NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 17-7154

DIAG HUMAN S.E.,

Plaintiff-Appellant,

v.

CZECH REPUBLIC - MINISTRY OF HEALTH,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia in Case No. 1:13-CV-00355-ABJ
Honorable Amy Berman Jackson, U.S. District Judge

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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GLOSSARY OF ABBREVIATIONS

ABBREVIATION/ACRONYM	FULL TERM
AA; Arbitration Act; or the Act	Czech Arbitration Act (Act No. 216/1994 Coll.)
Convention; or New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, *et seq.*
CZK	Czech Republic Koruna
CzR	The Czech Republic-Ministry of Health
Diag	Diag Human S.E.
FAA	Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*
Final Award	The binding arbitration award rendered on August 4, 2008 and delivered to the Parties on August 13, 2008 (JA91-316).

PRELIMINARY STATEMENT

The Czech Republic – Ministry of Health ("CzR") runs from the district court's opinion (the "Opinion") in its opposition (the "Opposition")[1] to Diag Human S.E.'s ("Diag") opening brief.[2] This is evident from a comparison of the number of direct quotations to the Opinion CzR is meant to be defending – *one* (Opp. Br. 18-19) – with the number of direct quotations to the foreign decisions CzR cites extensively without any explanation as to how they might support the district court's Opinion or allow this Court to affirm it – *nine* (Opp. Br. 26-30).[3] In an apparent effort to distance itself from the district court, the Opposition is a study in paraphrase and hedging, with CzR presenting a version of the Opinion it would prefer without actually explaining why the Opinion, as written, should be affirmed.

CzR takes issue with Diag's characterization of the Opinion as holding that the Final Award was essentially nullified by the submission of the review requests, arguing, "[h]owever, the District Court did not go so far in its reasoning." (Opp. Br. 16.) CzR then argues that, in fact, "the District Court's ruling is not inconsistent"

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[1] Brief of Defendant-Appellee, The Czech Republic-Ministry of Health, cited herein as "Opp. Br."

[2] Corrected Brief For Plaintiff-Appellant, cited herein as "Br." Capitalized terms not defined herein shall have the meanings ascribed to them in Diag's opening brief.

[3] CzR, like the district court, also fails to acknowledge that the most recent foreign decision from the Supreme Court of Justice of the Grand Duchy of Luxembourg, was decided in Diag's favor and confirmed the Final Award.

with Diag's explanation that under the Arbitration Act and Czech law, the submission of a review request merely suspends an award. (*Id*. at 16-17.) The district court plainly and wrongly found that because a review request was submitted here, "pursuant to the terms of the parties' own Arbitration Agreement, the 2008 Final Award never took effect." JA1352. The actual words of the district court demonstrate that it did not find the Final Award merely suspended; it explicitly found the Final Award never became and could never have become final solely by virtue of the submission of the parties' review requests. This was error, whether examined under Czech law or basic principles of contract interpretation under U.S. law; CzR cannot hide from it and this Court should either reverse the decision of the district court and confirm the Final Award on the record before it, or remand this case for further proceedings.

STATUTORY PROVISIONS

All applicable statutes, etc., are contained in the Corrected Brief for Plaintiff-Appellant and Brief of Defendant-Appellee.

SUMMARY OF ARGUMENT

1. CzR incorrectly argues that the district court did not err in failing to interpret the Arbitration Agreement in accordance with Czech law because Article III of the Convention mandated the district court's interpretation under U.S. law. Article III has no bearing on the question of what law applies to the interpretation of

a foreign arbitration agreement or award. On that question, CzR's own cases mandate the application of Czech law. Under Czech law, there is no question that the district court erred by finding that the plain language of Article V of the Arbitration Agreement and the Resolution (which discontinued the review proceedings) rendered the Final Award unenforceable under the Convention, because Article V can do no more than suspend the Final Award pending the outcome of the review proceedings, and the Resolution that discontinued the proceedings did not change, cancel or even mention the Final Award.

2. CzR is incorrect in arguing, without citation to any caselaw, that a contractual construction will not be deemed absurd unless the exact factual circumstances present render it so. Whether a contractual construction is susceptible of producing an absurd result, and is therefore wrong, is not fact specific, but rather a function of whether the construction, "[c]arried to its logical conclusion . . . would lead to absurd results." *Nextel Spectrum Acquisition Corp. v. Hispanic Info. & Telecommunications Network, Inc.*, 503 F. Supp. 2d 334, 339 (D.D.C. 2007). Because CzR does not deny that the logic of the district court's construction of Article V of the Arbitration Agreement leads to an absurd result, it has not demonstrated that the district court did not err in finding the plain language of the Arbitration Agreement results in the unenforceability of the Final Award.

