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Note: Belgian Supreme Court denies enforcement and overturns Brussels Court of Appeal decision in Diag Human SE v. Czech Republic

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Belgian Supreme Court denies enforcement and overturns Brussels Court of Appeal decision in *Diag Human SE v Czech Republic*

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I. Introduction

1. On 10 February 2022, the Belgian Supreme Court rendered its decision in the enforcement proceedings initiated by Liechtenstein company Diag Human SE against the Czech Republic. (1) Overturning the lower decision of the Brussels Court of Appeal of 12 November 2019, the Supreme Court denied enforcement of the Final Award dated 4 August 2008 issued in the underlying arbitration because this Award had not become binding on the parties within the meaning of Art icle V(1)(e) of the 1958 New York Convention.

2. The Supreme Court thereby confirmed its position that an award has become binding within the meaning of Article V(1)(e) of the New York Convention when it constitutes a final decision, meaning that it is no longer open to "recourse for modification". That question is to be determined by reference, successively and one in the absence of the other, to the arbitration agreement, to the law designated by the arbitration agreement for that purpose, and finally, the law of the country in which the award was rendered.

3. In the case in question, the Supreme Court noted that the parties' arbitration agreement provided for an appeal or "review" mechanism in accordance with the Czech arbitration law (2) , which review had been pursued by the Czech Republic in relation to the Final Award and resulted in the Award not having become binding. The Brussels Court of Appeal had come to the opposite conclusion, which decision was therefore quashed.

4. The Belgian Supreme Court's decision is the latest setback for Diag Human in its efforts
P 308 to enforce the 8.3 billion Czech Crowns (CZK) (currently ● equivalent to about US$ 370 million) Final Award, following similar refusals in the United States and the Netherlands. (3)

5. This note briefly sets out the background of the case (4) (***II***) and recalls the lower decision of the Brussels Court of Appeal (***III***) before discussing the Supreme Court's decision (***IV***) and its significance (***V***).

II. Background

6. The dispute between the parties arose some 30 years ago when Diag Human had set up a venture in blood plasma products in what was then Czechoslovakia. At the time, there was an urgent need for such products, which are used to treat various medical conditions. Diag Human had a business partner, the Danish company Novo Nordisk, which carried out essential blood fractionation (5) work for the venture.

7. In 1992, the Czech Health Minister wrote a letter to Novo Nordisk expressing concerns about Diag Human's business ethics and reliability. Novo Nordisk decided to end the cooperation, leading Diag Human's business to disintegrate.

8. Although Diag Human initially sued before the local courts, the parties eventually agreed to refer the dispute to arbitration. The parties' arbitration agreement of 18 September 1996 provided for the dispute to be resolved under the Czech arbitration law by a three-member tribunal with the possibility of appeal or "review" by a second tribunal. This review option was expressly contemplated in Article 27 of the Czech arbitration law:

> *"It may be agreed in the arbitration agreement that the award shall, upon the request of one or both parties, be reviewed by different arbitrators. Unless otherwise provided by the arbitration agreement, the request for review shall be notified to the other party within thirty days after the receipt of the award by the*
> *P 309* *requesting ● party. Review of the award forms part of the arbitral proceedings and the provisions of this Act shall apply."* (6)

9. The arbitral tribunal issued an Interim Award on 19 March 1997, finding in favour of Diag Human on liability but inviting the parties to negotiate the amount of damages. (7) The

Interim Award was upheld following review by another arbitral tribunal issuing a further award. (8)

10. As the parties were unable to agree on the amount of damages, the arbitral proceedings resumed. In its Partial Award of 25 June 2002, the tribunal confirmed that the Czech Republic's conduct had been unlawful and had destroyed the relationship between Diag Human and Novo Nordisk, resulting in damages for Diag Human. (9) Notwithstanding, the tribunal felt that it was not in a position to decide the amount of damages based on the evidence presented at the time. (10) Given the already existing delays to the procedure, the tribunal nonetheless awarded Diag Human the "undisputed" damages, i.e., the figure calculated by the Czech Republic's quantum expert, which was CZK 326 million (then equivalent to about US$ 10 million) – and invited the parties to negotiate the remainder of damages. (11) The Partial Award was upheld following review by another arbitral tribunal, issuing a further award. (12)

