England and Wales High Court (Commercial Court) Decisions

Neutral Citation Number: [2014] EWHC 1639 (Comm)
Case No: 2011 Folio 864

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
22 May 2014

B e f o r e :

MR JUSTICE EDER

Between:

DIAG HUMAN SE — **Claimant**

- and -

THE CZECH REPUBLIC — **Defendant**

MR RAYMOND COX QC, MR PHILIP RICHES & MS LIISA LAHTI (instructed by Goodman Derrick LLP) for the Claimant
MR MICHAEL CRANE QC & MR CHARLES JOSEPH (instructed by DWFM Beckman) for the Defendant
Hearing dates: 12, 13, 14 & 15 May 2014

HTML VERSION OF JUDGMENT

Mr Justice Eder:

Introduction

1. These proceedings concern a claim by the claimant ("Diag Human") to enforce an Arbitration Award dated 4 August 2008 made in its favour in the Czech Republic against the defendant, the Czech Republic (the "Award").

2. The claim is made pursuant to s103 of the Arbitration Act 1996 (the "1996 Act") which provides in material part as follows:

> "*103(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.*
>
> *(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves –*
>
> …
>
> > *(f) that 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, it was made*
>
> *(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.*
>
> *(4)* …
>
> *(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.*
>
> *It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.*"

3. The reference in s103(1) is to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 (the "New York Convention" or "Convention"). The wording in s103(1) and (2)(f) (which is the main focus of the present dispute) reflects the wording of Article V(1)(e) of the Convention which provides:

> "*Article V*

(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."

4. It is common ground that the Czech Republic is a party to the Convention; and that therefore the Award is a New York Convention award within the meaning of s100 of the 1996 Act and one to which s103 of the 1996 Act applies.

5. The present proceedings seeking enforcement of the Award were issued on 20 July 2011. Following an application without notice by Diag Human, an order was made by Burton J in this court the following day i.e. 21 July 2011 giving Diag Human leave to enforce the Award and entering judgment against the Czech Republic in the terms of the Award, namely:

> "*The defendant shall pay the plaintiff the amount of damages of 4,089,716,666.00 CZK.*
>
> *The defendant is liable to pay compensation to the plaintiff with interest on the arrears for the period from 1 July 1992 to 20 June 2007 of CZK 4,244,879,686.00.*
>
> *The defendant shall pay the plaintiff interest on the amount of arrears of CZK 1,287,877.00 per day, starting on 1 July 2007 until payment and the amount of CZK 58,130,213.00 from 14 July 2007 until payment, at the repo rate set by the Czech National Bank plus 7 percentage points on the basis that in each calendar half year, in which the debtor is in default, the arrears interest rate will be based on the repo rate set by the Czech National Bank valid for the first calendar day of the half-year.*"

6. The Czech Republic now seeks to set aside that Order. In broad terms, the main thrust of the case advanced by the Czech Republic is that the Award is not binding for reasons set out below.

7. The primary submission advanced by Mr Crane QC on behalf of the Czech Republic is that that question has already been determined in its favour in separate enforcement proceedings brought by Diag Human in Austria in a decision of the Supreme Court of Austria on 16 April 2013 which, Mr Crane submitted, gives rise to an issue estoppel between the parties. In the alternative, Mr Crane submitted that the Award is in any event not binding within the meaning of s103(2)(f) of the 1996 Act. In contrast, Mr Cox QC on behalf of Diag Human submitted that there is no issue estoppel; and that the Award is indeed binding. Those are the main issues which arise for determination. In the alternative, Mr Cox submitted that Diag Human is, at the very least, entitled to partial enforcement of the Award.

S103 of the Arbitration Act 1996

8. At the outset, it is convenient to set out certain preliminary observations with regard to the general scope and effect of s103 of the 1996 Act. These are based in part on the helpful submissions of Mr Cox on behalf of Diag Human which (unless otherwise stated) were agreed by Mr Crane on behalf of the Czech Republic and which I gratefully adopt.

9. First, the Convention was given domestic effect in the United Kingdom by the Arbitration Act 1975. Ss100-103 of the 1996 Act replaced the relevant statutory provisions contained in that earlier Act. There was some debate before me as to the form of these provisions. Parliamentary draftsmen use different methods for giving effect to international conventions. For example, s1(2) of The Carriage of Goods by Sea Act 1971 expressly provides that the Hague Rules shall have the "force of law"; s1(2) of The Human Rights Act provides that certain rights set out in the European Convention of Human Rights are to have "effect". However, that is not the methodology used in the 1996 Act. Rather, although the wording of Article V of the Convention is reflected in s103 of the 1996 Act, the latter stands as an independent statutory provision. Notwithstanding, as a matter of substance and as stated by Tomlinson LJ in *Lombard-Knight v Rainstorm Pictures* [2014] EWCA Civ 356 at [1]-[3], the effect is that it directly enacts the relevant part of the Convention and gives effect to it; and bearing this in mind, the statutory language must of course be given an autonomous meaning, which may be informed by the *travaux preparatoires*, the decisions on it of foreign courts and the views on it of foreign jurists – *la jurisprudence* and *la doctrine* – see Bennion on Statutory Interpretation, 5th Ed, 2008 at page 682.

10. Second, the Convention comprises an "overall scheme" for "the facilitation of the enforcement of an award." "The scheme reflects a *'pro-enforcement bias'*… or … constitutes a *praesumptio juris tantum*, for the enforceability of an award …" (Van den Berg, The New York Convention 1958: Towards a Uniform Judicial Interpretation (Kluwer 1981) (hereinafter "Van den Berg, NYC") p267; see also Gary Born, *International Commercial Arbitration* (2nd Ed, Kluwer 2014), pp3411-3417. A key feature of this pro-enforcement bias is the abolition of the "double exequatur" requirement under the New York Convention's forerunner. This was considered and explained by Burton J in *Dowans Holding SA v Tanzania Electric Supply Co Ltd* [2011] 2 Lloyd's Rep 275 at [8]-[10]:

> "*8. The New York Convention (on the Recognition of Enforcement of Foreign Arbitral Awards) 1958 superseded the Geneva Convention (on the Execution of Foreign Arbitral Awards) 1927, which provided in Article 1 that a relevant Convention award would "be recognised as binding and … be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the … award [had] been made in a [Convention] territory" but:*
>
> > *"To obtain such recognition or enforcement, it shall, further, be necessary:*
> >
> > …

(d) that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of testing the validity of the award are pending."

9. It was further provided by Article 3 that:

"If the party against whom an award has been made proves that under the law governing the arbitration procedure there is a ground … entitling him to contest the validity of the award in a Court of Law, the court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal."

10. The New York Convention, upon which the UK 1996 Act is based, contained in almost identical wording the provisions of s103(2)(f) in Article V(1)(e), and s103(5) is in almost identical terms to Article VI. It is common ground that the intention of the New York Convention was to make enforcement of a Convention award more straightforward, and in particular to remove the previous necessity for a double exequatur – i.e. the need, before a Convention award could be enforced in any other jurisdiction, for it to be shown that it has first been rendered enforceable in the jurisdiction whose law governs the arbitration (the "home jurisdiction" – an expression which covers the case both where the law of the seat and the governing law of the arbitration are the same and where (as for example in the Indian Supreme Court decision of Oil & Natural Gas Commission v Western Company of North America AIR 1987 SC 674 ("ONGC"), to which I shall refer below) the arbitration which had its seat in London was governed by Indian law. See for example what both sides agree is the seminal commentary on the New York Convention, albeit written in 1981, The New York Arbitration Convention of 1958 – Towards a Uniform Judicial Interpretation by Albert Jan van den Berg (VDB) at 266:

"Another improvement of the New York Convention's scheme for enforcement of an award is <u>the elimination of the "double exequatur</u>". Under the Geneva Convention the party seeking enforcement of an award had to prove that the award had become "final" in the country in which it was made. In practice this could be proven only by producing an exequatur (leave for enforcement or the like) issued in the country in which the award was made. As the party had also to acquire a leave for enforcement in the country in which he sought enforcement, this amounted to the system of "double exequatur". The thought prevailed at the New York Conference that the acquisition of a leave for enforcement in the country where the award was made was an unnecessary time-consuming hurdle, especially since no enforcement was sought in that country. Moreover, it could lead to delaying tactics on the part of the respondent who could forestall the award becoming final by instituting setting aside procedures in the country in which the award was made.

The elimination of the "double exequatur" is achieved in two ways. In the first place, the word "final" is replaced by the word "binding" in order to indicate that it does not include the exequatur in the country of origin (Art. V(1)(e)). In the second place, it is no longer the party seeking enforcement of the award who has to prove that the award has become binding in the country in which the award is made; rather, the party against whom the enforcement is sought has to prove that the award has not become binding.'"

11. This pro-enforcement bias is recognised in England. An award creditor seeking to enforce a Convention award in England under s101 "*has a prima facie right to recognition and enforcement*": *Dardana v Yukos* [2002] 2 Lloyd's Rep 326, per Mance LJ at [10]. To similar effect is the statement of Gross J in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2005] EWHC 726 (Comm) at [11]: "*… there can be no realistic doubt that section 103 of the Act embodies a predisposition to favour enforcement of New York Convention Awards, reflecting the underlying purpose of the New York Convention itself …*"; and also per Steyn LJ in *Rosseel NV v Oriental Commercial & Shipping Co (UK) Ltd* [1991] 2 Lloyd's Rep 625 at p628 column 1.

12. Third, 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: Van den Berg, NYC, p265 at pp267-268; Redfern & Hunter on International Arbitration (2009) at 11.60. Thus, enforcement is mandatory in all but the cases specified in the legislation and the list of defences is exhaustive: see, for example, Merkin: Arbitration Law at para 19.50. This is recognised in England: *Kanoria v. Guinness* [2006] EWCA Civ 222, per May LJ at [29].

