

**Civil judgment 2019TALCH10/00094**

Public hearing of Friday, seventh June two thousand and nineteen

Number 142988 on the list

Bench:

Stéphanie NEUEN, Deputy Presiding Judge,  
Livia HOFFMAN, judge, [signatures]  
Marlène MULLER, delegated judge,  
Danielle FRIEDEN, court clerk.

**Between**

the European company DIAG HUMAN SE, incorporated under the laws of the Principality of Lichtenstein, established and with registered office at Landstrasse 33, 9490 Vaduz, Principality of Lichtenstein, represented by its board of directors currently in office, registration no. FL-0002.198.358-2.

claimant pursuant to a writ of summons of 10 October 2011 of the deputy process server Gilles HOFFMANN, acting in the stead of the process server Carlos CALVO of Luxembourg,

represented by *Maître* Rémi CHEVALIER, barrister, resident in Luxembourg,

**and**

the CZECH REPUBLIC, represented by the Health Ministry, with registered office at Palackého nám 4, CZ- 128 01 Prague 2, identification no. 024341

defendant pursuant to the aforementioned CALVO writ,

represented by *Maître* Didier SCHOENBERGER, barrister, resident in Luxembourg.

## **The Court**

In view of the order of 5 October 2018 closing the preliminary enquiries.

Having heard the report made pursuant to article 226 of the New Code of Civil Procedure at the public hearing of 15 February 2019.

Having heard the European company DIAG HUMAN SE through *Maître* Rémy CHEVALIER, barrister appointed to act.

Having heard the CZECH REPUBLIC through *Maître* Didier SCHOENBERGER, barrister appointed to act.

## **The proceedings**

By virtue of an authorisation given by the president of the court on 15 September 2011 in response to an application filed at the clerks' office of the District Court of and in Luxembourg on 14 September 2011, the European company DIAG HUMAN SE (hereinafter: DIAG HUMAN), by means of a process server's writ of 4 October 2011, attached the sums in the possession of the third party debtors KBL EUROPEAN PRIVATE BANKERS and BGL BNP PARIBAS SA that they owed or might come to owe to the CZECH REPUBLIC, represented by its Health Ministry, as security for and to ensure payment of the sum of 419,734,449 Euros.

The attachment was duly served on the CZECH REPUBLIC by a process server's writ of 10 October 2011. That writ also contained a summons to appear before the Court of this judicial district to hear it order the summoned party to pay the sum of 419,734,449 Euros in respect of an order made under an arbitration award, as well as the costs of the proceedings, and to have the attachment validated.

The attachment was served on the attached third party debtors by a process server's writ of 12 October 2011.

## **The parties' arguments and claims**

DIAG HUMAN states that, in an arbitration award made in Prague on 4 August 2008, the CZECH REPUBLIC was ordered to pay it:

- the sum of CZK (Czech koruna) 4,089,716,666 as damages,
- the sum of CZK 4,244,979,686 as late payment interest,
- the sum of CZK 1,287,877 per day between 1 July 2007 and the day of payment.

DIAG HUMAN states that on the day of the application for the attachment the total sum was CZK 10,312,875,424, i.e. 419,734,449 Euros, at the EUR/CZK exchange rate of 1/24.57.

DIAG HUMAN states that the CZECH REPUBLIC refused to pay this amount to the attaching party.

The Czech State issued several international bond programmes on 3 June 2004 and 23 May 2008 for a maximum nominal amount of 3,000,000,000 Euros and 10,000,000,000 Euros respectively, for which the paying agents were KBL EUROPEAN PRIVATE BANKERS SA and BGL BNP PARIBAS Luxembourg, the attached third party debtors in the instant case.

DIAG HUMAN states that the arbitration award was rendered enforceable in Luxembourg by an exequatur order of the Court of this judicial district given on 10 August 2011.

