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The UK Commercial High Court Rejects Czech Republic's Jurisdictional Challenges Declining Setting Aside the Investment Award in *Diag Human & Mr. Josef Stava v Czech Republic*

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On 9 August 2024, the Commercial High Court of England and Wales (the “Court”) has declined to set aside the Permanent Court of Arbitration (“PCA”) investment award issued in *Diag & Mr. Josef Stava v Czech Republic* (the “Award”), rejecting the jurisdictional challenges raised by the Czech Republic (the “[Judgement](#)”).

The Czech Republic challenged the Award objecting, *inter alia*, the lack of a protected investment by Diag Human SE (“Diag”) & Mr. Josef Stava (“Mr. Stava”) (together the “Claimants”) and their qualification as investors under the [Czech Republic and Switzerland bilateral investment treaty](#) (“BIT” or “Treaty”), as well as the existence of the dispute between the parties prior to the entry into force of the BIT.

Background of the Dispute

In early 1990s, the Swiss company Diag – through its subsidiary Conneco (founded by Mr. Stava) – entered into commercial agreements to supply Czechoslovakia with blood plasma. Following the discovery of unlabeled blood plasma stored in a state-owned facility on behalf of Conneco, the Ministry of Health initiated investigations against it, and informed Novo Nordisk – the company collaborating with Conneco for the process of blood plasma – that the commercial agreement was terminated (the “Bojar Letter”).

Conneco and the Ministry of Health initiated commercial arbitration proceedings. The commercial arbitration tribunal issued an award ordering the Ministry of Health to pay CZK 8.3 billion in additional damages (in addition to the sum already paid in the aftermath of a partial award). The Ministry of Health initiated a review of the award which culminated in a Resolution Agreement declaring that the arbitral proceedings were discontinued.

The Claimants initiated a second arbitration, this time pursuing an investment claim, claiming that the Ministry of Health had wrongfully interfered with the review process of the commercial award, and breached its obligation under the Czech Republic and Switzerland BIT. In the still unpublished Award of 18 May 2022, the PCA tribunal rejected the Czech Republic jurisdictional objections,

and found it in breach of fair and equitable treatment obligations on the merits, awarding damages amounting to USD 350 million to the Claimants.

Jurisdictional Challenges

The Czech Republic challenged the Award under Sections 67 and 68 of the [1996 English Arbitration Act](#) (the “[Arbitration Act](#)”), leading to the proceedings before the Court. Shortly before the commencement of the hearing, the Claimants introduced further evidence into the proceedings, against which the Czech Republic had to amend its statement of case. Accordingly, on 8 March 2024, the Court determined part of the issues raised by the Czech Republic’s challenge under Section 68 of the Arbitration Act, the extent to which challenges brought by the Czech Republic were barred by Section 73(1) of the Arbitration Act and whether all of the issues raised by the Czech Republic under Section 67 of the Arbitration Act were properly classified as jurisdictional. While on 9 August 2024, the Court addressed the remaining jurisdictional challenges on the *ratione materiae*, *temporis* and *personae* objections, whether the Czech Republic was estopped from challenging the Claimants’ status as protected investor, and if the damages awarded to the Claimants would constitute a substantial injustice to the Czech Republic for the purposes of Section 68 of the Arbitration Act.

Therefore, the primary issue before the Court was assessing the jurisdictional objections [under Section 67 of the Arbitration Act](#), which provides for London-seated arbitrations to be challenged before English courts for the lack of substantive jurisdiction of the arbitral tribunal.

In this respect, under Section 67 of the Arbitration Act, a *de novo* review of jurisdictional objections allows the challenging party “*a full judicial determination on evidence of an issue of jurisdiction*” (*Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*, para. 26). There are no restrictions on the evidence that may be presented before the English courts, beyond those imposed by the court’s procedural rules (*Central Trading & Exports Ltd v Fioralba Shipping Co (The Kalisti)*, paras. 14-33). Accordingly, the Court affirmed that it was not limited to the evidence or arguments presented in the arbitral proceedings in assessing the jurisdictional objections (Judgment, para. 6).

The Court specifically addressed the following jurisdictional challenges:

- The “*Ratione Materiae*” objection: The Czech Republic alleged that the investments did not qualify for protection under the Treaty.
- The “*Ratione Personae*” objection: The Czech Republic contented that Diag was not controlled by a Swiss national after June 2011 and could not therefore benefit from the Treaty protection.
- The “*Ratione Temporis*” objection: the dispute arose before the Treaty came into force.