13. Fourth, in line with the pro-enforcement bias, the burden of proof is "firmly" on the party resisting enforcement: see *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Govt. of Pakistan* [2011] 1 AC 763, per Lord Collins at [101]. This is clear from the wording of Article V(1) of the Convention which requires the party resisting enforcement to furnish proof of the existence of one of the grounds under the article; and is also reflected in the words of s103. Thus, as stated by Hamblen J in *Sovarex SA v Romero Alvarez SA* [2011] EWHC 1661 (Comm) at [43]: "*… In effect the party who has obtained an award has the benefit of a presumption of validity and it is for the party resisting recognition or enforcement to prove otherwise.*"

14. Fifth, whether an award is binding on the parties is a question for the English Court, as the enforcing court. The Convention makes this clear. Article V(1) 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 (emphasis added). This is consistent with the intention of the Convention to have enforcement addressed exclusively by the enforcing court, not dependent upon the home jurisdiction requirements (as had been the case under the Geneva Convention). The English Court adopts this approach. As stated by Burton J in *Dowans* at [24]:

"*I am satisfied that the issue as to whether the ICC Award has become binding on the parties is <u>one for me</u>, by way of deciding whether the UK court is in a position to recognise and enforce a Convention award, and not by way of my assessment of whether the Tanzanian Court would consider that it is binding.*" (emphasis added)

15. Although both Mr Cox and Mr Crane agreed that the question whether an award is binding under s103(2)(f) of the 1996 Act is for the English Court, there was a major dispute between them as to the proper approach of the English Court in determining that issue. I consider this further below but at this stage, I would simply note that there is nothing in the 1996 Act or the Convention which provides any direct assistance in this regard and refer to the analysis of Burton J in *Dowans.* The facts in that case are important. In summary, the claimants in that case were the successive assignees of a certain agreement with the defendant who asserted that the agreement was void ab initio. This was treated as repudiatory by the second claimant. The dispute was referred to arbitration under the ICC Rules and resulted in an ICC award which held that the agreement was valid and that the defendant was liable to pay some US$65 million plus interest and costs. Following publication of the ICC award, it was filed with the High Court of Tanzania under s17 of the Tanzanian Arbitration Act which provided: "*An award on a submission on being filed … shall, unless the court remits it to the reconsideration of the arbitrators or umpire or sets it aside, be enforceable as if it were a decree of the court.*" The defendant then issued various petitions before the Tanzanian court challenging such filing and seeking to have the ICC award set aside or remitted for reconsideration. At the time of the hearing before Burton J (July 2011), the petition was due to be determined some months later i.e. in September 2011 with the possibility of an appeal which would take between 9 and 18 months.

16. The first main issue in *Dowans* was: Did the fact that there were pending petitions to set aside the ICC award in the home jurisdiction (Tanzania) mean that the award was *not yet binding* within the meaning of s103(2)(f)? In the event, Burton J held that the ICC award in that case was binding. His reasons for reaching that conclusion are set out at paragraphs 12-27 of his Judgment, which I do not propose to repeat. In summary, although Burton J accepted that the ICC award was not binding in its home jurisdiction of Tanzania because of the unresolved petitions, he accepted the submissions on behalf of the claimants that this had no relevance as a matter of English law to the question whether or not the ICC award was binding under s103(2)(f). In reaching that conclusion, he referred at [15] to the early debate following the Convention as to whether the relevant test as to the award being binding fell to be decided by reference to the local law (of the home jurisdiction) or by reference to the *autonomous* interpretation of the Convention. In that context, he referred extensively to the views expressed by Professor Van den Berg ("VDB"), who was a strong supporter of the *autonomous* interpretation as well as other authorities in England and abroad and concluded [24] that this represented the predominant international view. I respectfully agree with that analysis and the conclusion reached by Burton J on the facts in that case.

17. However, in my view, the sentence which I have quoted above from paragraph 24 of the Judgment of Burton J and which was heavily relied upon by Mr Cox must be read carefully and in its proper context. In particular, I do not consider that Burton J intended to say that in reaching its own decision as to whether an award is binding, the English Court will never have regard to the law of the arbitration agreement or the curial law of the seat of the arbitration. This seems tolerably clear from what appears in paragraphs [17]-[18] of the Judgment in *Dowans*:

> "*The VDB view that there was and should be an autonomous interpretation of binding, is best analysed by differentiating between ordinary recourse and extraordinary recourse. The former, which may not be permitted by the terms of the relevant agreement between the parties or the law governing the arbitration, would ordinarily be subject to a time limit, after which no such ordinary recourse (if otherwise available) would be permitted. Then there is the possibility of extraordinary recourse, which would be some limited challenge to the award, in the courts of its home jurisdiction, by reference to the restrictive terms of the New York Convention. Once ordinary recourse is excluded, the possible availability of extraordinary recourse does not prevent an award from being, or having become, binding. Mr Diwan submits that, although it is clear that there was sufficient discussion before the finalisation of the terms of the New York Convention to prevent any such agreed definition being included in the Convention, Article 31 of the Vienna Convention allows for such commonsense and logical interpretation of the Convention notwithstanding.*
>
> *Such autonomous interpretation is entirely consistent with the admitted purpose of ending the need for a double exequatur, and is inconsistent with any extension of the idea that an award is "lifeless", as per paragraph 14 of ONGC, until enforced by its country of origin, except insofar as that can be interpreted as simply referring to enforcement within that country.*" *(Emphasis added)*

18. As it seems to me, Burton J was there espousing the view expressed by VDB that there was an important distinction between "ordinary recourse" and "extraordinary recourse"; and recognising that although the possibility of the latter does not prevent an award being binding under the Convention (and also s103(2)(f) of the 1996 Act) that is not so (or at least not necessarily so) with regard to the former. Of particular importance, in my view, is the conclusion reached by Burton J in [26] when he states: "*As I conclude, the binding effect of an award depends upon whether it is or remains subject to ordinary recourse. Once it is binding, it does not cease to be so as a result of some event in the home jurisdiction; and the absence of such impediment does not make it so.*" As I read the Judgment in *Dowans*, the proceedings before the Tanzanian Court to set aside or to remit the ICC award were, in effect, treated by Burton J as "extraordinary recourse" and it was for that reason that he concluded that such proceedings were irrelevant for the purposes of enforcement as a matter of English law under s103 of the 1996 Act. In my view, the result is that if an award is subject to "ordinary recourse", it will not be binding.

19. I fully recognise that there may be a problem of definition i.e. what constitutes "ordinary recourse" as opposed to "extraordinary recourse"; that there may well be a fine line

between the two categories; that the recognition of such a distinction carries with it the potential danger of reintroducing the abandoned "double exequatur" (or at least a modified form of it) by the back door which should be avoided; and that it remains necessary to consider the proper approach as to how the English court should determine whether or not the award is subject to "ordinary recourse". But it seems to me that these problems are inherent in the wording of Article V of the Convention and s103(2)(f) of the 1996 Act.

20. In the present case, Mr Cox submitted that the term "ordinary recourse" refers to "a genuine appeal on the merits" (Wolff, Article V, para 361; and see Redfern & Hunter at 11.85); and that such term is to be contrasted with "extraordinary recourse", which refers to an application to a court to set aside (also called "annulment" or "vacatur") usually on procedural irregularity grounds (for example, under s68 of the 1996 Act). In further support of such submission, he relied in particular on a decision of the High Court of Hong Kong in *Soc Nationale d'Operations Petrolieres de la Cote d'Ivoire v Keen Lloyd Resources Ltd* [2004] 3 HKC 452 and a commentary by VDB where he says:

> "*… it should be observed that the distinction between ordinary and extraordinary means of recourse, as introduced by the Dutch delegate to distinguish between non-final and final awards, is typical for several Civil Law countries, but is unknown in many Common Law countries. Although varying from country to country in the Civil Law world, it can generally be said that ordinary means of recourse connote a genuine appeal on the merits, whilst extraordinary means of recourse are reserved for certain irregularities, especially the procedural ones, tainting a final decision.*"
>
> (van den Berg, NYC, pp334-335)
>
> *At the New York Conference of 1958, the distinction between ordinary and extraordinary means of recourse was proposed for the term binding: the ordinary means of recourse were used for denoting a genuine appeal on the merits of the arbitral award to a second arbitral instance or to a court. Extraordinary means of recourse were reserved for other irregularities, and especially the procedural ones, tainting a final decision.*
>
> *The latter means of recourse were meant to correspond to setting aside or equivalent proceedings. The distinction was proposed in order to make clear that if the award was still open to the possibility of another decision, it was not to be considered "binding", whereas if it was open to the possibility of other means of recourse, this would not prevent the award from becoming binding. The expression "has not become binding in the sense that the award is still open to ordinary means of recourse" was finally not inserted. This must be deemed, however, not to be due to a rejection of the distinction as such. Rather, the expression was rejected because, in various countries, the distinction between ordinary and extraordinary means of recourse did not exist, or existed with different meanings.*
>
> *The essence of the distinction may be deemed to have been retained. This can also be inferred from the text of Article V(l) (e) as the concept behind extraordinary*

means of recourse is covered by the second part of Article V(l) (e) and Article VI which refer to the setting aside of the award. The idea behind the ordinary means of recourse, i.e., the appeal on the merits to a second arbitral instance or to a court, can then be deemed to be covered by the first part of Article V(1) (e), viz., the term "binding".

This distinction has the advantage that it dispenses with the sometimes difficult inquiries under the law governing the award, such as, at which moment it is ready for enforcement under that law, or what may be the equivalent of the term "binding" under that law. It is true that the law governing the award is still to be consulted in order to find out whether it is still open to a genuine appeal on the merits to a court (which is exceptional). However, technically speaking, this is not an inquiry to find out whether the award has become binding under the applicable law, but an inquiry only for the purpose of the term "binding" of Article V(1)(e)."

(van den Berg, NYC, pp342-343)

21. Whilst recognising the distinction between "ordinary recourse" and "extraordinary recourse", I am extremely reluctant to provide any definition of either category; and in my view it would be inappropriate to do so particularly because (i) as appears above, those responsible for drafting the Convention appear to have shied away from such exercise; (ii) the parliamentary draughtsman did not provide any definition of "binding" in the 1996 Act; (iii) it seems unnecessary to do so in the circumstances of the present case; and (iv) even if Mr Cox is right that the term "ordinary course" would embrace a "genuine appeal on the merits", I am not persuaded that the concept of such term should necessarily be defined in such way.

Background

22. Having considered certain features of the statutory scheme and before turning to the main issues, it is convenient to summarise the long and tortuous background to these present proceedings.

23. The original dispute between the parties goes back over 20 years. According to Diag Human, it was by the late 1980s 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; the relationship between Diag Human and the Czech Republic broke down in the early 1990s; the Czech Minister of Health, Martin Bojar, wrote a letter dated 9 March 1992 (the "1992 letter") to Diag Human's business partner, Novo Nordisk (which carried out the essential blood fractionation work); in the letter Mr Bojar expressed wholly unwarranted "concerns" about Diag Human and the ethics of its business; as a direct result of this letter Novo Nordisk felt obliged to terminate its relationship with Diag Human which would otherwise have been maintained until at least 2000; and the Czech Republic thereby destroyed Diag Human's business and caused Diag Human to suffer substantial losses.

24. 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 s2 of law 216/1994 of the Czech Republic (the "Czech Arbitration Act" or "CAA"). That agreement provided for the resolution of the dispute between the parties in respect of compensation for the loss allegedly suffered by Diag Human in connection with the 1992 letter by a tribunal consisting of three arbitrators. Articles I-IV of the arbitration agreement specified the procedure for the appointment of the arbitrators and the conduct of the arbitration.