That enforceable title was served on 6 September 2011, in accordance with the provisions of regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

Meanwhile, an exequatur judgment on appeal made on 27 April 2017 rejected the CZECH REPUBLIC's appeal against the order made at first instance, as a result of which the arbitration award of 4 August 2008, to which the writ of execution had been appended by the arbitrators in the meantime, acquired the force of *res judicata* and the attachment carried out should therefore be validated.

DIAG HUMAN requests provisional enforcement of the judgment and that the CZECH REPUBLIC be ordered to pay it a contribution of 25,000 Euros toward the expenses of the proceedings not included in the costs.

The CZECH REPUBLIC first argues that the Court does not have jurisdiction to rule on DIAG HUMAN's requests. In the alternative, it asks the Court to rule that those requests are null, otherwise inadmissible, otherwise unfounded.

In this regard it invokes the jurisdictional immunity and the immunity from enforcement it enjoys under public international law.

It asks the Court to declare that it does not have jurisdiction to rule on either DIAG HUMAN's request for the judgment order or its request for validation of the attachment, otherwise to rule those requests inadmissible.

It asks the Court to rule that the attachment is null, arguing that the award of 4 August 2008 was open to review.

As to the merits, it asks the Court to rule that DIAG HUMAN's requests are unfounded, because the attaching party does not have an enforceable title. Its claim is neither certain, nor liquid, nor due.

It asks that the attachment order be lifted, and that DIAG HUMAN be ordered to pay it a contribution of 5,000 Euros toward the expenses of the proceedings not included in the costs pursuant to article 240 of the New Code of Civil Procedure.

The claimant should also be ordered to pay the costs of the proceedings, to be paid to *Maître SCHÖNBERGER*.

DIAG HUMAN asks the Court to reject the CZECH REPUBLIC's immunity pleas.

As regards the enforceable nature of the title on which the attachment carried out is based, DIAG HUMAN argues that at the time of the attachment carried out on 4 October 2011 it did have an enforceable title, as the appeal against the exequatur order of 12 August 2011 was filed only on 7 October 2011.

It also asks the Court to reject the CZECH REPUBLIC's request for a contribution towards the expenses of the proceedings not included in the costs, and to order the CZECH REPUBLIC to pay the costs of the proceedings, to be paid to *Maître Rémi CHEVALIER*, and to order it to pay the costs of the exequatur proceedings.

DIAG HUMAN has increased its claim on several occasions during the proceedings and in its most recent submissions asks the Court to order the CZECH REPUBLIC to pay the sum of 524,98,923 Euros, to which should be added the sum of 50,524.54 Euros per day of delay from 10 July 2018. In the alternative, it asks the Court to express its order in Czech koruna.

It points out that, in the document introducing the proceedings, it made its claim "*subject to increase during the proceedings*".

The CZECH REPUBLIC argues that, since DIAG HUMAN agreed, in the interlocutory proceedings, to the sums attached being limited to 419,734,449 Euros, it cannot claim a higher amount without making a new claim.

It therefore argues that DIAG HUMAN's requests for the sum to be increased made during the proceedings are null because they are new claims.

Finally, the CZECH REPUBLIC invokes the reasoning of the Court of Cassation of the Netherlands in its judgment of 15 June 2018 in proceedings between the same parties, in which it found that the arbitration award made on 23 July 2014 concluded the arbitration proceedings as a whole, thus rendering irrelevant the arbitration award of 4 August 2008, which therefore cannot constitute a final and irrevocable decision for the parties, regardless of the fact that the award contains a clause giving it legal force in the Czech Republic.

It invokes this decision on the basis of article 36 (1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, by virtue of which decisions

given in a Member State are recognised in the other Member States without any special procedure being required.

In the alternative, the CZECH REPUBLIC asks the Court to refer to the Court of Justice of the European Union (hereinafter: CJEU) for a preliminary ruling as to whether article 36 of regulation EU no. 1215/2012 must be interpreted as obliging the judicial authorities of a Member State to automatically recognise a decision made by the judicial authorities of another Member State consisting of an arbitration award not having the status of *res judicata* and binding force between the parties, since the outcome of the dispute is linked to accurate interpretation of the rules of European law.