11. The negotiations again failed, and the tribunal proceeded to award an additional CZK 8.3 billion (then equivalent to about US$ 400 million) in damages in its Final Award of 4 August 2008. The Final Award was subjected to review by a separate review panel, which issued its Review Resolution dated 23 July 2014.

12. Contrary to the previous two review decisions, the Review Resolution did not confirm the Final Award It consisted of two parts: (a) a dispositive part or "Resolution", which
P 310 stated that "[t]he proceedings are discontinued"; ● and (b) the "Reasoning", where the review panel found that the Partial Award was, in reality, a "final and conclusive" award, subject to *res judicata* Pursuant to Czech jurisprudence, a partial award may only be rendered in certain circumstances, such as in respect of a fully separate claim. The Partial Award failed to specify what part of the claim it concerned and therefore fully disposed of the matter, preventing it from being heard further. (13)

13. The Review Resolution also identified that, following the issuing of the Partial Award, parallel court proceedings were ongoing between Diag Human, the Czech Republic, and certain third parties about parts of the dispute, without Diag Human or the Czech Republic having raised the arbitration agreement in those proceedings. (14) As parallel proceedings are not permissible in Czech law, the parties were considered to have waived further arbitration The review panel nonetheless noted that "the plea of res judicata occurred earlier." (15)

14. Diag Human tried to enforce the Final Award in several countries, including Belgium, where the matter eventually came before the Brussels Court of Appeal.

III. Brussels Court of Appeal decision

15. The question before the Brussels Court of Appeal (and later the Supreme Court) concerned the effect of the 2014 Review Resolution on the 2008 Final Award. The Czech Republic had resisted enforcement based on (inter alia) Article V(1)(e) of the New York Convention, which provides:

> *"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."*

16. The Czech Republic argued that the Final Award had not become binding in view of
P 311 (inter alia) the review panel's finding of *res judicata* in respect of the Partial Award. ●

17. In its decision of 12 November 2019, the Court of Appeal sided with Diag Human, finding that the Review Resolution was merely a procedural decision that discontinued the review procedure and left the Final Award intact. (16) The Court of Appeal specifically noted that in circumstances where the Review Resolution's dispositive part is "clear", a different interpretation based on the reasoning is not permitted under Czech law. (17)

18. The Court of Appeal was also of the view that the respective arbitration and review proceedings were not the same procedure but separate, such that the Review Resolution could not have impacted the Final Award unless specifically stated. (18) Moreover, the Court of Appeal noted that the Review Resolution was not the subject of enforcement proceedings and had not been recognised in Belgium. (19)

IV. Supreme Court decision

19. On 10 February 2022, the Belgian Supreme Court overturned the Brussels Court of Appeal's decision. The Supreme Court first observed that the wording of Article V(1)(e) of the New York Convention does not stipulate which law determines whether an award has become binding. This is to be distinguished from the question in the second limb of Article V(1)(e), of whether an award "has been set aside or suspended", which is to be determined by the "competent authority of the country in which, or under the law of which, that award was made". (20)

20. The Supreme Court then held that an award has become binding within the meaning of Article V(1)(e) of the New York Convention if it constitutes a final decision, meaning that it is no longer open to "recourse for modification" ("*rechtsmiddel tot wijziging*"/"*voie de recours tendant à sa réformation*"). (21) The question of whether recourse for modification may be brought against an arbitral award and the effect of a decision rendered under such recourse on the binding character of the arbitral award shall be determined by reference, successively and one in the absence of the other, to the arbitration agreement,
P 312 ● to the law designated by the arbitration agreement for that purpose, and, finally, to the law of the country in which the award was rendered. (22)