25. Article V of the arbitration agreement provided in effect for an additional arbitral review process as follows:

> "*The parties have also agreed that the arbitral reward (sic) will be submitted to a review by other arbitrators whom the parties appoint in the same manner if an application for review has been submitted by the other party within 30 days from the date on which the applicant party received the arbitral award. Articles II-IV of this agreement apply similarly to the review of the arbitral award. If the review application of the other party has not been submitted within the deadline, the award will enter into effect and the parties voluntarily undertake to implement it within the deadline to be determined by the arbitrators, in default of which it may be implemented by the competent court.*"

It was common ground that such review process was permissible under the law of the Czech Republic as confirmed and reflected in ss27 and 28 of the CAA which provide in material part as follows:

> "*27. The parties shall be free to agree in the arbitration agreement on the review of the award done by other arbitrators upon application of any of them or both of them. Unless otherwise agreed in the arbitral agreement such application for review shall be sent to the other party within thirty (30) days after service of the arbitral award on the applicant. The review of an award shall be part of the arbitral proceedings to which the provisions of this Act shall apply accordingly.*
>
> …
>
> *28(2) Upon being served the award that is not subject to review under Section 27 hereof or in respect of which the term for lodging the application for revision under section 27 expired without such application being lodged, shall become legally valid and enforceable by the Courts of law.*
>
> …"

26. It was common ground that the review process reflected in these provisions of the CAA and expressly provided for in Article V of the arbitration agreement was properly characterised as being in the nature of "ordinary recourse"; and that (subject to one important caveat) provided a party submits to the other party an application for review

within the stipulated deadline (that is to say a valid review application authorised by or on behalf of the requesting party) the award in question will not become binding upon the parties until the review process is determined.

27. Pursuant to the arbitration agreement, the arbitral tribunal was duly constituted and subsequently issued an Interim Award dated 19 March 1997. Thereafter, this Interim Award was subject to the review process referred to in Article V. This resulted in a Review Interim Award dated 27 May 1998. Thereafter, the tribunal issued a further Partial Award dated 25 June 2002. This again was subject to the review process in Article V resulting in a Review Partial Award dated 17 December 2002.

28. For present purposes it is sufficient to note that the Review Partial Award upheld Diag Human's claim that it had suffered loss by reason of the 1992 letter and decided that such loss amounted to a *minimum* amount of CZK 326,608,334 (approximately £11m) with the interest due on this initial sum and any remaining loss to be quantified in a Final Award if not agreed. The initial sum was paid by the Czech Republic on or about 16 January 2003.

29. In the course of the present hearing, Mr Cox provided the court with a written summary of what he described as the history of the Czech Republic's representation in the arbitration proceedings. It is unnecessary to set out the details. For present purposes, it is sufficient to note that from the start of the arbitration proceedings, various individuals were specifically designated to represent the Czech Republic in the arbitration proceedings; that, in particular, on 6 November 2007, the new Minister of Health (Dr Tomas Julinek) confirmed in a letter to Mr Kalvoda (Diag Human's representative) that the "exclusive representative" of the Czech Republic was the Office of Government Representation in Property Affairs ("OGRPA"); and that on 18 January 2008, JUDr Jan Herda (of OGRPA) was the Czech Republic's representative.

30. Thereafter, the arbitral tribunal issued its Award (described as a "Final Award") dated 4 August 2008 which is the subject of these proceedings in which it determined that the Czech Republic was liable to pay Diag Human further sums as follows:

> "*(1) CZK 4,089,716,666.00 in damages;*
>
> *(2) Interest of CZK 4,244,879,686.00 for the period from 1 July 1992 to 30 June 2007;*
>
> *(3) Interest of CZK 1,287,877.00 per day starting on 1 July 2007 until payment;*
>
> *(4) Interest on CZK 58,130,213.00 from 15 July 2007 at the Czech National Bank repo rate on 1 January and 1 July of each year for the respective half calendar year thereafter plus 7% until payment.*"

31. The value of this Award is approximately £135m in damages and £140m in interest plus further interest accruing daily.

32. In passing, I note that in both this Award and the earlier awards, the arbitral tribunal made significant criticisms of the Czech Republic with regard to its conduct in the

arbitration. In particular, Mr Cox drew my attention to references in these awards to (i) what the tribunal referred to as an "*overt threat to the arbitrators*" by the Czech Republic; and (ii) the fact that the Czech Republic adopted inconsistent positions, repeatedly attempted to challenge the arbitrability of the dispute even though the question had been decided by the Panel, improperly procured evidence from a Parliamentary Enquiry Commission; and procured police interference. These criticisms are disputed at least in part by the Czech Republic and are the subject of certain evidence before the court. However, in my view, they do not bear on anything that I have to decide in these proceedings and I propose to say nothing more about them. For its part, the Czech Republic makes various criticisms of Diag Human's conduct in relation to the proceedings. In my view these criticisms are equally irrelevant to anything I have to decide; and similarly I say nothing more about them.

33. Following the publication of the Award, both the Czech Republic and Diag Human sought to invoke the review process as set out in Article V of the arbitration agreement.

The Czech Republic's application for review

34. For its part, the Government of the Czech Republic pronounced a Decree No 1068 dated 20 August 2008 which, amongst other things, provided in material part as follows:

> "*The Government:*
>
> I. *Takes Notice of the proposal for further actions in the matter of the dispute for compensation of damages between Diag Human SE and the Czech Republic – Ministry of health in relation to the issuance of the Final Arbitration Award contained in Part III of the document file no. 1278/08;*
>
> II. *Agrees with filing a request for the revision of the Final Arbitration Award issued on 4 August 2008 in the Arbitration Proceedings ad hoc concerning the dispute on damages compensation between Diag Human SE and the Czech Republic – Ministry of Health, file no. Rsp 06/2003.*
>
> III. *Asks the Minister of Health to:*
>
> 1. *Prepare a request for the revision of the Final Arbitration Award*
>
> 2. *Appoint an arbiter in accordance with Article V of the Arbitration Agreement executed between the contracting parties: the Czech Republic – Ministry of Health, and Diag Human SE, pursuant to the provisions of Section 2 of Act no 216/1994 Coll., on Arbitration Proceedings and Execution of Arbitration Awards, as amended, dated 18 September 1996*
>
> 3. *Arrange for the delivery of the request for the revision of the Final Arbitration Award to Diag Human SE, in cooperation with the Minister of Foreign Affairs and the President of the Office of the Government Representation in Property Affairs.*"

This Decree was signed by the Prime Minister of the Czech Republic. It is common ground that this Decree is valid.

35. It is also common ground that shortly thereafter i.e. on or about 22 August 2008, four separate letters were sent purportedly on behalf of the Czech Republic giving notice of its application to review the Award in accordance with Article V of the arbitration agreement; that all these letters were duly received by or on behalf of Diag Human within the deadline stipulated in Article V; and that each letter was on the letter heading of the "Ministry of Health of the Czech Republic" and signed at the bottom of the page by Dr Tomas Julinek, the Minister of Health, above typed wording which reads (in translation): "*Czech Republic – Ministry of Health, MUDr Tomas Julinek, MBA, Minister*". In addition to Dr Julinek's signature on all four letters, three of the letters were also signed by Ing Miloslav Vanek, the General (or Managing) Director of OGRPA immediately underneath Mr Julinek's signature above typed wording which reads (in translation): "*Czech Republic – Office of the Government Representation in Property Affairs, Ing Miloslav Vanek, general director*". As I understand, neither the Ministry of Health nor OGRPA are themselves legal entities but are "part of the State". Notwithstanding such letters signed by both the Minister and Ing Vanek, it is Diag Human's case that neither had any authority to sign such letters on behalf of the Czech Republic and that therefore these letters were, in effect, a nullity.

36. With regard to the fourth letter, the position is somewhat more complicated. It is common ground that this letter was again signed by the Minister purportedly on behalf of the Czech Republic in the same manner as the other three letters and also by Dr Petr Posledni who was an employee of OGRPA at the Prague Office and Mr Vanek's deputy. As appears from the face of this letter, Dr Posledni's signature appears immediately below the Minister's signature and above the same typed wording "*Czech Republic – Office of the Government Representation in Property Affairs, Ing Miloslav Vanek, general director*" and is immediately preceded by the two letters "v.z." which are (it is common ground) equivalent to "p.p.". In essence, it is said by Diag Human that even if Dr Posledni had authority to sign the letter on behalf of the Czech Republic, his signature is properly to be regarded as a signature on behalf of Ing Vanek who had no authority to sign the letter. For these reasons, it is Diag Human's case that this letter too is a nullity.

37. As to Dr Posledni's signature, Mr Cox also relies upon a further point viz that when this fourth letter was sent, it was accompanied by an authorisation letter dated 9 June 2006 signed by Ing Vanek which reads in translation as follows:

> "*Authorization*
>
> *I hereby authorize the following employee of the Office of the Government Representation in Property Affairs (hereinafter referred to as the "Office")*
>
> *JUDr. Petr Posledni, born on 15 June 1962 residing in Babice 136, district of Prague – East*
>
> *First Deputy to the General Director of the Office, who is in charge of the management of activities pertaining to the Regional Department for Prague, to act in terms of making legal acts on behalf of the Czech Republic in matters relating to the Office to the extent of all rights granted to, and duties imposed on, the General Director through Act No. 201/2002 Coll, on the Office of the*

Government Representation in Property Affairs, as well as by the Organizational Rules of the Office as amended.

Further, I hereby authorize the above named person to act on behalf of the Office in all cases where such acts bind the Office to the extent of the authorizations granted by the General Director, as set out by the Organizational Rules of the Office.

The above named person is authorized to deputize for the General Director at the time of his absence to the full extent pursuant to the Organizational Rules.

The above named person is obliged to undersign documents in such a manner that, to the full name and designation of the function of the General Director, he shall attach his own surname and indicate that he acts on behalf of the General Director …"

38. Mr Crane accepts that that is indeed the authorisation letter that accompanied the letter signed by Mr Posledni. However, the evidence before me is that Dr Posledni had a separate authorisation letter also dated 9 June 2006 and signed by Ing Vanek which reads in translation as follows:

> "…
>
> *I hereby authorise the employee of the Office of the Government representation in Property Affairs, the attorney-at-law*
>
> *JUDr. Petr Posledni, born 15 June 1962*
>
> *Residing in Babice 136, district Prague-East*
>
> *for all actions on behalf of the State in the proceedings before Courts, arbitration panels, administrative bodies and other authorities in the cases, in which in accordance with the Act no. 201/2002 Coll. on the Office of the Government Representation in Property Affairs, the State is represented by the Office of the Government Representation in Property Affairs.*
>
> …"

39. In passing, it should be noted that the first authorisation letter ("AL1") in effect purports to give Dr Posledni authority to sign documents on behalf of Ing Vanek; whereas the second authorisation letter ("AL2") gives Dr Posledni what has been referred to as an "all actions" authority on behalf of the Czech Republic.