### **The Court's assessment**

#### **1. Facts and background**

On 4 August 2008, an arbitration award was made in Prague between the claimant and the CZECH REPUBLIC, in accordance with the arbitration agreement signed by the parties on 18 September 1996 in which the parties submitted to an arbitration panel the dispute which had arisen between them concerning the damages suffered by DIAG HUMAN in connection with the award of a blood plasma contract.

In that award, the arbitrators ordered the CZECH REPUBLIC to pay DIAG HUMAN the sum of CZK 4,089,716,666.00 as damages, the sum of CZK 4,244,879,686.00 as late payment interest, and the sum of CZK 1,287,877.00 per day from 1 July 2007 until payment, also as late payment interest, and to do so within the period of one month following the date on which the final arbitration award acquired the status of *res judicata*.

This decision was rendered enforceable in the Grand Duchy of Luxembourg, as if it had been made by a Luxembourg court, by means of the order of the Presiding Judge of the court of 10 August 2011, pursuant to article 1250 of the New Code of Civil Procedure.

This exequatur order was served on the CZECH REPUBLIC by a process server's writ of 6 September 2011.

The CZECH REPUBLIC appealed against the exequatur order of 10 August 2011 by means of a process server's writ of 7 October 2011.

The CZECH REPUBLIC's appeal was rejected by the Appeal Court in its judgment no. 55/17 of 27 April 2017, which was served on the CZECH REPUBLIC on 26 May 2017.

On 25 July 2017, the CZECH REPUBLIC lodged an appeal on points of law (*pourvoi en cassation*) against the judgment of 27 April 2017 at the Court of Cassation. Its appeal was rejected by the Court of Cassation in its judgment no. 70/2018 of 28 June 2018.

On 22 June 2012, the interlocutory applications judge ordered that the attachment carried out be limited to 419,734,449 Euros, until such time as a final decision was made on the merits.

## 2. The Court's territorial jurisdiction

For validation of an attachment, international jurisdiction is determined by reference to the jurisdiction of the authority called on to decide the interim relief measure of which the action for validation is the necessary consequence. It is, in fact, accepted that, because of the principle of territoriality of enforcement procedures, the validation aspect remains under the jurisdiction of the courts of the place of domicile of the attached third party debtor.

In the instant case, DIAG HUMAN had the attachment carried out on the basis of the arbitration award of 4 August 2008, pending that award being declared enforceable in the Grand Duchy.

As the attached third party debtors are domiciled in Luxembourg, the Court does have jurisdiction to rule on the request for validation of the attachment carried out.

## 3. The regularity of the proceedings

The attachment carried out on 4 October 2011 was served on the CZECH REPUBLIC by a process server's writ of 10 October 2011, that same writ also containing a summons for validation of the attachment.

The attachment was served on the attached third party debtors on 12 October 2011.

The claim as made by process server's writ of 10 October 2011 is admissible as the legal requirements concerning time and form were complied with.

## 4. The plea of non-admissibility based on immunity

As the CZECH REPUBLIC invokes both its jurisdictional immunity and its immunity from enforcement, the nature of the dispute between the parties must be determined.

The CZECH REPUBLIC argues that the dispute between it and the claimant concerns an act lying within its sovereign power, while DIAG HUMAN argues that the dispute that has arisen between them relates to the CZECH REPUBLIC's civil liability relating to the harm caused to DIAG HUMAN's trading name and reputation, resulting in the arbitrators ordering the CZECH REPUBLIC to pay it damages.

The CZECH REPUBLIC invokes its immunity from enforcement on the basis of the principle that State assets are to be considered exempt from seizure or attachment.

In its arguments, the CZECH REPUBLIC relies *inter alia* on article 15 of the European Convention on State Immunity and its additional Protocol, signed in Basel on 16 May 1972, approved by the Luxembourg act of 8 June 1984. It argues that the CZECH REPUBLIC is not a signatory to that convention, but that it applies to this dispute because it has been signed by Luxembourg.

