisdictional immunity is a privilege which can be waived by the state by a certain and unequivocal waiver. This waiver may be express or implicit.

The court emphasises that the waiver of jurisdictional immunity does not automatically entail waiver of immunity from enforcement, as waiver of immunity from enforcement must be specific and unequivocal. This waiver may result implicitly from a particular provision of an agreement. The court must therefore analyse the agreement in light of its content and the circumstances in order to establish the intention of the foreign state.

Upon analysis of the arbitration agreement dated 18 September 1996, the court concludes that the dispute at stake related to a matter of private law and was therefore not connected with the Czech Republic's exercise of its sovereign powers. It also considers that according to the wording of the arbitration agreement the parties accepted the principle that the award to be handed down would become enforceable, and if the parties failed to comply with it, it could be enforced by the court having jurisdiction.

The court therefore ruled that for those reasons, the Czech Republic had waived its jurisdictional immunity and immunity from enforcement. In regard to the request to have the attachment annulled, the court noted that the attaching party must prove that it has a certain claim, a claim which exists as of the day the attachment is made. The court was of the opinion that the claim may not be questioned. Indeed, on 4 October 2011 (the date the attachment was made by virtue of a court authorisation), Diag Human had a claim against the Czech Republic on the basis of the award dated 4 August 2008, a claim which was enforceable in Luxembourg as per the exequatur order dated 10 August 2011.

The District Court emphasises that the fact that the Czech Republic challenged the exequatur order, which therefore is not a final decision, does not prevent the creditor from initiating attachments. Indeed, it is only on the date on which a decision, on the validation of the attachment, is handed down that the judge must verify that the claim relies on a final decision.

In regard to the validation of the attachment, the court is required to verify that the attaching party has an enforceable decision in hand, the burden of the proof lying in the hands of the creditor. Diag Human relied on the decision of the Court of Appeal dated 27 April 2017 which rejected the challenge filed by the Czech Republic and confirmed the exequatur of the award dated 4 August 2008. To challenge this decision of the Court of Appeal, the Czech Republic filed as support a decision of the Supreme Court of the Netherlands, refusing the enforcement of this same award (as explained hereabove).

The District Court emphasised that the effects of a decision handed down in exequatur proceedings are limited to the territory of the country in which they are brought. Therefore, the decision handed down in the Netherlands was without effect in the ongoing proceedings in Luxembourg.

Finally, the court decided to limit the amount of the validation to the amount determined in the interlocutory judgment, ie €419,734,449. The court therefore ordered the Czech Republic to pay the amounts arising out of the arbitral award, together with the late interest, in the amount of €419,734,449. The decision handed down was declared provisionally enforceable as the claim was certain, liquid and due, and in view of the fact that the case was longstanding.

Why is the decision of interest to international arbitration practitioners? (In this regard, please could the authors consider the history of the case more broadly, including the fact, I think, that the US courts have refused to enforce the award)

In my opinion, this decision is particularly relevant, especially internationally.

First of all, this case shows the determination of the Luxembourg courts to ensure the effectiveness in Luxembourg of foreign arbitral awards. Exactly like in the *Commissa v PEMEX* case, dating back to 2017, the Luxembourg court was not influenced by the decisions handed down abroad in the same case.

Indeed, in this case, the US courts had initially refused to grant exequatur of the award on the basis that the arbitral panel had not confirmed the award, but instead had solely filed a 'resolution'. Therefore, the final award didn't enter into effect. See News Analysis: [ECHO ID 2765209]

Similarly, in the UK, the exequatur of a final award was refused on the basis of an Austrian decision, which itself had refused the exequatur on the argument that the award was not final and binding for the parties. See News Analysis: [ECHO ID 303987]

The French courts also refused to grant the exequatur of the final award. The French Supreme Court, on 5 March 2014, even considered that the request for a re-examination overturned the 4 August 2008 award.

Also, the Czech Republic specifically tried to have the Luxembourg courts apply a Dutch decision refusing the exequatur which was handed down in the Netherlands. The court refused on the basis that exequatur proceedings can only produce its effects in the country where they are handed down. This confirms the opinion of several scholars regarding the impossibility to transfer an exequatur decision from one state to the other. This issue was in fact an open question which has now been confirmed by two recent decisions of the Luxembourg courts (albeit in first instance only).

The Luxembourg courts clearly do not intend to give greater effect to an award than that award would have in its home state, but it does intend to give an award effect where such award is enforceable in its home state. Where Belgium and France have hardened the conditions to allow attachments proceedings against sovereign states, by changing their applicable laws, Luxembourg has not enacted legislation in this regard, and has not been influenced, so far, by its direct neighbours.

The decision confirms that attachments can be made against state assets located in Luxembourg, and that such attachments may be validated provided that the creditor has a claim and the state waived somehow its sovereign immunity, (the content of the agreement entered into with the state may of course be determining).

Laure-Hélène Gaicio focuses on complex real estate, commercial, corporate and financial disputes. Gaicio has extensive experience in all forms of international and domestic dispute resolution including litigation and arbitration, as well as enforcing and obtaining freezing injunctions in international arbitration, enforcements of the International

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