21. Here, the parties' arbitration agreement provided for the application of a specific appeal or "review" option contemplated in the Czech arbitration law as well as a Czech Republic seat of arbitration Whether recourse for modification may be brought against the Final Award and the effect of a decision rendered under such recourse on the binding character of the Final Award was therefore to be determined by reference to Czech law. (23) In its analysis, the Supreme Court expressly considered that:

- pursuant to Article 27 of the Czech arbitration law, parties may indeed opt for an appeal or "review" by a second tribunal of an arbitral award, which review forms part of the arbitral proceedings;
- Article 28(1) of the Czech arbitration law provides that an arbitral award, which is executed in writing, must be served on the parties and, having been duly served, stamped with the confirmation of legal force and effect;
- Article 28(2) of the Czech arbitration law provides that an arbitral award not capable of review pursuant to Article 27, or for which the period for requesting such review has expired, becomes final and binding; and
- Article 15(1) of the Czech arbitration law provides that arbitrators are entitled to decide on their jurisdiction and, should they determine that they have no jurisdiction to decide the matter, they shall issue a procedural decision ending the procedure. (24)

22. Based on these provisions, the Supreme Court concluded that:

- an award subject to review is not binding as long as the review procedure is ongoing;
- following the end of the review procedure, the arbitral award becomes binding only if it is confirmed in an arbitral award rendered in that review procedure;
- if a review procedure results not in an award but in a procedural decision wherein the arbitrators declare themselves without jurisdiction and discontinue the
P 313 proceedings, the arbitral award does not become binding. (25) ●

23. Since the Review Resolution was a procedural decision wherein the arbitrators declared themselves without jurisdiction – due to the *res judicata* effect of the Partial Award and waiver of further arbitration (see paragraphs 12-13 above) – and discontinued the proceedings, the Supreme Court considered that the Final Award had not become binding within the meaning of Article V(1)(e) of the New York Convention. (26) The conditions for this ground for refusal of enforcement were therefore met, and the Brussels Court of Appeal had erred in law by deciding otherwise and allowing enforcement. (27)

24. In addition, the Brussels Court of Appeal had erred in law by not properly considering the Review Resolution, which is a legal fact ("*rechtsfeit*"/"*fait juridique*") – meaning an act that has legal consequences – that should have been taken into account without the decision having to be recognised or enforced in Belgium in accordance with the New York Convention. (28)

V. Discussion

25. The Belgian Supreme Court's decision of 10 February 2022 is significant because it reaffirms the Supreme Court's position that an award has become "binding" within the meaning of Article V(1)(e) of the New York Convention when it is no longer open to recourse for modification The question of whether such recourse may be brought against an arbitral award and the effect of a decision rendered under such recourse on the binding character of the arbitral award shall be determined by reference, successively and one in the absence of the other, to the arbitration agreement, to the law designated by the arbitration agreement for that purpose, and, finally, to the law of the country in which the award was rendered (thereby giving pre cedence to party autonomy as expressed in the arbitration agreement over the law of the seat, which may not have been the parties' choice (29)).

26. The Supreme Court set out the very same interpretation of the term "binding" in Article V(1)(e) of the New York Convention in its decision in *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements* handed down
P 314 nearly 25 years ago. In that case, the ● Supreme Court determined that an arbitral award was binding in light of the arbitration agreement, which expressly stated that the award would become binding upon being rendered. (30) The Supreme Court had reached this conclusion even though the law of the seat of arbitration, Jordanian law, required the confirmation of an award by the Jordanian courts before becoming binding. That

conclusion was not surprising, since deciding otherwise would have required an enforcement decision from the courts of the seat and thus *double exequatur* (31) (of which, as noted by one commentator, the "elimination was perhaps the principal achievement of the Convention" (32)).