DIAG HUMAN replies that, because the CZECH REPUBLIC is not a signatory to the Basel Convention invoked, the provisions of that convention cannot be relied either in its favour or against it, stating that in any event the CZECH REPUBLIC did not invoke its immunity before pleading on the merits, as required by article 3 of the Basel Convention.

The claimant also invokes the provisions of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, to which both Luxembourg and the CZECH REPUBLIC are parties.

As regards the immunity from enforcement invoked, the claimant states that the CZECH REPUBLIC has failed to prove that the assets attached were of such a nature as to benefit from immunity from enforcement and points out that the sums attached serve neither for the performance of a public service mission or the exercise of prerogatives of the public authorities.

The claimant argues that immunity of the CZECH REPUBLIC from enforcement would be incompatible with both the requirements of European Union law and the commitments given by the CZECH REPUBLIC in the Council of Europe. It invokes *inter alia* the decision of the European Court of Human Rights (hereinafter: ECHR) of 19 March 1997 in the case of HORNSBY versus Greece, according to which enforcement of a first instance judgment or judgment upon appeal of any court whatsoever must be regarded as being an integral part of the proceedings, pursuant to article 6 of the European Convention on Human Rights (hereinafter: the Convention). As the CZECH REPUBLIC is party to the Convention and a member of the European Union, accepting arbitration, as it did in the instant case, necessarily entails waiver by the CZECH REPUBLIC of its immunity from enforcement.

For its part, the CZECH REPUBLIC invokes *inter alia* the decision of the ECHR of 3 March 2005 in MAINOLESCU and DOBRESCU versus Romania and Russia, which recalled the principle that States enjoy immunity in the territory of the forum, subject to certain strictly limited conditions.

DIAG HUMAN argues that article V of the arbitration agreement signed by the parties constitutes waiver by the CZECH REPUBLIC of both its jurisdictional immunity and its immunity from enforcement.

The jurisdictional immunity that all States and their emanations enjoy enables the beneficiary thereof to object to a court hearing a claim brought against it. Jurisdictional immunity affects not only the jurisdiction of the court seised of the matter, but also the claimant's right to sue. In effect, it

deprives the claimant of the right to apply to the courts of a given judicial system to rule on his claim, whether that claim is well-founded or not.

Jurisdictional immunity is a privilege which the State or entity that is the beneficiary thereof can waive. Waiver must be certain and unequivocal; it may be express or implicit and be inferred from the circumstances. Waiver of jurisdictional immunity may be established *inter alia* by contractual clauses manifesting the unequivocal intention to waive the benefit of the immunity, or by the beneficiary of the immunity entering an appearance as defendant in the proceedings while not relying on its immunity and accepting that the merits of the case will be debated.

Immunity from enforcement protects the beneficiary thereof from enforcement of a decision made against it. It prevents the courts from ordering a measure or a sanction against the beneficiary of the privilege.

Waiver of jurisdictional immunity does not automatically entail waiver of immunity from enforcement. Waiver of immunity from enforcement must be specific and unequivocal. It may be established *inter alia* by a particular provision of an agreement manifesting, even implicitly, a certain and unequivocal intention to do so. The court must analyse the agreement in the light of its content and the circumstances in order to establish the intention of the foreign State.

In the instant case, the parties signed an arbitration agreement on 18 September 1996. According to the official German translation of that agreement, the dispute they undertook to submit to a panel of arbitrators concerned *“the compensation for the damage that is alleged to have been caused in connection with the letter from Dr.med. Martin Bojar, CSc; the then Health Minister of the Czech Republic, to K. Eldrup-Jørgensen, the Vice President of A/S Novonordisk København dated 9 March 1992”*.

It follows from the terms used in the definition of the dispute to be resolved that the dispute relates to a matter of private law and therefore has no connection with the Czech State’s exercise of its sovereign powers.

