

## Arbitration & ADR - United Kingdom

### Courts refuse enforcement of award on grounds of estoppel

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#### Introduction

The enforcement of a New York Convention award may be refused by the English courts on the grounds of issue estoppel. The recent Commercial Court decision in *Diag Human v Czech Republic* [2014] EWHC 1639 (Comm) was the first time that the common law doctrine of issue estoppel has prevented the enforcement of an award under Section 101 of the Arbitration Act 1996. This decision considered the scope of the doctrine of issue estoppel and whether the enforcing courts must follow the decisions of previous enforcing courts.

A similar question had been addressed in *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2012] EWCA Civ 855, where the Court of Appeal found that issue estoppel did not operate to prevent the enforcement of an award.

#### Facts

Arbitration proceedings were commenced in 1996 (following the abandonment of court proceedings that year) pursuant to an arbitration agreement under the Czech Arbitration Act 1994. This agreement contained provisions allowing for a detailed review process by a second arbitral tribunal following the granting of any award. Two interim awards were granted and not contested. The final award was issued in August 2008, awarding £135 million in damages and £140 million in interest (with further interest accruing daily). The Czech Republic attempted to invoke the review process in relation to the final award. Diag Human (which also attempted to use the review mechanism but later withdrew its application) challenged the jurisdiction and composition of the second arbitral tribunal.

After the final award was handed down and before the review process was complete, Diag Human pursued enforcement proceedings in Austria, Luxembourg, Switzerland, France and the United States. All attempts failed (except for those in Luxembourg and the United States, which were still pending at the time of judgment). In England, enforcement proceedings were initially brought before Judge Burton in the Commercial Court, who gave leave to enforce the award against the Czech Republic. The Czech Republic sought to have this order set aside and the matter came before Judge Eder. The Czech Republic argued that the question of whether the decision was binding had already been considered by the Austria Supreme Court on April 16 2013 and formed the basis for the Austria Supreme Court's refusal to grant leave to enforce the award under Article V(1)(e) of the New York Convention, which provides that a court may refuse enforcement where an award "has not yet become binding".

#### Issues

##### **Issue estoppel arises**

In *Yukos*, the English Court of Appeal had to consider whether the parties were estopped from raising an issue before the English court that had already been determined by the Dutch court. In considering whether to enforce Russian-seated awards that had been set aside by the Russian court, the Dutch court held that the Russian-seated decisions were "partial and dependent" and that, as a matter of public policy, the Russian court decisions should not be recognised by the Dutch courts. Thus, the awards were enforced in the Netherlands. The English courts held that issue estoppel did not arise because the issue of whether the Russian courts' decisions were "partial and dependent" and therefore unenforceable as a matter of English public policy had not been considered by the Dutch courts.

As per *Yukos*, Eder acknowledged that a decision of 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 of estoppel in England.

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However, the question in this case related to whether the award underlying the enforcement application was binding. The judge applied the usual test to ascertain whether issue estoppel arose. He found that based on the facts of the case:

- he was confronted with the same issue and subject matter in a later proceeding between the same identifiable parties;
- the Austria Supreme Court was a court of competent jurisdiction recognised under English private international law;
- the Austria Supreme Court's judgment was final and conclusive; and
- the decision was "on the merits" (ie, it was more than merely procedural in nature).

As such, the parties were estopped from raising this same issue before the English court.

Diag Human contended that the Austria Supreme Court decision was not applicable to the English courts as it was based on Article V(1)(e), whereas the English Commercial Court's decision arose from an application under Section 103 of the Arbitration Act 1996. The judge noted that this was a "distinction without a difference", since Section 103 enacts the United Kingdom's obligation under the New York Convention and the provisions are almost identical.

#### **Award "not yet binding" under Section 103(2)(f)**

In case the judge had erred as to the application of issue estoppel, he also addressed the Czech Republic's alternative argument.

Section 103(2)(f) provides that the court may refuse recognition or enforcement of an award where the award "has not yet become binding on the parties". It was common ground that if the review process had been validly triggered by the Czech Republic, the award would not become binding until the review process was complete. The judge found that the review process had been validly triggered. Moreover, he held that the review process was properly characterised as a requirement for ordinary recourse or appeal, without which an award is not considered binding (*Dowans Holding SA v Tanzania Electric Supply Co Ltd* [2011] 2 Lloyd's Rep 275 considered). Pending completion of the review (which was still ongoing at the time the judge rendered his judgment), the award could not be considered binding.

#### **Comment**

Depending on where the assets of an award debtor are located across the world, enforcement of any arbitral award may take place in a number of different jurisdictions. This case highlights the risk that pre-existing decisions relating to the enforcement of an award in one jurisdiction may have an impact on whether the award is enforceable in another. The case also provides a useful analysis of Section 103(2)(f). Such cases are rare, as are review mechanisms of the type found in this contract.

Since this judgment was handed down, enforcement of the award has also been resisted in the United States. The review by the second tribunal has been discontinued and, as such, the review process is now complete. The parties appear to disagree as to whether this renders the award binding for the purposes of enforcement.<sup>(1)</sup> It remains to be seen whether Diag will succeed in its enforcement of the award.

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#### **Endnotes**

(1) "Czech Republic declares end to blood plasma saga", Sebastian Perry, *Global Arbitration Review*, August 28 2014.

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