40. At first blush, it might seem curious (to say the least) that four separate letters were sent. However, the explanation appears from paragraph 270 of the statement of Dr Horacek:

> "*It must be stated that the situation associated with the Arbitral Proceedings is not usual in the Czech Republic and, as far as I am aware, it has not been addressed in any other case in the practice of the OGRPA or of the Ministry of Health. For this reason, I do not find the plurality of legal opinions surprising. Since the Defendant expected that the Claimant would try to take advantage of*

this situation and question the requests for review filed by the Defendant, it took a precautionary measure. That is why there were four requests for the review, all made on the same day but with some different signatories. For reasons of prudence, the requests were signed by (i) the Minister of Health, (ii) the General Director of the Office of OGRPA, and (iii) an employee OGRPA authorised by the General Director to act for the State. All three variants presented in the proceedings before this Court were thus respected. In spite of that the Claimant still tries to contend before this Court that the Defendant did not file effective requests for review."

41. In summary, Mr Cox submitted that all four letters had been sent without the authority of the Czech Republic and that they were all a nullity and ineffective to trigger the review process under Article V of the arbitration agreement. It is convenient to refer to this as the "authority point".

42. In passing, I should mention that the Czech Republic originally asserted that Diag Human waived its right to take this authority point (in particular by appointing its own review arbitrator and thereafter participating in the review process); but Mr Crane informed me that this assertion was no longer being pursued and I say no more about it.

Diag Human's application for review – and withdrawal

43. For its part, shortly thereafter i.e. on 11 September 2008, Diag Human also made its own application to review the Award pursuant to Article V of the arbitration agreement although on 29 March 2010, this was subsequently "withdrawn" by Diag Human. The effect of such "withdrawal" (the "withdrawal point") was hotly disputed by the parties. In particular, Mr Cox submitted that the effect of such withdrawal was to bring the review process automatically to an end. In contrast, Mr Crane submitted that the review process remained extant and would not come to an end until the review tribunal published its own further award or, at least, determined that the review process had come to an end; that neither such event had occurred; and that regardless of the status of the Czech Republic's own application for review, the effect was that the Award was still subject to "ordinary recourse" and therefore not binding for that reason.

Subsequent proceedings in the Czech Courts

44. The arbitrator originally appointed by Diag Human to the review tribunal was a Mr Della Ca. In the event, the third review arbitrator (Mr Kuzel) was appointed by the Prague District Court on 27 November 2008. Thereafter, the evidence before me shows a series of protracted court proceedings over a number of years in the Czech Republic concerning challenges to the constitution of the review tribunal which, even now, have not been finally resolved. Those proceedings have involved serious allegations (including allegations of bias by Diag Human against the courts of the Czech Republic) which it is unnecessary for me to consider in any detail. For present purposes it is sufficient to note that Mr Della Ca resigned citing (according to Diag Human) pressure exerted on him by the Czech Republic; that although Diag Human sought to replace Mr Della Ca with a new

appointee (Mr Baumann), Diag Human says that the Czech Republic objected to such appointment and "pushed" for the appointment of a Mr Schwarz instead, which it achieved; and that the result is that Diag Human has appointed none of the three members of the review tribunal. Diag Human says that this is plainly unfair and in breach of all norms of arbitration; and that, furthermore, it has genuine concerns about the independence of the review tribunal. The Czech Republic denies any improper conduct on its part or that there is any justification in these complaints or concerns; and makes its own complaints with regard to Diag Human's conduct in the review process and what it says have been unfounded allegations in the Czech courts leading to the very substantial delays which have occurred. However, such matters are not relevant to anything I have to decide in these current proceedings.

45. It is unnecessary to say anything more about these protracted proceedings in the courts of the Czech Republic save for one important point relied upon by Mr Crane viz that in the course of its judgment when deciding to appoint a new arbitrator to the review tribunal, the Municipal Court of Prague considered an argument raised by Diag Human that the Award was already "*in legal force and enforceable*" because the review process had not been validly triggered by the Czech Republic (the authority point) and Diag Human had withdrawn its own application for review (the withdrawal point). In this context, the Municipal Court stated (in translation) in material part in its judgment as follows:

> "…
>
> *During the entire proceedings, [Diag Human] also attempted to argue that the Final Arbitral Award was, in principle, in legal force and enforceable and, consequently, the given proceedings could not be held and, in consequence, it was not necessary to appoint another arbiter.*
>
> …
>
> *In contrast, the court was not and is not competent to assess whether or not the arbitration proceedings have been terminated. The final arbitral award was rendered on 4 August 2008 and both parties delivered to each other an application for review of the final arbitral award within a deadline of 30 days and, at the same time, each appointed one arbitrator to the review arbitration tribunal. The Czech Republic appointed Doc JUDr Milan Kindl and Diag Human SE appointed Mr. Damiano Della Ca.*
>
> *While the court considers it proven, based on the evidence taken, that Diag Human SE withdrew its application for review of the Final Arbitral Award on 30 March 2010, however, this can have no effect on the legal force or enforceability of the arbitral award. The court is of the opinion that only the review arbitration tribunal can make a decision on the legal force and enforceability of the Final Arbitral Award, where, in the case of Diag Human SE, it may decide on discontinuation of the review arbitration proceedings and, in the case of the Office for the Government Representation in Property Affairs, the Prague Office, it shall assess the timeliness of its application and whether it was lodged by a legitimate entity; only then may it proceed with hearing the case in rem.*"

46. Thus, Mr Crane submitted that (i) this passage is inconsistent with any suggestion that the Award is binding; (ii) on the contrary, the Municipal Court in effect held that the authority point and the withdrawal point are both issues which are for the review tribunal itself to determine as part of the review process; and (iii) the effect is that unless and until such issues are determined by the review tribunal itself, the Award is the subject of "ordinary recourse" and therefore not binding as a matter of the law of the Czech Republic. As I understand, Diag Human's appeal against this decision was dismissed by the High Court although this particular point was not raised in the course of such appeal. I also understand that a further appeal to the Supreme Court is still pending in the Czech Republic.

47. Meanwhile and pending such further decision of the Supreme Court, the position appears to be that the review tribunal is properly constituted as a matter of Czech law. Although not directly relevant, I should also note that Diag Human has sought to persuade the review tribunal about the lack of validity of the Czech Republic's applications for review and indeed has sought to have this issue determined as a preliminary issue. However, the review tribunal refused to determine this issue as a preliminary issue.

Other enforcement proceedings

48. Although not directly relevant, it is noteworthy that Diag Human has not attempted to initiate any enforcement proceedings in respect of the Award in the Czech Republic. However, it has made various attempts to enforce the Award in other jurisdictions including France, Luxembourg, the USA and Austria. Ultimately, the attempts to enforce in France and Austria have failed. The enforcement proceedings in the USA and Luxembourg are still ongoing. For present purposes, nothing turns on such proceedings apart from the judgment of the Supreme Court of Austria delivered on 16 April 2013 which, as stated above, is relied upon by the Czech Republic as giving rise to an issue estoppel to the effect that the Award is "not binding". By way of background, that judgment was delivered in the context of enforcement proceedings initiated by Diag Human to enforce the Award under the New York Convention against the Czech Republic in Austria. The judgment dealt with a number of issues that are not directly relevant. For present purposes, the relevant part is to be found in Section 3 of the judgment of the Supreme Court which reads in material part (in translation) as follows:

> "…
>
> *3.3 … the issue when an arbitral award is binding pursuant to the New York Convention is in the legal doctrine not by any means indisputable:*
>
> *3.3.1 According to the prevalent opinion (Czernich in B/N/G/S, International Civil Procedure Law, Art. V of the New York Convention, comment 47 with other evidence; other multiple evidence in Solomon, The Binding Nature of Arbitral Awards 97, FN 7), the binding nature of an arbitral award must be stipulated in accordance with the law applied to the respective procedure. According to this procedure, the arbitral award is binding if it complies with all requirements to be acknowledged as enforceable according to the national law.*

3.3.2 The proponents of the autonomous interpretation of the term "binding" hold the opinion that it is only the admissibility of appeal to an arbitration court of a higher instance or to a national court including the review of facts and legal issues (meant not in the sense of annulment, but "complete appeal") which excludes a link to the arbitral ward (evidence in Schlosser, International Private Arbitration, comment 786, FN 7). In doing so, the proponents of the assumption of an autonomous interpretation argue that international enforcement of arbitral award may again depend on double exequatur if the country of origin of the arbitral award links its binding nature to exequatur.

3.4 A more detailed analysis of this issue is, however, unnecessary, because both interpretation options lead to the same result:

3.4.1 In case of an autonomous interpretation of the term "binding", the arbitral award is binding if a due appeal against it to an arbitration court of a higher instance or to a national court with a detailed review from the legal and factual point of view cannot be lodged any more.

3.4.2 The same – which is acknowledged by the Enforcing Party – results from the applicable Czech Arbitration Procedure Act: According to Sections 27 and 28 of the Czech Arbitration Procedure Act quoted in Art. 2.4, an arbitral award which is contested by any of the Contentious Parties requesting review within the due period is not enforceable if – like in the case concerned – the Arbitration Agreement provides for such review.

3.4.3 The arbitral award is thus formally binding (only) when all procedural acts have been conducted in order for the arbitration court to be able to make a final decision concluding the arbitration procedure. If an appeal to an arbitration court of the "second instance" is admissible within arbitration procedure selected by the Contractual Parties, the dispute has not been finally decided according to the system of dispute settlement which was selected by the Contractual Parties and which is relevant for them. The lack of binding nature can be obviously deduced from Art. V of the Arbitration Agreement. If an application for review is not filed, "the finding (meaning: the arbitration award) shall become legally effective and the Contractual Parties shall be voluntarily obliged to enforce it within a period defined by arbitrators". Herefrom clearly arises the suspensive effect of the submitted application for review.

The arbitration procedure of the first and higher instance represents a single procedure aiming at the arbitration court issuing a decision which would conclude the arbitration procedure altogether. Just as the decision of the national court which can still be challenged is not final yet in that it may be repealed in a national procedure by a higher instance, the decision of the "first instance court" may be – also here – rejected or changed within the system of dispute settlement by arbitration courts.

Consequently, an arbitral award issued by a first instance arbitration court can – as long as it can be challenged by a higher arbitration court – neither be enforced nor rejected by a national court. Only when an appeal to the higher arbitration court, especially due to expiration of period, is not possible, the arbitral award of

the first instance becomes "formally legally effective" (Solomon, The Binding Nature of Arbitral Awards in International Private Arbitration, 390 to 392; also Torggler, Code of Practice 265; Czernich in B/N/G/S, International Civil Law Procedure, Art. V of the New York Convention, comment 48).

3.4.4 The fact that the application for review of arbitral award, provided for in the respective Arbitration Agreement, results in a "complete" review of arbitral award also in terms of facts, arises from the reference in Art. V of the Arbitration Agreement to Art. II to IV of the Agreement (in particular reference to Art. IV which regulates the manner of adducing evidence).