According to the same German translation of the said agreement, clause V invoked by DIAG HUMAN is worded as follows:

*“Furthermore, the contractual parties have agreed that the findings of the arbitration panel shall be subject to review by other arbitrators, which the contractual parties shall select in the same manner, if the request for a review is served to the other contractual party within 30 days of the date on which the requesting contractual party has been served the findings of the arbitration panel. Article II. to IV. of this agreement shall apply similarly to the review of the findings of the arbitration panel. If the request for review is not served to the other contractual party within said period, the findings shall acquire legal force and the contractual parties shall voluntarily undertake to execute them in the period determined by the arbitrators, otherwise they may be executed by the competent court.”*

It follows from the wording of that article that the arbitration award will take effect if the application for review of the arbitration award is not filed within the required period, that the parties voluntarily undertake to implement it by the deadline to be set by the arbitrators, and that if the parties fail to do so the arbitration award may be enforced ("*vollzogen*") by the court having jurisdiction.

By signing the arbitration agreement of 18 September 1996, DIAG HUMAN and the CZECH REPUBLIC agreed to submit their dispute to a panel of arbitrators. It is established by the clear terms of that agreement and more specifically the aforementioned clause V that the parties accepted the principle that the arbitration award to be made would become enforceable at a given moment and that, if it was not implemented by one of the parties, it could be implemented by the court having jurisdiction.

It follows from this undertaking given by the CZECH REPUBLIC that it implicitly and unequivocally waived the right to invoke its jurisdictional immunity in connection with implementation of the arbitration award to be made.

For the same reasons, the Court finds that the CZECH REPUBLIC, by signing the arbitration agreement, implicitly and unequivocally waived the right to invoke its immunity from enforcement in connection with the dispute between itself and DIAG HUMAN, since implementation of the forthcoming decision, which it agrees in principle to submit to the court having jurisdiction, falls within the scope of its enforcement.

For the sake of completeness, the Court finds that the CZECH REPUBLIC cannot invoke the provisions of the European Convention on State Immunity concluded in Basel on 16 May 1972, as it is not a party to this convention.

Nor can any legal conclusion about State immunity be drawn from the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, since the present dispute lies outside its scope as this convention does not deal with State immunity.

The CZECH REPUBLIC's pleas of immunity must therefore be rejected.

##### 5. The request that the attachment be annulled

The CZECH REPUBLIC argues that the attachment is null, since DIAG HUMAN did not have a certain claim at the date on which it was carried out.

To avoid an attachment being null, the attaching party must be able to approve that the existence of a claim in its favour is certain. That certainty must exist on the day the attachment is carried out. (T. HOSCHEIT, *La saisie-arrêt de droit commun* (Attachment under ordinary law, Pas. 29, p. 59)

A claim is certain when it is free of any dispute and is firm and unconditional.

According to case law, the following are deemed to be certain: a recognised claim for which there is evidence of its existence, or a claim the principle of which is certain and not disputed.

In the instant case, DIAG HUMAN attached the assets of the CZECH REPUBLIC on 4 October 2011 on the basis of an authorisation from the Presiding Judge of the court obtained on the basis of the Czech arbitration award of 4 August 2008, declared enforceable in Luxembourg by an exequatur order of 10 August 2011. DIAG HUMAN served the exequatur order on the CZECH REPUBLIC by process server's writ of 6 September 2011 and the latter filed an appeal against the exequatur order on 7 October 2011.

According to the French translation of the arbitration award of 4 August 2008, the arbitrators ordered the CZECH REPUBLIC to pay DIAG HUMAN the sum of CZK 4,089,716,666 as damages (point 1), the sum of CZK 4,244,879,686 as late payment interest (point 4), *"the sum of CZK 1,287,877 per day between 1 July 2007 and the date of payment, as well as on the amount of CZK 58,130,213 between 14 July 2007 and the date of payment, at the refinancing rate set by the Czech central bank plus 7 percentage points, and for each calendar half year during which the debtor is in payment arrears the amount of the late payment interest will depend on the level of the refinancing rate set by the Czech central bank and in force on the first day of the calendar half year calculated."* (point 6.)