27. In the present case of *Diag Human v Czech Republic*, the situation was different in that the parties' arbitration agreement expressly provided for the possibility of review in accordance with the Czech arbitration law (in addition to providing for a Czech Republic seat of arbitration). Applying the same choice-of-law rules as 25 years ago, the Supreme Court concluded that the question of whether the Final Award is binding on the parties – meaning whether recourse for modification may be brought against the Final Award and the effect of a decision rendered under such recourse on the binding character of the Final Award – must therefore be answered by reference to the relevant provisions of the Czech arbitration law. (33) Pursuant to those provisions, the Final Award had not become binding.

28. Although the Supreme Court is not perfectly transparent in its reasoning, logically, its conclusion is based on the Czech arbitration law being "designated" in the arbitration agreement for the purpose of determining the same question. The present decision, in addition to reaffirming the Belgian courts' interpretation of the meaning of "binding" as no longer being open to such recourse is, therefore, a helpful clarification as to the meaning of the second prong of the Supreme Court's choice-of-law rules. A few questions
P 315 nonetheless also arise.

29. First, the question arises of what type of "recourse" the Belgian Supreme Court exactly means when stating that an award is binding when it is no longer open to "recourse for modification." The formulation *rechtsmiddel tot wijziging* (Dutch) or *voie de recours tendant à sa réformation* (French) (literal English translation: "recourse for (its) modification") is not entirely clear For example, certain courts and commentators have defined the term "binding" as no longer being open to 'ordinary means of recourse' or 'appeal on the merits' (a point also mentioned by a few delegates during the drafting of the New York Convention (34)). (35) Belgian law recognises the difference between ordinary and extraordinary recourse, yet these terms (nor any other clarification) do not appear in the Supreme Court's decision.

30. Notwithstanding, the language "recourse for [the award's] modification" suggests that the Supreme Court meant an ordinary means of recourse (i.e., appeal on the merits) rather than an extraordinary means of recourse (i.e., recourse on procedural grounds) such as setting aside or annulment proceedings (as the result of annulment proceedings would not be to 'modify' the award, but to annul it). This interpretation is also consistent with the Opinion of the Advocate General that accompanied the Supreme Court's decision, which favours an autonomous interpretation of the term "binding" in Article V(1)(e) of the New York Convention as not being open to ordinary recourse – meaning an appeal on the merits. (36) The Advocate General specifically noted that the Belgian Supreme Court, in its 5 June 1998 decision in *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements* (which, as mentioned, set out the same test or choice-of-law rules for determining the meaning of "binding" as the present Supreme Court decision), had recognised the same autonomous interpretation of the
P 316 term "binding." (37)

31. Second, arbitral rules commonly state that an award shall be 'final and binding' or simply 'binding'. (38) When an arbitration agreement refers to such arbitral rules, logically, this is sufficient to find that an award rendered under those rules is binding within the meaning of Article V(1)(e) of the New York Convention. However, the Supreme Court has not specified under which prong of its choice-of-law rules arbitral rules would fall Most probably, they would be considered as incorporated in the first prong of the Supreme Court's test, as part of and incorporated in the arbitration agreement. Nonetheless, a clearer and more comprehensive formulation of the Supreme Court test would be "by reference, successively and one in the absence of the other, to the arbitration agreement, to the law ***or rules*** designated by the arbitration agreement for such purpose, and finally, to the law of the country in which the award was rendered."

32. Finally, uncertainty remains at an international level as to the meaning of "binding" in Article V(1)(e) of the New York Convention. (39) In the absence of a definition or choice-of-law rules in the Convention itself or a clear indication in the Convention's preparatory works, the question has been left to be resolved by national courts. Those have taken different approaches, with some courts referring to the law of the country where the award was rendered and others relying on an independent interpretation of the meaning of "binding" (or an "autonomous" approach), or a combination of these two. (40)

33. In the present matter, enforcement courts in the US, the Netherlands, and Luxembourg all considered the effect of the Review Resolution on the Final Award in light of Article V(1)(e) of the New York Convention, yet none have applied the choice-of-law
P 317 rules now set out by the Belgian Supreme Court. (41)