3.4.5 Based on this, the indisputable facts, that within the period of 30 days an application for review was filed on behalf of the Obligated Party and the Supreme Court of the Czech Republic stipulated a Czech court competent to appoint the third arbitrator, lead to the conclusion that the arbitral award is not binding;

The fact whether the application for review filed in due time was submitted by a representative of the Obligated Party authorized hereto shall be exclusively decided by the higher arbitration court. The same applies to the issue whether the possible lack of representation upon filing the application for review underlies to a corrective procedure.

Thus, as long as the higher arbitration court convened in due time does not reject the application for review of the Obligated Party or, having reviewed the facts of the first instance arbitral award, the higher arbitration court fully (or partially) preserves it, the arbitration proceeding has not been concluded and the arbitral award is thus not binding yet.

3.5 An analysis of the comprehensive and varied submission on the issue who was competent to represent the Obligated Party in filing the application for review is therefore not necessary. This issue shall be rather clarified by the reviewing arbitration court.

4. The decision of the appellate court shall thus be confirmed: In view of lacking enforceability of the arbitral award, the application for distraint was validly rejected."

49. The effect of this judgment is dealt with in the witness statement of Mr Hasberger, the lawyer acting for the Czech Republic in the Austrian enforcement proceedings. In summary, his evidence is that this judgment determined that the Award had not yet become "binding" on the parties within the meaning of Article 1(e) of the New York Convention; and that it was a decision on the merits of that question binding on the parties i.e. Diag Human and the Czech Republic.

50. Against that background, I deal with the main issues which can conveniently be considered under three main heads viz (i) issue estoppel; (ii) if there is no issue estoppel, whether or not the Award is in fact "binding"; and (iii) partial enforcement.

Issue Estoppel

51. As stated above, Mr Crane submitted that the decision of the Supreme Court of Austria created an issue estoppel in favour of the Czech Republic that the Award was not binding.

52. In support of that submission, Mr Crane submitted that since the decisions of the House of Lords in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 AC 853 and the *Sennar (No. 2)* [1985] 1 WLR 490, it has been trite law that a decision of a foreign court on an issue can give rise to an estoppel *per rem judicatam* on that same issue in later proceedings between the same parties (or their privies) provided (i) the foreign court is recognised under English private international law as a court of competent jurisdiction; (ii) its decision on the issue is final and conclusive; and (iii) the decision was "on the merits". As to the last of these requirements, Mr Crane reminded me of the speeches of Lords Brandon and Diplock in *The Sennar (No. 2)* which, he submitted, cleared up any confusion as regards the meaning, in this context, of a decision "on the merits". Rather:

> "*Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned. If the expression "on the merits" is interpreted in this way, as I am clearly of opinion that it should be, there can be no doubt whatever that the decision of the Dutch Court of Appeal in the present case was a decision on the merits for the purposes of the application of the doctrine of issue estoppel.*" [Lord Brandon @ p499 F]

And per Lord Diplock at 494 A/B

> "*It is often said that the final judgment of the foreign court must be "on the merits". The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has Jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate Jurisdiction although it may be subject to appeal to a court of higher Jurisdiction.*"

53. Mr Crane also referred me to the observations of Lord Diplock at p493H to the effect that if the relevant conditions are made out, it is immaterial that an English court would regard the reasoning of the foreign court as open to criticism. Indeed, it is irrelevant that an English court subsequently faced with the same issue might take the view that the decision of the foreign court was wrong either on the facts or as a matter of English law. This proposition was affirmed by the Court of Appeal in *The Good Challenger* [2004] 1 Lloyd's Reps 67 a case in which the authorities on issue estoppel were reviewed and the following principles set out:

"*The authorities show that in order to establish an issue estoppel four conditions must be satisfied, namely (1) that the judgment must be given by a foreign court of competent jurisdiction; (2) that the judgment must be final and conclusive and on the merits; (3) that there must be identity of parties; and (4) that 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: see, in particular Carl Zeiss Stiftung v Rayner C Keeler Ltd (No 2) [1967] 1 AC 853 ("the* Carl Zeiss*" case), The Sennar (No 2) [1985] 1 WLR 490*" [Clarke LJ @ para 50 of the judgment]

And later, at paragraph 54:

"*The authorities establish that there must be "a full contestation and a clear decision" on the issue in question. That is made clear in the speech of Lord Wilberforce in the Carl Zeiss case and (as the judge observed in paragraph 36) was echoed by Lord Brandon in The Sennar (No 2). The cases also underline four further important features of the approach of the courts to issue estoppel, which I will consider in turn. They are as follows:*

i) It is irrelevant that the English court may form the view that the decision of the foreign court was wrong either on the facts or as a matter of English law.

ii) The courts must be cautious before concluding that the foreign court made a clear decision on the relevant issue because the procedures of the court may be different and it may not be easy to determine the precise identity of the issues being determined.

iii) The decision of the court must be necessary for its decision.

iv) The application of the principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice."

54. I did not understand Mr Cox ultimately to disagree with any of the foregoing save that he emphasised (rightly in my view) that consistent with the observations of Lord Reid and Lord Wilberforce in *Carl Zeiss* at p918C and 967A-E respectively and Clarke LJ in *The Good Challenger* at [54], special caution is required before a foreign judgment can be held to give rise to an issue estoppel.

55. However, I should mention that Mr Cox originally advanced a very broad proposition that in proceedings to enforce under the New York Convention issue estoppel cannot arise from decisions in other states on enforcement itself. In particular, Mr Cox submitted that this is because any decision made for the purposes of enforcement in those states are *ex hypothesi* not for the purposes of enforcement in England and because the tests may differ even if described the same. In support of such submission, Mr Cox relied in particular on a decision of a Spanish Court in *Pavan s.r.l. v. Leng d'Or, SA,* Exequatur No. 584/06, 11 June 2007 Juzgado de Primera Instancia e Instrucción [Court of First Instance] No. 3 (reported in Yearbook of Commercial Arbitration 2010, Vol XXXV (Kluwer 2010), pp.444-447). Thus, Mr Cox originally submitted that just as questions of arbitrability and of public policy may be different in different states, so too there may be

different tests applied as to the meaning of "binding" and the meaning of an "autonomous" approach. Further, Mr Cox submitted that the New York Convention contemplates an award creditor seeking to enforce in multiple jurisdictions and that forum shopping is in fact a fundamental characteristic of the Convention regime. In that context, he relied on the following passage in Redfern & Hunter:

> "*11.26 Where, however, the successful party in an arbitration is seeking to enforce an award, the position is different. The first step is to determine in which country or countries enforcement is to be sought. To reach this decision, it is necessary to locate the State or States in which the losing party has (or is likely to have) assets available to meet the award. This usually calls for careful (and possibly difficult) investigative work. If enquiries suggest that assets are only likely to be available in one State, the party seeking enforcement of the award has no choice: for better or worse, he must seek enforcement in that State. Where there is a choice, the party seeking enforcement is able to proceed in one or more places as seems appropriate …*
>
> *11.30 If, as often happens in international commerce, assets are located in different parts of the world, the party seeking enforcement of the award has a choice of country in which to proceed—a chance to go 'forum shopping', as it is sometimes expressed. In looking for the appropriate forum, not merely the location of assets but also the other factors already mentioned (such as the attitude of the local courts, the adherence of the target country to the New York Convention, and so on) must be taken into account.*"

56. In addition, Mr Cox submitted that the recent judgment of the Court of Appeal in *Lombard Knight v Rainstorm* [2014] EWCA 356 confirms that different outcomes in different jurisdictions are to be expected. As Tomlinson LJ said at [44]: "*It may well be that there is not absolute uniformity of approach to the Convention requirements. It would perhaps be surprising if there were …*"

57. Accordingly, Mr Cox originally submitted that the conclusion must be that unless there are some very specific circumstances, issue estoppel is simply not an argument that can be run to prevent enforcement in England.

58. As formulated, I do not accept Mr Cox's broad proposition. Certainly, it is not supported by any authority. In particular, the dictum of Tomlinson LJ in *Knight-Lombard* is concerned with the limited question of "certification" in different jurisdictions. As such, it is hardly surprising but, in my view, it does not assist Mr Cox's broader proposition. Of course, I agree that, as stated in Redfern & Hunter, any party seeking to enforce a New York Convention award will almost certainly need to consider very carefully the appropriate forum; and, as part of that exercise, the claimant will no doubt consider various matters including the location of assets, the attitude of the local courts and the adherence of the target country to the New York Convention. I also readily accept that questions of arbitrability and of public policy may be different in different states and that a decision in a foreign court refusing to enforce an award under the New York Convention on public policy grounds of that state will not ordinarily give rise to an issue

estoppel in England. Indeed, that was the basis of the decision of the Court of Appeal in *Yukos Capital v Rosneft Oil* [2013] 1 WLR 1329.

59. However, in circumstances where a foreign court decides that an award is not "binding", I see no reason in principle why that decision should not give rise to an issue estoppel between the parties provided, of course, that the other conditions referred to above apply. In particular, provided that the issue is the same and that the decision can properly be said to be "on the merits", it does not seem to me that the fact that such decision was made in the context of enforcement proceedings as opposed to any other type of proceedings can, of itself, be material. Indeed, that is consistent with the view expressed in the leading textbook, *Dicey, Morris & Collins*, The Conflict of Laws, 15th Ed para 14-122 referring to *Owens Bank v Bracco* [1992] 2 AC 443 at pp470-F-472E and *House of Spring Gardens Ltd v Waite* [1991] QB 241. It also seems implicit in the decision of the Court of Appeal in *Yukos Capital v Rosneft.* In the event, I understood Mr Cox to concede that this was indeed the case i.e. he accepted that there was no reason why issue estoppel may not, in an appropriate case, arise from rulings made by a foreign court in the course of enforcement proceedings including enforcement proceedings under the New York Convention.