There is no doubt as to the existence of the claim and therefore the Court finds that DIAG HUMAN has established that on 4 October 2011, the day of the attachment, it had a claim against the CZECH REPUBLIC, resulting from a foreign arbitration decision declared by an exequatur order of 10 August 2011 to be enforceable in Luxembourg as if it had been made by a Luxembourg court.

The mere fact that the exequatur order rendering the arbitration award enforceable in Luxembourg was appealed by the defendant, so that it had not yet acquired the status of *res judicata* on the day of the attachment, cannot alter the fact that the claim was certain on the day of the attachment, which cannot be called into question in the instant case. Indeed, the fact that an exequatur order has not yet acquired the status of *res judicata* does not prevent the creditor from commencing attachment proceedings (*op. cit.*, p.58). It is only on the day of the forthcoming decision on validation of the attachment that the judge must examine whether the claim is based on a decision having acquired the status of *res judicata* in order to be able to determine whether the claim satisfies the requirement that it be certain, liquid and due.

Since, on the day of the attachment, DIAG HUMAN's claim satisfied the required condition of certainty, the attachment carried out is not null.

#### 6. The merits of the request for validation

The Court must verify whether the attaching party has an enforceable title as part of its analysis of the merits of the request for validation of the attachment carried out.

In the instant case, it is necessary to determine whether the exequatur decision that declared the arbitration award of 4 August 2008 enforceable in Luxembourg satisfies the triple requirement of bearing the writ of execution, having been duly served and containing an order to pay an amount that is certain, while having the authority of *res judicata* on the main issue (*op. cit.*, p. 57)

It is for the party requesting validation to provide proof that these requirements are met, either by producing to the Court certificates that there is no objection or no appeal, or by producing the decision made on the appeal, which must satisfy the requirements for enforcement.

In the instant case, DIAG HUMAN bases its request for validation on the arbitration award of 4 August 2008 rendered enforceable in Luxembourg.

Accordingly, it produces to the Court the aforementioned arbitration award, the exequatur order of 10 August 2011, the exequatur judgment on appeal of 27 April 2017 rejecting the CZECH REPUBLIC's appeal against the exequatur order, and the writ of service of that judgment on the CZECH REPUBLIC of 26 May 2017.

The exequatur judgment of 27 April 2017, which rejected the appeal against the exequatur order concerning the arbitration award of 4 August 2008, now has the status of *res judicata*, thus rendering the arbitration award of 4 August 2008 enforceable in Luxembourg, regardless of the appeal on points of law to the Court of Cassation filed in the instant case by the CZECH REPUBLIC, which, moreover, was rejected by the Court of Cassation in its judgment of 28 June 2018.

The arbitration award rendered enforceable contains an order for the CZECH REPUBLIC to pay an amount that is certain.

As this is a "final" arbitration award, as established by its title in its French version, it is not a provisional decision but a decision that has the authority of *res judicata* on the main issue.

In order to block the effects of the Luxembourg Appeal Court's exequatur judgment concerning the enforceability of the arbitration award of 4 August 2008, the CZECH REPUBLIC invokes a judgment given by the Court of Cassation of the Netherlands on 15 June 2018 between the same parties in the exequatur proceedings concerning the same arbitration award in the Netherlands. It bases its arguments on the findings of that court, which found that the arbitration award of 4 August

2008 was not enforceable in the Netherlands because it had been rendered irrelevant by the arbitration award made on 23 July 2014.

It invokes this foreign decision before this court on the basis of article 36(1) of Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, by virtue of which decisions given in a Member State are recognised in the other Member States without any special procedure being required.

In the alternative, the CZECH REPUBLIC asks the Court to refer to the CJEU for a preliminary ruling on the interpretation of article 36 of said regulation.

DIAG HUMAN does not take any position either on whether the regulation invoked by the CZECH REPUBLIC is applicable, or on the preliminary ruling requested in the alternative.