34. The Dutch Supreme Court in its decision of 15 June 2018 simply noted that the "prevailing view" in case law and literature is that the outcome of an arbitral appeal – such as the one before it – can lead to the non-binding nature of an arbitral award, without setting out specific choice-of-law rules (although the Dutch Supreme Court's

interpretation could also be categorised as adhering to the "autonomous" approach). (42) The US Court of Appeals held that "[w]hen the 'binding' status of an award is in doubt under Article V(1)(e) of the New York Convention, the court may look to the law of the rendering jurisdiction," which was Czech law. (43) Both courts held that the Final Award was not binding within the meaning of Article V(1)(e) of the New York Convention, and refused enforcement for similar reasons as the Belgian Supreme Court By contrast, the Luxembourg Supreme Court granted enforcement of the Final Award However, the Court came to its conclusion based on an analysis of the Review Resolution again without identifying specific choice-of-law rules.

35. In conclusion, the Belgian Supreme Court's identification of clear and sound choice-of-law rules to determine whether an arbitral award is "binding" pursuant to Article V(1)(e) of the New York Convention is certainly helpful for interpreting this provision in Belgium. The rules may even serve as inspiration for enforcement courts in other countries. Nonetheless, there remains a lack of clarity as to the international legal framework, which is unlikely to be resolved in the near future. ●

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References

1) *Czech Republic v. Diag Human SE*, Belgian Supreme Court, Case No. C.20.0247.N, 10 February 2022 (***Supreme Court decision***), published p. 298 et seq. of this edition of b-Arbitra 2022/2.
2) Act of the Czech Republic No. 216/1994 Coll., on Arbitral Proceedings and Enforcement of Arbitral Awards.
3) In the meantime, a separate investment treaty tribunal has reportedly issued an award holding the Czech Republic liable for frustrating Diag Human's efforts to enforce the Final Award. See, for example, 'Czech enforcement saga leads to treaty award', *Global Arbitration Review*, 1 June 2022, https://globalarbitrationreview.com/article/czech-enforcement-saga-leads-treaty-award.
4) For a more detailed overview of the background of the case and Diag Human's worldwide enforcement efforts, see Katherine Jonckheere, 'Note: Re-litigation of identical issues in post-award proceedings: *Diag Human SE v The Czech Republic*', *b-Arbitra* 2020/2, pp. 374 – 396.
5) Blood fractionation serves to separate plasma from the other component parts of blood, and the component parts of plasma from each other.
6) Act of the Czech Republic No. 216/1994 Coll., on Arbitral Proceedings and Enforcement of Arbitral Awards, Article 27. See also *Diag Human SE v. The Czech Republic*, Resolution of the review arbitral panel, 23 July 2014 (available at https://www.italaw.com/sites/default/files/case-documents/italaw10714.pdf) (***Review Resolution***), p. 3.
7) See *Diag Human SE v. The Czech Republic*, Partial Award, 25 June 2002 (available at https://www.italaw.com/sites/default/files/case-documents/italaw10710.pdf) (***Partial Award***), p. 2.
8) Partial Award, pp. 2-3.
9) Partial Award, pp. 12-13.
10) Partial Award, p. 13.
11) Partial Award, p. 15.
12) See *Diag Human SE v. The Czech Republic*, Case No. RSP 06/2003, Final Award, 4 August 2008 (available at https://www.italaw.com/sites/default/files/case-documents/italaw10712.pdf) (***Final Award***), paras. 11 and 236 (grounds).
13) Review Resolution, section 4.4.
14) Review Resolution, section 4.5.
15) Review Resolution, section 4.5 (p. 15).
16) *Diag Human SE v. De Tsjechische Republiek,* Court of Appeal of Brussels, 2016/AR/1596, 12 November 2019 ***(Court of Appeal decision)*** , *b-Arbitra* 2020/2, pp. 357 – 373.
17) Court of Appeal decision, section 3.1.1.a.
18) Court of Appeal decision, section 4.1.
19) Court of Appeal decision, section 3.1.1.a.
20) Supreme Court decision, section 5.
21) Supreme Court decision, section 5.
22) Supreme Court decision, section 5.
23) Supreme Court decision, section 6.
24) Supreme Court decision, section 7.
25) Supreme Court decision, section 8.
26) Supreme Court decision, section 11.
27) Supreme Court decision, sections 12-13.
28) Supreme Court decision, section 14.
29) See also *Czech Republic v. Diag Human SE*, Belgian Supreme Court, Case No. C.20.0247.N, 10 February 2022, Advocate General's Opinion of 10 February 2022 (Conclusie van het Openbaar Ministerie van 10 februari 2022), section 8 (available online at juportal.be).