60. However, Mr Cox maintained his position that no issue estoppel arises in the circumstances of the present case. As to this point, I have already set out at some length the relevant passage of the judgment of the Supreme Court of the Czech Republic and summarised Mr Hasberger's evidence. Further, Mr Crane submitted in summary as follows:

    i) The decision that the Award is not binding on the parties until the review proceedings are determined, dismissed or abandoned was necessary and fundamental to the Supreme Court's decision not to enforce the Award.

    ii) The Supreme Court was applying the New York Convention in particular, Article V which took direct effect in Austrian law upon ratification of the treaty by the Republic of Austria in 1961 and which made it obligatory to enforce the award unless the Czech Republic proved that it had not become "binding".

    iii) The reasoning of the Supreme Court was clear in this and other respects – it is to be noted in particular that the Supreme Court identified a legal question as to whether "binding", as a term in an international treaty, was possessed of an autonomous meaning or was to be interpreted in accordance with Austrian law; but held that whichever approach was followed, the result was the same.

    iv) This was plainly a decision upon the merits of the question whether in the circumstances which pertained then and pertain now the Award had become binding on the parties.

    v) Consistent with the authorities referred to above, whether this Court considers the reasoning underlying that conclusion to be right or wrong is irrelevant. It is accordingly

no answer to a plea of estoppel to criticise the decision of the Supreme Court of Austria for concluding as it did without itself deciding whether under Czech law the submission of the requests for review were properly authorised - and if not what the consequences would be under Czech law. As the supervisory courts of the seat have already observed, this is an issue for the review tribunal to determine in the course of the review proceedings. Correctly or not, the Supreme Court concluded that the Award was not yet binding upon the parties. That is precisely the question in issue on this application.

vi) As to whether the estoppel works justice in this case, the argument is all one way. There is current unanimity amongst the courts of New York Convention states which have adjudicated the matter that the Award is unenforceable. Uniformity of approach is highly desirable in applying an international convention of this nature. Moreover, it is inescapable that Diag Human would long since have obtained an award from the review tribunal had it accepted the appointment of the third arbitrator by the supervisory courts of the seat and simply got on with it. The Czech Republic is a member of the European Union and a modern democracy – all suggestions of malpractice by Mr Kalvoda in his various witness statements are strenuously refuted in the evidence of Mr Horacek and are utterly irrelevant.

61. In the event, Mr Cox accepted that the decision of the Supreme Court was "on the merits". However, the main thrust of his submission was that no issue estoppel arises in the present case because the issue determined by the Supreme Court of Austria was different from the issue presently before this court. In particular, he submitted that the Supreme Court did not decide the essential question which he submitted this court must decide in the context of s103(2)(f) of the 1996 Act viz whether there is in fact a valid review in process as contemplated by Article V of the arbitration agreement. In summary, the nub of Mr Cox's submission was that by virtue of the authority point and/or the withdrawal point, there is in fact no valid review in process – a point which the Supreme Court failed to consider at all; that such consideration is essential as a matter of English law to a determination as to whether the Award is binding under s103(2)(f) of the 1996 Act; and that therefore the decision of the Supreme Court says nothing about the issue which arises in the context of these present English proceedings.

62. I do not accept that submission. There is no doubt that Diag Human's argument that there was in fact no valid review in process and that the Award was therefore binding for that reason was raised before the Supreme Court – as I understood Mr Cox accepted. However, that argument was, in effect, rejected by the Supreme Court. In any event and bearing fully in mind the importance of caution in interpreting any judgment of a foreign court, there is no doubt, in my view, that the issue actually determined by the Supreme Court was that the Award was not binding. It is true that that decision was reached in the context of enforcement proceedings brought pursuant to the Convention which is, as I understand, in effect directly enforceable in Austria whereas the present enforcement proceedings are brought pursuant to s103 of the 1996 Act. However, in my view, that is a distinction without a difference given the background to that statutory provision and the fact that its purpose is to give statutory effect in this jurisdiction to the Convention; and I did not understand Mr Cox to suggest otherwise. In my judgment, that is sufficient to

give rise to an issue estoppel to such effect i.e. the Award is not binding. As submitted by Mr Crane, Mr Cox's complaint is in truth that the decision of the Supreme Court is wrong as a matter of English law if not as a matter of Austrian law; but as stated above, it is irrelevant whether this court might consider such decision was wrong on the facts or as a matter of English law. For the avoidance of doubt, any overriding consideration that the application of the principles of issue estoppel must work justice rather than injustice does not, in my view, lead to any different consideration.

63. My conclusion on issue estoppel is determinative of this application in favour of the Czech Republic. However, in case I am wrong, I go on to consider the further issues on the basis that there is no issue estoppel.

Is the Award binding ?

64. For the reasons already stated, it is my conclusion that if the Award is the subject of "ordinary recourse", it is not binding for the purposes of s103(2)(f) of the 1996 Act. The question remains as to how this court should approach that issue.

65. Mr Crane submitted that irrespective of any question of issue estoppel, this court should, in effect, adopt the same approach as that adopted by the Supreme Court of Austria ie by asking itself whether there is a process of ordinary recourse currently pending. Although that is not the precise wording referred to by the Supreme Court, nevertheless Mr Crane submitted that this was the test essentially adopted by that Supreme Court when it referred to there being a "complete appeal" and a "complete review of the arbitral award" in paragraphs 3.3.2 and 3.4.4 of its Judgment.

66. In essence, Mr Cox submitted that this was, as a matter of English law, the wrong approach given that his case was that there was no review actually pending because (i) the effect of the authority point was that the Czech Republic had not properly triggered the review process and (ii) Diag Human had withdrawn its own application for review. In such circumstances, Mr Cox submitted that in considering whether or not the Award is binding, it is necessary for this court to determine for itself whether or not the authority point and/or the withdrawal point are valid as a matter of Czech law. Further, he submitted that this issue had to be determined at this stage on the ordinary civil standard i.e. balance of probability; that there was no question of adopting any other test (e.g. "good arguable case") or otherwise adjourning that question pending, for example, a determination of the courts of the Czech Republic or the review tribunal itself on these issues; and that although the latter course might be appropriate pursuant to s103(5) of the 1996 Act in circumstances where there is an application to set aside or to suspend an award, the 1996 Act does not permit the court to adjourn the enforcement proceedings if there is a dispute as to whether the award is or is not binding even where there are pending proceedings elsewhere to determine that issue. In other words, it was Mr Cox's submission that this court must decide that issue one way or another at least as a matter of English law.

67. As formulated, I do not accept that submission at least in the circumstances of the present case. As submitted by Mr Crane, it seems to me that the Municipal Court of Prague has determined that both the authority point and the withdrawal point are to be resolved by the review tribunal itself; that therefore the Award is properly described as being subject to a process of "ordinary recourse"; and that, for that reason, the Award is not binding for the purposes of s103(2)(f) of the 1996 Act. In my view, the decision of the Municipal Court constitutes an issue estoppel to such effect which is binding on the parties; and it is trite law that in the ordinary course, any issue estoppel is unaffected by any pending appeal.

68. At one stage of the argument, I understood that Mr Cox conceded that the review tribunal had the jurisdiction to determine both the authority point and the withdrawal point and would do so as part of the review process. However, in the event, Mr Cox clarified the position of Diag Human i.e. that the review tribunal has no jurisdiction to determine the withdrawal point. In that context, he drew my attention to paragraphs 70-71 of the report of Professor Zoulik and paragraphs 313-323 of the report of Professor Belohlavek. I acknowledge that this argument is not entirely straightforward. However, even if there is no issue estoppel, it seems to me that contrary to the views of Professor Zoulik and Professor Belohlavek, the decision of the Municipal Court supports the conclusion, on a balance of probability, that as a matter of the law of the Czech Republic, both the authority point and the withdrawal point are to be determined by the review tribunal itself; and that such conclusion is consistent with the general principle that a tribunal in an international commercial arbitration has the power to consider its own jurisdiction: see, for example *Dallah* per Lord Collins at [84].

69. Notwithstanding, Mr Cox advanced a further argument in this context viz even if the review tribunal did have jurisdiction to determine the authority point and the withdrawal point, nevertheless it does not follow that it has the exclusive power to determine its own jurisdiction, a point which Lord Collins himself made in *Dallah* [84]. However, even accepting that submission formulated in that way, it does not seem to me to assist Mr Cox in the present context which is concerned with the question whether or not the Award is binding. In other words, if it is right as a matter of Czech law that the review tribunal has jurisdiction to decide the authority point and the withdrawal point then it seems to me that it must necessarily follow that the Award is subject to "ordinary recourse" and therefore not binding.

70. If I am right as to the proper approach under s103(2)(f) of the 1996 Act and my conclusion as stated above, that is a further and sufficient reason to uphold the present application in favour of the Czech Republic.

71. However, if I am wrong, I turn to consider Mr Cox's further submission that by virtue of the authority point and the withdrawal point, the review process has not been triggered or has come to an end and that the Award is therefore binding. I approach these issues with some diffidence not only because they depend upon a detailed consideration of the law of the Czech Republic of which I have no personal expertise but also because I am very conscious that every tribunal that has so far been faced with these issues has shied away

from attempting to resolve them one way or another – as well as also for a number of other specific reasons.

72. First, it is extremely regrettable that the points raised in this context by reference to the law of the Czech Republic were never the subject of any proper pleading. The explanation for this omission probably lies in the form in which the application comes before the court although it seems to me that this is a matter which could and should have been raised and addressed at an earlier stage of the proceedings. The result is, in my view, most unsatisfactory. Both parties have served very lengthy reports from experts on the law of the Czech Republic extending (with exhibits) to many hundreds of pages viz Diag Human served reports from Professor JUDr Frantisek Zoulik CSc (who sadly passed away after service of his report) and Professor Dr et Mgr Ing Alexander Belohlavek Dr.h.c and the Czech Republic served reports from JUDr Ales Gerloch Csc and Professor JUDr Vladimir Balas CSc. All these individuals have very impressive cvs and are plainly eminent lawyers in the Czech Republic. There is no doubt that such reports must have taken a large amount of time and effort to prepare and contain much learning; and I would like to extend my thanks to these experts for the assistance which they have provided. However, as appears below, the essential issues boil down to a number of discrete points; and although these are, of course, important, I am sure that they could have been addressed much more succinctly to the benefit of both parties – and the court – if the parties had each served a properly pleaded statement of case.

73. Second, although the experts have provided extensive written reports, their native language is Czech not English and it is sometimes not easy to follow the meaning of the text.

74. Third, the subject matter involves matters of local procedure before the courts of the Czech Courts which is not familiar territory to an English lawyer.

75. Fourth, there is a number of major points on which the experts expressed fundamentally different views based on broad assertions by one or other expert (or both) the foundation for which was at least sometimes difficult to discern or otherwise to justify on any rational basis at least from the perspective of an English lawyer.

76. Fifth, although it was originally intended that there would be oral evidence from Professor Belohlavek and Professor Balas, I was informed on the first day of the hearing that Professor Belohlavek had fallen ill and was unable to give oral evidence. In the event, the parties agreed to proceed without calling any oral evidence. In order to avoid an adjournment, that was no doubt entirely sensible. However, the result was there was no oral evidence as to the law of the Czech Republic and, in particular, no cross-examination of the material in the reports of the legal experts which would, I think, have been particularly useful in the present case. Be all this as it may, I would like to repeat my thanks to the experts and, in particular, to the Joint Statement prepared by Professor Belohlavek and Professor Balas which I found most helpful in identifying the relevant issues.