The decision of the Court of Cassation of the Netherlands invoked was given in connection with proceedings brought by DIAG HUMAN seeking a ruling that the arbitration award of 4 August 2008 was recognised and enforceable in Holland, and therefore in connection with exequatur proceedings. It is a judgment rejecting an appeal to the Court of Cassation on points of law against a judgment of the Court which had confirmed the decision of the first instance court not to find in favour of DIAG HUMAN's request.

Exequatur proceedings seek to render an arbitration award enforceable or to authorise enforcement of a judgment in the territory of the country in which they are brought. The effect of decisions made in such exequatur proceedings is, given the nature of those proceedings, limited to the territory of the country in which they are brought.

In the instant case, DIAG HUMAN brought exequatur proceedings in Luxembourg concerning the arbitration award of 4 August 2008, seeking to have that award rendered enforceable in Luxembourg, pursuant to the provisions of the Luxembourg New Code of Civil Procedure and the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

The decision of the Court of Cassation of the Netherlands invoked by the CZECH REPUBLIC concerns DIAG HUMAN's request to have the same arbitration award of 4 August 2008 ruled enforceable in Holland, pursuant to the applicable Dutch legislation and the aforementioned New York Convention of 1958.

Since a decision given in exequatur proceedings can only produce its effects within the country in which it is given, the decision of the Court of Cassation of the Netherlands, which is limited to confirming that the arbitration award of 4 August 2008 should not be declared enforceable in the Netherlands, does not constitute a decision pursuant to article 36(1) of EU regulation no. 1215/2012 and, consequently, that regulation does not apply.

In these circumstances, the decision invoked cannot influence the question of whether the arbitration award of 4 August 2008 is enforceable in Luxembourg and, *a fortiori*, has no effect in this dispute.

As the interpretation of the provision of European Union law invoked in the alternative is therefore irrelevant to resolution of the dispute, the CZECH REPUBLIC's request to refer to the CJEU for a preliminary ruling on the interpretation of article 36(1) of the aforementioned regulation must be rejected.

As there is no obstacle to prevent the Appeal Court's exequatur judgment of 27 April 2017 taking effect, the Court finds that the Czech arbitration award of 4 August 2008 given between the parties is enforceable in Luxembourg.

As the question of whether the arbitration award is enforceable has been settled in the exequatur proceedings, it is not necessary to analyse the CZECH REPUBLIC's arguments raised in these proceedings seeking to cast doubt over such enforceability.

In light of the foregoing facts and arguments, this Court must find that the arbitration award of 4 August 2008, rendered enforceable in Luxembourg by the aforementioned Appeal Court judgment of 27 April 2017, constitutes an enforceable title, which gives rise to the certain, liquid and due nature of DIAG HUMAN's claim, a title which justifies an attachment.

It is therefore necessary to rule in favour of DIAG HUMAN's request for validation.

Since there is an enforceable title, DIAG HUMAN's request for a judgment order is irrelevant.

DIAG HUMAN's requests to increase the amounts claimed made during the proceedings arise out of the same title as the request for validation of the attachment carried out.

Validation of an attachment is limited to the object of the attachment. The Court cannot validate an attachment either for amounts that are higher than the attachment or the authorisation to attach or for heads of claim that were not included in the attachment.

The request for validation of the attachment carried out is therefore justified in the maximum amount of 419,734,449 Euros, the amount in which the attachment was carried out.

It follows that it is necessary to rule in favour of the request for validation of the attachment carried out by DIAG HUMAN on the basis of the arbitration award of 4 August 2008 rendered enforceable in Luxembourg by the Appeal Court's judgment no. 55/17 of 27 April 2017 in the sum of 4,089,716,666 Czech koruna as damages, 4,244,879,686 Czech koruna as late payment interest for the period 1 July 1992 to 30 June 2007, and the sum of 1,287,877 Czech koruna per day between 1 July 2007 and the

date of payment, in accordance with the arbitration award of 4 August 2008, all to be converted to Euros at the exchange rate ruling on the day of the judgment, without exceeding the amount of 419,734,449 Euros, this being the amount in which the attachment was carried out.