Ratione Materiae

The Czech Republic argued that the Claimants’ activities and assets did not constitute a protected investment under the relevant BIT claiming that (i) there was no sufficient contribution by the Claimants; (ii) the Claimants’ assumed a commercial risk and not an investment risk; and (iii) the content, value and duration of the Claimant’s activity did not meet the protected investment

threshold.

The Court considered the definition of “investment” under the BIT, and noted that it does not expressly provide for a three-factor-test, although some investment treaty tribunals, such as *Salini v. Morocco*, *Romak v. Uzbekistan*, and others, have suggested these three factors being part of the inherent meaning of “investment” (Judgment, para. 70). Nevertheless, the Court established it was not required to provide a precise definition of investment. Instead, it focused on the facts of the case. The Court determined that the Claimants’ business activities, including the establishment and operation of Conneco, were sufficiently substantial to constitute an investment. Referring to the Claimants’ long-term business model, the Court acknowledged that an investment “*is not established by the existence of an asset alone*” (Judgment, para. 60), rather by considering the investment as a whole. In the Court’s view assessing the content, value, duration and risk helps substantiating the existence of an investment. Similarly, consistent with [Article 25 of the ICSID Convention](#), which distinguishes between “*non-economic activities and commercial activities that do not involve investment specific risks,*” they are “*of assistance*” to differentiate between a transaction and a protected investment only in extreme cases (Judgment, paras. 93-95).

The Court ultimately reaffirmed the Tribunal’s decision by rejecting the Czech Republic’s jurisdictional objection *ratione materiae* and upholding that the Claimants had made a protected investment in the Czech Republic under the relevant BIT (Judgment, paras. 145-146).

Ratione Personae

The Czech Republic also raised a *ratione personae* jurisdictional objection claiming that the Claimants did not qualify as protected investors under the Treaty. According to the State, the fact that the shares of Diag were transferred to a Liechtenstein trust prevented the Claimants from invoking the treaty protection, as Diag ceased to be a Swiss company for the purposes of Article 1(1) of the Treaty (Judgment, paras. 165-167).

The Court turned to analyze the issue of control by reviewing the corporate structure of Diag and whether Mr. Stava had control over it.

The Czech Republic, citing [Professor Zachary Douglas](#), framed the issue of control as a question of law sustaining that “*the link between the investor and the asset must be a legal right of control,*” and that the direct or indirect control does not correspond to a distinction between *de jure* and *de facto* control (Judgment, paras. 198-199). Notwithstanding, the Court considered the question of control to be comprehensive of *de jure* and *de facto* control (Judgment, para. 215).

The Court concluded that the Claimants were protected investors under the relevant BIT since Mr. Stava, a dual Czech and Swiss national, had made an investment in the Czech Republic through Diag, and that *de facto* controlled Diag as its chairman with legal decision-making powers (Judgment, para. 170).

Ratione Temporis

The Czech Republic contended that the Tribunal lacked jurisdiction to adjudicate a dispute that had

arisen before the BIT came into effect on 7 August 1991.

The Court noted that the dispute following the Bojar Letter was not a continuation of a prior tender-related dispute commenced before the entry into force of the Treaty. The Court found the Claimants' claim to constitute a new dispute concerning a different subject matter, with different facts, and capable of being resolved independently as evident from the terms of the first commercial arbitration agreement that provided for the loss suffered from the Bojar Letter to be arbitrated separately (Judgment, paras. 155-163).

Conclusion

The Court rejected all of the Czech Republic's jurisdictional challenges and upheld the Tribunal's findings.

The Judgment offers valuable insights into the approach of English courts in conducting *de novo* jurisdictional reviews, having broad discretion over the evidence and challenges introduced in the litigation proceedings that might extend beyond the jurisdictional objections and the evidence considered in the arbitration. As such, the Law Commission of England and Wales recommended to reform the Arbitration Act to restrict jurisdictional objections or evidence to those before arbitral tribunal ([Review of the Arbitration Act 1996](#)).

While the Court could have reached different findings than those in the Award on the qualifications of a protected investment and investor, it nonetheless emphasized the integrity and accountability of arbitral proceedings.

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