77. Turning then to a consideration of the law of the Czech Republic, I am bound to say that I was and remain somewhat confused as to Mr Cox's submissions in this regard. I originally understood him to accept that the Minister and Ing Vanek each had the necessary actual authority individually to sign and to submit the applications for review on behalf of the Czech Republic pursuant to Article V of the arbitration agreement save to the extent that such authority was otherwise "carved out" or removed; and that such general actual authority derived in both cases from s7 of the Representation of the State Act and, so far as the Minister is concerned, additionally from the specific Decree dated 20 August 2008 which I have already quoted above. However, following circulation of this judgment in draft, he informed me that this was not the case and clarified Diag Human's position as follows. As to the Minister, Diag Human's submission was that the Ministry may act for the State or in some cases the OGRPA may act for the State (not both, and the latter only in some cases). The Minister is permitted to act for the Ministry where permitted by the Act on State Property and that may be not at all. The carve out is that in certain cases OGRPA must act. This was such a case. Also, Diag Human did not accept that the Decree gave the Minister a general authority. As for Ing Vanek, Diag Human's position was that he was authorised to act on behalf of OGRPA, but not to act on behalf of the State before courts or arbitration bodies which included making a request pursuant to Article V.

78. In this context, Mr Cox relied, in particular, on Law 201/2002 ("Law 201") which established the OGRPA and provided (in translation) in material part as follows:

> "*Act 201/2002….*
>
> *On the Office of the Government Representation in Property Affairs*
>
> *…*
>
> *PART ONE*
>
> *…*
>
> *CHAPTER II*
>
> *EXCLUSIVE JURISDICTION OF THE OFFICE*
>
> *Sec. 2*
>
> (1) *In cases and subject to the conditions stipulated by this Act, the Office shall represent the State in proceedings before courts, Arbitration Bodies, administrative authorities, and other bodies in matters concerning the state's property (hereinafter referred to as "property") in the stead of the organisational units 2) authorised to manage that Property pursuant to a special legal regulation 3) (hereinafter referred to as "Relevant Organisational Units").*
>
> (2) *When representing the State pursuant to paragraph 1, it shall act on behalf of the State. Its actions shall include all procedural tasks that could be executed in the proceedings by the Relevant Organisational Unit pursuant to a special legal regulation.*
>
> *Sec. 3*

(1) *The Office shall act (Sec 2) in the following proceedings…*

...

(b) Before…arbitration bodies, in matters concerning financial performance in excess of CZK 50,000,000 and in commercial matters of CZK 250,000,000.

PART TWO

ORGANISATION AND MANAGEMENT OF THE OFFICE AND THE STATE EMPLOYEES WORKING AT THE OFFICE

Sec. 14

(1) *The Office shall carry out its activities (…) through its regional offices operating at the seats of the regional courts and in the City of Prague, for the territorial districts of the regional courts and for the territory of the City of Prague. The regional offices shall also perform other tasks pursuant to this Act [Sec 1(2)(c)].*

(2) *When a regional office carries out the activities of the Office or performs other tasks pursuant to this Act (paragraph 1), the mailing address shall always be the address of that regional office.*

(3) *The Office is led by its Director General, who is appointed and recalled from his position by the Minister of Finance; the Director General discharges his function within an employment relationship.*

…

Sec. 16

(1) *Only natural persons may be employees of the Office (hereinafter referred to as "Office Employees") who possess integrity, are citizens of the Czech Republic, and possess full capacity to engage in legal acts. The condition as to integrity cannot be met by a person who has been finally convicted of an intentional crime and whose sentence was not expunged.*

(2) *A qualification requirement for an Office Employee who is to engage in activities stated in the provisions of Sec. 3, 4, 6, 7, 9, 11, 13, 13a, 13b, and 13d, or who is to engage in a similar activity while executing other tasks of the Office (Sec. 18, 19), is tertiary education obtained in a masters programme in the field of law at a tertiary educational institution in the Czech Republic, and at least three years of experience in the field of the expected type of work following the completion of the prescribed education.*

…

PART THREE

COMMON PROVISIONS

…

Sec. 21

(1) *If the Office commences acting in proceedings pursuant to Sec. 3 and 4 or pursuant to Sec. 6 and 7, where the proceedings are already under way, the outcomes of such proceedings obtained up to that point shall stand and the effects of any procedural steps made up to that point shall apply. The same shall apply if the Office stops acting in such a capacity during proceedings, in cases stipulated by this Act (Sec. 23(4) and (5)).*

(2) *If the Office commences acting in proceedings pursuant to Sec. 3 and 4 or pursuant to Sec. 6 and 7, it shall act in that capacity until the proceedings are completed with final effect, including any extraordinary appeal proceedings, unless otherwise stipulated below (Sec. 23(4) and (5)).*

(3) *When the Office acts pursuant to Sec. 3 and 4 and pursuant to Sec. 6 and 7, any and all procedural steps made by the Relevant Organisational Unit in the proceedings shall be void. Any legal acts effected by the organisational unit outside of the proceedings in the periods specified above that contravene the steps taken by the Office in the proceedings, shall be void.*"

79. In addition, Mr Cox relied upon certain provisions of the Civil Procedure Code of the Czech Republic ("CPC") as well as a Commentary on the CPC (the "Commentary").

80. The CPC provides (in translation) in material part as follows:

"*CHAPTER THREE*

Taking part in the proceedings

Participants in the proceedings

Section 21

(1) *The following may act on behalf of a legal entity:*

a) its statutory body; if the statutory body comprises more natural persons then the legal entity is represented by its chairman or member authorised thereto …

…

(5) *Everyone acting on behalf of a legal entity must demonstrate its entitlement thereto. Only one person is authorised to act on behalf of a legal entity in the same matter.*

Section 21a

(1) *The State is represented before the court by the following:*

a) Office of the Government Representation in Property Affairs set out by a special legal regulation,

b) branch of the State applicable according to a special legal regulation in other cases.

(2) *If the Office of the Government Representation in Property Affairs is party to the proceedings on behalf of the state, an employee registered with the Office of the Government Representation in Property Affairs, authorised by its Managing Director, shall act on behalf of the State before the court.*

(3) *If a branch of the State applicable according to a special legal regulation is a participant in the proceedings on behalf of the state, the head of the organisation branch of the State or an employee working with this or another organisation branch of the State authorised by the manager shall act on behalf of the State before the court.*

(4) *Provisions of Section 21 Subsection 4 and 5 shall apply accordingly.*"

81. The Commentary provides (in translation) in material part as follows:

"*Persons Acting on Behalf of the State*

If the Office for Government Representation in Property Affairs (…) is called upon to represent the state in court proceedings, it is self-evident that the state's procedural rights can be exercised, and its procedural duties discharged, only by individuals (natural persons). Section 21a(2) stipulates that acts on behalf of the state in court proceedings shall be performed by an employee of the Office who was authorised to do so by the General Director of the Office. The General Director himself or herself is not entitled to act on behalf of the state in court proceedings; this means, inter alia, that he or she must not attend hearings as a person acting on behalf of the state, or lodge any pleadings on behalf of the state. The reason is that the law limits the General Director's powers in civil court proceedings to the granting of the authorisation stipulating which employee of the Office will act on behalf of the state in a particular dispute or any other legal matter.

…

Neither the manager of the state's organisation unit, nor the employees authorised by him or her or the employees authorised to act on behalf of the state by the General Director of the Office for Government Representation in Property Affairs, are representatives (agents) of the state within the meaning of Section 24 et seq. Acts performed by these individuals represent acts of the state and documents addressed to the state are served either on the respective organisation unit (its data box, or the address of its registered office), or on the Office (its data box, or the address of the competent regional department of the Office), not on the individuals themselves; their names and surnames are not mentioned in the written copy of the judgment or resolution (cf. Section 157(1) and Section 169(1)). Costs incurred by these individuals during the proceedings are costs incurred by the party to the proceedings (the state)." (emphasis added)

82. Much of the expert evidence was directed at the scope and effect of these provisions of Law 201, the CPC and the Commentary. In essence, and relying upon the evidence of Professor Belohlavek, Mr Cox submitted as follows:

i) All these provisions applied to arbitration proceedings generally including the arbitration proceedings in the present case. This followed from the express terms of s2 of Law 201 and an explanatory memorandum to that Law; and, so far as the CPC was concerned, from s30 of the CAA which (in translation) provides: "*Unless otherwise stated herein, the arbitrators shall apply the provisions of the [CPC] to proceedings pending before them as appropriate*". Further, he relied on a decision of the Supreme Court of the Czech Republic: 32 Cdo 4997/2008.

ii) So far as the present case is concerned, the provisions gave rise to four main "rules" viz:

a) The OGRPA shall act in proceedings including arbitration. Depending on the financial amount, this is mandatory in certain cases including the present case: see s3 of Law 201.

b) Where the OGRPA acts, its acts are those of the state i.e. the Czech Republic: see s2 of Law 201.

c) Where the OGRPA acts, it does so exclusively. In support of such "rule", Mr Cox emphasised three sub-points viz.

i) If the OGRPA acts, then any acts of the "Relevant Organisational Unit" are void: see s21(3) of Law 201.

ii) Where the OGRPA comes on the scene and begins to act after the organisational unit then the previous acts of the organisational unit still stand: see s21(1) of Law 201.

iii) The exclusive jurisdiction of the OGRPA is confirmed by the heading to s2 of Law 201 – "Exclusive Jurisdiction of the Office".

d) Where the OGRPA acts, it must act by an employee. In this context, Mr Cox emphasised two sub-points by reference to s16 of Law 201 and s21a(2) and (4) of the CPC viz (i) there can only be one employee at any one time; and (ii) the employee must be authorised by the General (Managing) Director and properly qualified.

83. As to these submissions, there was an important threshold debate between the experts as to whether Law 201 and the CPC strictly applied to arbitrations at all. Contrary to the view expressed by Professor Belohlavek as summarised above, Professor Balas' evidence was that they did not apply to arbitration "strictly" and that Professor Belohlavek's interpretation was "entirely formalistic" and not correct. Given the express terms of s2 of Law 201 which refers expressly to "Arbitration Bodies", I find it difficult to accept Professor Balas' evidence in this respect with regard to Law 201 although I agree that the wording of s30 of the CAA supports Professor Balas' view to some extent at least with regard to the CPC. A further point raised by Professor Balas and expanded somewhat by Mr Crane was, in effect, that once the original arbitral tribunal published the Award, the original tribunal became *functus officio* with the result that it ceased to exist and that there were then no extant proceedings in existence to which either Law 201 or the CPC could apply. In effect, there was, he submitted, a hiatus until the review process under

Article V of the arbitration agreement was in existence. I recognise that this point (referred to by the parties as the "gap" point) has a certain attraction. Mr Crane submitted that it derived support from certain comments by the appellate court in the Czech Republic in relation to what he said was a similar point as appears (in translation) from the following passage taken from the judgment of the Supreme Court given on 14 October 2010:

> "*The appellate court first addressed the procedural objections of Diag Human SE. It reached the conclusion that although the proceedings regarding the appointment of an arbiter according to Section 9, paragraph 1 of the AAP were separate proceedings, they were nonetheless closely tided (sic) to the particular arbitration proceedings. Therefore, it is essential for the state to be represented by the same organizational unit as in the arbitration proceedings, meaning the unit whose employees have become familiar with the course and contents of the arbitration proceedings. Based on the constant court interpretation of the provisions of Section 21a of the Rules of Civil Court Procedure regarding the conduct of the state, it was determined during the proceedings that for the Office should appear before the court on the state's behalf instead of the organizational unit of the state with authority according to Act No. 219/2000, and the court, as soon as this situation becomes apparent, should begin negotiating with the Office, with the hitherto results of the proceedings and the effects of procedural acts carried out so far by the respective organizational remaining preserved. The appellate court therefore continued to negotiate with the Office on the side of the plaintiff. However, the proposal for the appointment of the arbiter by the court was filed procedurally by a competent entity, which is a party to the proceedings (the Czech Republic).*" (emphasis added)

84. However, I do not consider that Mr Crane derives much, if any support from this passage; and, on balance, it seems to me that Mr Cox probably has the better of the argument with regard to the "gap" point on the basis that the review process is properly regarded as forming part of a single set of proceedings.