#### 7. The ancillary claims

Article 240 of the New Code of Civil Procedure allows the court to order one of the parties to pay the other a contribution when it seems unfair to leave that party to pay the sums actually incurred by it and not included in the costs.

In light of the outcome of the dispute, the CZECH REPUBLIC's request to be awarded a contribution to the expenses of the proceedings must be ruled unfounded.

Application of article 240 of the New Code of Civil Procedure is at the discretion of the court.

Since it seems unfair to leave DIAG HUMAN to pay the sums it has incurred which are not included in the costs, it is necessary to rule in favour of its request to be awarded a contribution to the expenses of the proceedings on the basis of article 240 of the New Code of Civil Procedure, in the amount of 5,000 Euros.

#### 8. Provisional enforcement

DIAG HUMAN requests provisional enforcement of the forthcoming judgment.

The CZECH REPUBLIC objects to provisional enforcement of the forthcoming judgment, failing which it asks that provisional enforcement be accompanied by payment of security corresponding to the amount claimed by the claimant at the time of the forthcoming judgment.

Under article 244 of the New Code of Civil Procedure, provisional enforcement, without security, will be ordered, including *ex officio*, if there is an authentic title, a recognised promise, or an earlier judgment order against which there is no appeal. In all other cases, provisional enforcement may be ordered with or without security.

Where provisional enforcement is optional, as in the instant case, whether it is appropriate is assessed according to the particular circumstances of the case, taking into account *inter alia* the parties' respective interests, the degree of urgency, the danger in delaying, and the advantages or disadvantages that provisional enforcement may bring for one party or the other.

In the instant case, the Court, in the presence of a certain, liquid and due claim on the part of the claimant, and seeking to balance the impact of the exceedingly longstanding nature of the facts and of the dispute with the parties' respective interests, finds that provisional enforcement of the

judgment without security is justified and therefore that it is necessary to rule in favour of DIAG HUMAN's request that provisional enforcement of the judgment be ordered.

As losing party, the CZECH REPUBLIC must be ordered to pay the costs of the proceedings.

The request for the CZECH REPUBLIC to be ordered to pay the costs of the exequatur proceedings is, however, inadmissible, since it has already been ordered to do so by the Appeal Court in its judgment of 27 April 2017.

#### **FOR THESE REASONS**

The District Court of Luxembourg, tenth division, sitting in a civil matter and ruling after due hearing of both parties,

rules the requests admissible in form,

rules that the European company DIAG HUMAN SE's request for a judgment order in the summons of 10 October 2011 is irrelevant,

rules that the request for validation of the attachment carried out by process server's writ of 4 October 2011 is admissible and well-founded,

therefore, declares good and valid the attachment by the European company DIAG HUMAN SE pursuant to process server's writ of 4 October 2011 against the CZECH REPUBLIC to ensure collection of the sum of 4,089,716,666 Czech koruna as damages, the sum of 4,244,879,686 Czech koruna as late payment interest for the period from 1 July 1992 to 30 June 2007 and the sum of 1,287,877 Czech koruna per day between 1 July 2007 and the date of payment, in accordance with the arbitration award of 4 August 2008, all to be converted to Euros at the exchange rate ruling on the day of the judgment and without the total amount exceeding 419,734,449 Euros, the amount in which the attachment was carried out on 4 October 2011,

rules that consequently the sums that the attached third party debtors acknowledge they owe or are found by a judgment to owe shall be paid by them to the claimant to be deducted from and up to the amount of the claim of the European company DIAG HUMAN SE,

declares that the request for 5,000 Euros made by the European company DIAG HUMAN SE on the basis of article 240 of the New Code of Civil Procedure is well-founded,

therefore, orders the CZECH REPUBLIC to pay 5,000 Euros to the European company DIAG HUMAN SE as a contribution towards the expenses of the proceedings not included in the costs,

orders provisional enforcement of the judgment,

orders the CZECH REPUBLIC to pay the costs of the proceedings, to be paid to *Maître Rémi CHEVALIER*, barrister, who so requests, confirming that he has advanced them.

[signatures]