30) Cass. (1e ch.), 5 June 1998, *JT* 1998/33, n° 5899, p. 701-702, also published in XXIV Y.B. Com. Arb. (1999), pp. 603-614.
31) To recall, the 1927 Geneva Convention had required a party seeking enforcement or recognition of an award to demonstrate that the award had become final in the country in which it was made. 1927 Geneva Convention, Article 1(d) ("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 practice, this meant obtaining an enforcement decision from the courts of the seat and thus double exequatur.
32) M. Paulsson, *The 1958 New York Convention in Action*, Kluwer Law International, 2016, p. 195.
33) Supreme Court decision, section 6.
34) UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article V(1)(e), p. 209 (referring to *Travaux préparatoires*, Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/SR.1114, SR17).
35) See, e.g., UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article V(1)(e), p. 210; ICCA's Guide to the Interpretation of the New York Convention (ICCA 2011), available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/judges_guide_nyc_english_2018_reprint.pdf, pp. 101-102.
36) *Czech Republic v. Diag Human SE*, Belgian Supreme Court, Case No. C.20.0247.N, 10 February 2022, Advocate General's Opinion of 10 February 2022 (Conclusie van het Openbaar Ministerie van 10 februari 2022), section 8.
37) *Ibid.*
38) See, for example, 2013 UNCITRAL Rules, Article 34(2) ("All awards shall be made in writing and shall be final and binding on the parties)"; 2021 ICC Rules, Article 35(6) ("Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made").
39) See, e.g., Nigel Blackaby and Constantine Partasides, Redfern & Hunter on International Arbitration (6th ed., Oxford University Press 2015), para. 11.87.
40) See, e.g., UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), Article V(1)(e), pp. 209-211.
41) *Diag Human SE v. The Czech Republic*, Dutch Supreme Court, Case No. 17/02024, 15 June 2018 (reported in Stephan W. Schill (ed), Yearbook Commercial Arbitration, Volume XLIV (ICCA & Kluwer Law International 2019) pp. 598-606); Luxembourg Supreme Court, Case No. 70/2018, 29 June 2018; *Diag Human SE v. Czech Republic - Ministry of Health*, United States Court of Appeals, District of Columbia Circuit, No. 17-7154, 26 October 2018 (reported in Stephan W. Schill (ed), Yearbook Commercial Arbitration, Volume XLIV (ICCA & Kluwer Law International 2019) pp. 779-785).
42) *Diag Human SE v. The Czech Republic*, Dutch Supreme Court, Case No. 17/02024, 15 June 2018, para. 3.5.5 (also reported in Stephan W. Schill (ed), Yearbook Commercial Arbitration, Volume XLIV (ICCA & Kluwer Law International 2019) pp. 598-606).
43) *Diag Human SE v. Czech Republic - Ministry of Health*, United States Court of Appeals, District of Columbia Circuit, No. 17-7154, 26 October 2018, p. 8 (also reported in Stephan W. Schill (ed), Yearbook Commercial Arbitration, Volume XLIV (ICCA & Kluwer Law International 2019) pp. 779-785).