85. In any event, I am persuaded by what I understand to be the main thrust of Professor Balas' evidence to the effect that both Law 201 and the CPC are essentially irrelevant with regard to the question of who may have the requisite authority to make an application such as the application for review under Article V of the arbitration agreement. In reaching that conclusion, I acknowledge that I have had some difficulty in understanding certain parts of Professor Balas' evidence in this context - in particular his discussion of the so-called "principle of enumerative nature of public-law pretentions". However, to my mind, the main thrust of his evidence appears most clearly from paragraphs 2-4 of his supplementary report where he refers in particular to Law 201 and the CPC and, in that context, emphasises (in paragraph 2) that the interpretation of these provisions "… *should not merely be semantic but also contextual and teleological i.e. bearing in mind the object and purpose of the Act* …" In particular, after referring specifically to s2 of Law 201, Professor Balas states:

"*Under these provisions my view is that the authorisation vested to the OGRPA can be interpreted as the authority to serve the State in a similar way as Attorneys at Law acting on behalf of their clients based on a Power of attorney serve their clients in court proceedings or in arbitrations. It would be absurd for the court or arbitrator not to accept the request for a review filed by the client if the attorney did not file the request on her/his/its behalf …*"

86. I also accept what is stated by Professor Balas in paragraph 9 of his supplemental report viz that "*… that the request [ie. the application for review] was filed validly by the State represented by the top-level governmental official representing quite undisputedly the Czech Republic as the party to the dispute …*"

87. For these reasons and, in particular, having regard to the terms of the Decree dated 20 August 2008, it is my conclusion that the Minister had the necessary authority to sign the letters and make the application for review under Article V of the arbitration agreement; that such authority was not otherwise "carved out" or removed as alleged by Diag Human; that the review process was validly triggered by the Minister; and that, on this basis, the Award is subject to "ordinary recourse" and not binding.

88. If this conclusion is right, it is unnecessary to consider the authority of Ing Vanek or Dr Posledni. However, if I am wrong about the authority of the Minister, it would be my conclusion that the application for review was validly triggered by Ing Vanek. As already stated, Mr Cox's main objection to Ing Vanek is that although he was an employee of OGRPA, he did not have the authority himself to "act" on behalf of the Czech Republic and did not have the necessary legal qualifications to do so. In effect, Mr Cox submitted, Ing Vanek's authority was limited to the appointment of another individual with the necessary legal qualifications to make the application for review. In this context, Mr Cox relied in particular on the Commentary and s16 of Law 201. However, as submitted by Mr Crane, it seems to me that consistent with the evidence of Professor Balas, these provisions are primarily concerned with rights of representation before a court or (let it be assumed) an arbitration body rather than the question here as to who has authority to serve an application for review as in the present case. In any event, I am not persuaded that these provisions have the effect under Czech law to "carve out" or remove the general authority vested in Ing Vanek to make such application.

89. If this conclusion is right, it is unnecessary to consider the authority of Dr Posledni. However, if I am wrong about the authority of the Minister or Ing Vanek, it would be my conclusion that the application for review was validly triggered by the fourth letter signed by Dr Posledni for the following reasons. There is no dispute that even if Ing Vanek had no authority himself to sign the application for review on behalf of the Czech Republic, he had at the very least authority to authorise another employee of OGRPA to sign provided that employee had the necessary legal qualifications. There is also no dispute that Dr Posledni was an employee of OGRPA and had the necessary legal qualifications to sign the application on behalf of the Czech Republic. As I understood Mr Cox's submissions, they focussed on two main objections viz (i) the fact that Dr Posledni signed his name "v.z." (i.e. pp) Ing Vanek who (on this assumption) had no relevant authority;

and (ii) the fact that the fourth letter was accompanied by AL1 which was only a limited authority to sign on behalf of Ing Vanek who (on this assumption again) had no relevant authority to sign himself. For the purposes of this stage of the argument, I am prepared to assume in favour of Mr Cox that Ing Vanek had no relevant authority to sign himself. However, I am not persuaded that Dr Posledni's signature is therefore to be regarded as a nullity. In my view, the fact that Dr Posledni signed his name "v.z." is explicable simply because of the typed wording of the letter immediately below his signature referring to Ing Vanek. It seems to be totally unreal to suppose that Dr Posledni was prefacing his signature with "v.z." to indicate that he was signing not on behalf of OGRPA or the Czech Republic but on behalf of Ing Vanek who had no relevant authority to act and that therefore such signature was, and was intended to be, a complete nullity. Equally, the fact that the fourth letter was accompanied by AL1 does not seem to me fatal. In my view, even if Dr Posledni is to be taken as having signed the fourth letter pursuant to AL1 rather than AL2, it seems to me sufficient to give Dr Posledni the necessary authority to act on behalf of OGRPA (and thereby in relevant respect, the Czech Republic) even if (on this assumption) Ing Vanek did not himself have the relevant authority to act on behalf of OGRPA or the Czech Republic.

90. Following circulation of this judgment in draft, Mr Cox indicated that I had failed to record an important point referred to in Diag Human's submissions viz that there was no evidence of Dr Posledni being "designated" to this dispute – rather the evidence was that it was JUDr Jan Herda who was "designated". The reason for this omission was that I had not understood that this was a discrete point. Be that as it may, given the terms of AL1 (or AL2) and the terms in which Dr Posledni signed the fourth letter, I do not consider that this point is such as to alter my conclusion as set out in the previous paragraph.

91. Thus, it is my conclusion that the application for review under Article V of the arbitration agreement was validly triggered on behalf of the Czech Republic by the signature and service of one or more of the four letters dated 22 August 2008; that the Award is therefore the subject of "ordinary recourse" and not binding for that reason.

Ratihabition ?

92. Even if this conclusion is wrong, Mr Crane had a further arrow to his bow. In particular, he submitted that the original application for review as contained in one or more of the four letters has been retrospectively remedied by virtue of a process referred to in Czech law as "ratihabition". In that context, Mr Crane relied in particular on paragraphs 24-27 of Professor Balas' supplementary report as well as certain Czech cases to the effect that where the wrong organisational entity does something vis-à-vis the court, this is not a matter of "substantive legitimacy"; and in appropriate circumstances this can and will be remedied with retrospective effect by the court itself. Again, there was much evidence from the legal experts on this topic, although the main point at issue was relatively narrow.

93. In particular, Mr Cox accepted the general concept of ratihabition. However, he submitted that the Czech cases relied upon by Mr Crane were distinguishable; that the

principle of ratihabition was limited to the situation where an organisational unit had not initially been authorised to act; and that this was not the situation here because on 22 August 2008, the OGRPA was the entity authorised to act on behalf of the Czech Republic in respect of the proceedings in question. Mr Crane fairly accepted that the Czech cases were factually different; and it would seem that the point raised by Mr Cox has not been specifically addressed by the Czech courts. To that extent, it is an open question as a matter of Czech law. However, I have difficulty in seeing why, as a matter of principle, ratihabition should not apply in such circumstances and Mr Cox was unable to suggest any rational reason why it should not apply. On this basis, I would be inclined to accept Mr Crane's submission that if (contrary to my previous conclusion) the applications for review were made by the wrong organisational unit, then such deficiency did not vitiate the triggering of the review process but can be cured retrospectively and is ultimately a matter for the review tribunal. Insofar as may be necessary, I would therefore conclude that the Award was the subject of "ordinary recourse" and not binding for this reason.

The withdrawal point

94. Given my earlier conclusions, it is unnecessary to determine this point and I propose to say nothing more about it.

Partial enforcement

95. Although this was a new point raised very shortly before the hearing, it was advanced most persuasively by Mr Cox. In particular, he submitted that even if I concluded that the Award was not binding nevertheless it was "indisputable" that the Czech Republic was obliged to pay interest to Diag Human on the capital sum awarded to it of CZK 326,608,334 in the original Review Partial Award almost 12 years ago in June 2002. According to a schedule produced by Mr Cox, the interest due was on a conservative basis CZK 201,687,443 (approximately £6 million). Thus, Mr Cox submitted that this court can and should permit the Award to be enforced to this extent.

96. As to the law, Mr Cox submitted that even if an award cannot be enforced in full, such part of the award in respect of which there is no realistic or credible challenge can still be enforced; and that in those circumstances there is no justification for keeping the claimant out of sums to which he is clearly entitled including an award of interest. In support of that submission, Mr Cox relied upon Merkin, *Arbitration Law*, para 19.7.1, and *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation (No 2)* [2008] 2 Lloyd's Rep 59 upheld by the Court of Appeal in *Nigerian National Petroleum Corp v IPCO (Nigeria) Ltd (No 2)* [2009] 1 Lloyd's Law Rep 89). In particular, Mr Cox drew my attention to the order made by Tomlinson J in that case.

97. These are powerful arguments. However, unlike *IPCO v NNPC*, the present case is not concerned with a pending application in the foreign jurisdiction to set aside an award. Rather, for the reasons stated above, it is my conclusion that the Award is not binding. In my view, that conclusion is fatal to any question of partial enforcement. I know of no

case in which the English Court (or indeed any court) has permitted enforcement of any award in such circumstances i.e. which it has held is not binding. The fact that a particular sum may be said to be "indisputable" (and, I should make plain that Mr Crane made no admission in this regard) does not, in my view, justify the relief sought by Mr Cox however attractive it might seem to be.

Conclusion

98. For one or more of these reasons, it is my conclusion that the Award is not binding under s103(2)(f) of the Arbitration Act 1996. It follows that the order made by Burton J dated 21 July 2011 must be set aside. Further, it is my conclusion that the application by Diag Human for an order for partial enforcement should be dismissed. Counsel are requested to agree an order (including costs and any other consequential matters) failing which I will deal with any outstanding issues.
