

Dutch Supreme Court refuses recognition and enforcement of revised arbitral award

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In *Diag v Czech Republic (ECLI:NL:HR:2018:918)*, the Dutch Supreme Court refused a request for recognition and enforcement of a final award rendered by a Czech arbitral tribunal, as the award was held to have been revised by a subsequent resolution of a different arbitral tribunal.

Speedread

In its decision of 15 June 2018, the Dutch Supreme Court refused recognition and enforcement of a final arbitral award which had been revised by different arbitrators. According to the Supreme Court, the outcome of the revision proceedings meant that the 'final award', previously rendered, lacked legal effect.

A dispute arose between Diag and the Czech Republic in 1992. In 1996, the parties agreed to submit their dispute to arbitration under Czech law, allowing for revision of the arbitral award thus rendered. In a 1998 "Review Interim Award" different arbitrators upheld a 1997 interim arbitral award issued by the tribunal.

A 2002 partial award, in which the tribunal ordered the Czech Republic to pay Diag CZK 326,608,334, was also upheld by a later "Review Partial Award" also issued by different arbitrators. However, the 2008 final award, in which the tribunal ordered the Czech Republic to pay Diag CZK 4,089,716,666, was held to lack legal effect by a 2014 resolution (Resolution) issued by a different tribunal, again following revision proceedings.

The Supreme Court ruled that it followed from the Resolution that the final award lacked binding effect, so that Diag's request for recognition and enforcement of the final award and the request for recognition of the partial award had to be refused.

The Supreme Court decision confirms that the revision of an arbitral award by a different arbitral tribunal has the same effect as the setting aside of an arbitral award by state courts in respect of the recognition and enforcement of such revised arbitral award. (*Diag v Czech Republic (ECLI:NL:HR: 2018:918)*, (15 June 2018).)

Background

In order to obtain recognition and leave for enforcement of foreign arbitral awards in the Netherlands, a request for court leave must be made in accordance with Articles 1075 and 1076 of the *Dutch Civil Procedural Code (Wetboek van Burgerlijke Rechtsvordering)*.

If the application concerns awards rendered in member states of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*New York Convention*), the provisions thereof will also apply, and may even be favourable to the party requesting recognition and enforcement.

Recognition and enforcement may only be refused on limited grounds, such as when the arbitral award for which recognition and enforcement is sought has been set aside or suspended by the competent authority. The (state) court that addresses the request for recognition and enforcement may not re-examine the case itself.

Facts

In 1992 a dispute arose between Diag (a Liechtenstein company) and the Czech Republic. By way of an arbitration agreement of 18 September 1996, Diag and the Czech Republic agreed to have their dispute resolved by means of arbitration pursuant to Czech law. The arbitration agreement provided that the arbitral award could be revised by different arbitrators at the request of either of the parties. Diag subsequently submitted the dispute to an arbitral tribunal based in Prague.

On 19 March 1997, the tribunal rendered an interim arbitral award, upheld by different arbitrators in a "Review Interim Award" of 27 May 1998. By a partial award of 25 June 2002, the tribunal ordered the Czech Republic to pay Diag CZK 326,608,334 (presently around EUR 12,700,000). This award was also upheld by different arbitrators in a "Review Partial Award" issued in December 2002.

By a final award of 4 August 2008, the tribunal ordered the Czech Republic to pay Diag CZK 4,089,716,666 (presently around EUR 158,900,000), and 'terminated' the claim for damages in the amount of CZK 326,608,334. Again, following arbitral revision proceedings, different arbitrators rendered a resolution on 23 July 2014 (Resolution), ruling that "[t]he proceedings are discontinued".

Among other things, the reviewing arbitrators had honoured the Czech Republic's plea of *res judicata* under Czech procedural law, as the partial award of 25 June 2002, upheld by the "Review Partial Award" of December 2002, with which the Czech Republic had complied, in fact included a decision on the entire claim. Given that the partial award did not specify what part of the asserted claim was concerned, the further arbitration proceedings, including the final award, lacked legal effect.

Diag's request for recognition and leave for enforcement of the final award in the Netherlands was subsequently denied by the Amsterdam District Court in 2015. Diag appealed this decision, now also requesting recognition of the partial award. In a decision of 21 February 2017, the Amsterdam Appeal Court dismissed the appeal and confirmed the first instance decision, ruling that the final award had lost its binding effect through the Resolution.

Decision

The Dutch Supreme Court dismissed all complaints against the decision of the Amsterdam Appeal Court, thus refusing Diag's request for recognition and enforcement of the final award and refusing the request for recognition of the partial award.

The Supreme Court ruled that the Appeal Court had rightfully applied Czech arbitration law to the meaning of the Resolution in respect of the final award. The Supreme Court cannot address complaints on the contents of Czech law itself pursuant to Article 79(1)(b) of the *Dutch Judiciary Organisation Act* (*Wet op de rechterlijke organisatie*).

As the arbitration agreement allowed for revision of the arbitral award(s), the final award could, and in fact did, lose its legal effect through the Resolution, even though a 'clause of legal force' was given to the final award in the Czech Republic. The fact that in its reasons the Resolution did not explicitly state that the final award had been extinguished, does not change this interpretation of the Resolution.

Even if the final award did qualify as an arbitral award within the meaning of Article I(2) of the New York Convention, recognition and enforcement of the final award should be denied based on Article V(1)(e) of the New York Convention (to be interpreted in accordance with the provisions of the *Vienna Convention of the Law of Treaties*). According to the prevailing opinion in case law and literature, revision of an arbitral award by different arbitrators may deprive the arbitral award of its binding effect. Such revision has the same effect as the setting aside of an arbitral award pursuant to Article V(1)(e) of the New York Convention.

Lastly, the Supreme Court ruled that it had not been established that the way the Resolution came about would somehow be in violation of public order.

Comment

The Supreme Court's decision confirms that, if an arbitration agreement provides for revision of an arbitral award by different arbitrators, such revision in fact has the same effect as the setting aside of an arbitral award by a state court. Notably, in this matter, the first instance and appeal courts ruled that the Resolution overturned the final award, while applying Czech arbitration law, even though the Resolution did not explicitly state so in its reasons. Lastly, this case shows that allowing for revision of arbitral awards may significantly delay and complicate arbitration proceedings.

Case

Diag v Czech Republic (ECLI:NL:HR: 2018:918), (15 June 2018).

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