3. CzR misrepresents Diag's argument concerning the effect of the Resolution in order to assert that Diag advocated below for the district court's *de novo* review of the Resolution. While Diag took issue with some of the Review Panel's statements in the reasoning portion of the Resolution as suspect under Czech law, it argued that the district court's error was in elevating those statements to the level of a ruling and not, as CzR contends, in arguing for *de novo* review. Under Czech law, any "ruling" must be contained in the decretal paragraphs of the Resolution. Despite CzR's protestations to the contrary, this view of Czech law is entirely supported by Diag's experts.

4. Regardless of CzR's attempts to minimize and rationalize its *ex parte* communications with the Review Panel Arbitrators, they indisputably occurred while the review was pending, and they resulted in a thirty-seven-fold increase in the amount of fees promised by CzR to the Review Panel over all previous arbitrators. Such contact is both implicitly and explicitly contrary to U.S. public policy and CzR does not, and cannot, establish otherwise.

ARGUMENT

I. CZECH LAW APPLIES TO THE INTERPRETATION OF THE RESOLUTION AND UNDERLYING ARBITRATION AGREEMENT

As Diag established in its opening brief, the district court erred in interpreting the Arbitration Agreement, and in particular Article V thereof, without reference to Czech law. (Br. 20-25.) Diag demonstrated that had the district court engaged in an

appropriate contractual interpretation under Czech law, it would have concluded that Article V, which adopts the optional review process of Arbitration Act § 27, does not mean that the mere lodging of a request for review of an award permanently renders the award unenforceable. Rather, under Czech law, the enforceability of an award following the submission of a review request is determined by the outcome of the review proceeding, and because the Resolution here discontinued the arbitration without expressly overturning, or even mentioning the Final Award at all, it became fully enforceable under Czech law, and, therefore, the Convention. (Br. 23-24.) In its Opposition, CzR argues that the Convention actually mandates the application of U.S. principles of contract interpretation to the Arbitration Agreement, and that under those principles, the district court's interpretation was correct. However, as shown below, the very cases it cites contradict CzR's argument and actually demonstrate Czech law must be applied. Moreover, even under U.S. principles of contract interpretation the district court's interpretation fails because it leads to an absurd result.

A. Article III of the Convention Does Not Mandate Interpretation of a Foreign Arbitration Agreement Under U.S. Law.

In its Opposition (at 14-15), CzR, relying primarily on *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 75 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017) ("*CBF*"), argues that the Convention mandates that the Arbitration Agreement (and, perhaps implicitly, the Resolution) must be interpreted according

to U.S. law as the law of the "***territory where the award is relied upon.***" (Opp. Br. 14 (quoting Convention Art. III) (alteration in the original)). But this fundamentally misinterprets the purpose of Convention Article III and misstates the holding of *CBF*.

As the Second Circuit explains in *CBF*, the purpose of the statement in Article III of the Convention that a signatory state "shall recognize arbitral awards as binding and *enforce* them in accordance with the rules of procedure of the territory where the award is relied upon" (emphasis added), is so "'[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.'" *CBF*, 850 F.3d at 75 (quoting Convention Art. III). Accordingly, Article III has no bearing on the question of whose law a court must look to when interpreting an underlying arbitration agreement; it concerns itself merely with the limits of enforcement and with ensuring that foreign awards are treated in the same manner as domestic awards in the enforcement jurisdiction.

CBF demonstrates this point aptly. In *CBF*, the plaintiff, a Brazilian company, had obtained a $78 million arbitral award in the ICC Paris against a Swiss entity, SBT. The plaintiff alleged SBT had transferred all of its assets to other successor companies during the pendency of the underlying arbitration. With its award against

SBT – now judgment proof – in hand, CBF sought to enforce the award in the Southern District of New York against parties who were not named in the award but who, the plaintiff alleged, were "'alter egos' and 'successor[s]-in-interest'" of SBT. *Id.* at 68. The plaintiff did not argue that it was allowed to enforce the award against these third-parties pursuant to the arbitration agreement or some other contract between the parties, but rather under general principles of U.S. law applicable in the enforcement jurisdiction. Accordingly, the relevant inquiry was whether the plaintiff could proceed to *enforce* its award rendered against SBT against third parties to the award, not, as here, what the award or the arbitration agreement means. On this *enforcement* point, the Second Circuit held that "the question of whether a third party not named in an arbitral award may have that award enforced against it under a theory of alter-ego liability, or any other legal principle concerning the enforcement of awards or judgments, is one left to the law of the enforcing jurisdiction, here the Southern District of New York, under the terms of Article III of the New York Convention." *CBF*, 850 F.3d at 75.

CBF is thus inapposite here. In this appeal, which arose from a confirmation proceeding rather than an enforcement proceeding, the Convention Article III has no bearing on the question of what law applies to the interpretation of the Arbitration Agreement.

B. Czech Law Applies to the Interpretation Of the Arbitration Agreement and Resolution Rather than U.S. Law.

Although the district court failed to explicitly state under what law it was interpreting the Arbitration Agreement, CzR relies on *Citizen Potawatomi Nation v. Oklahoma*, 881 F.3d 1226 (10th Cir. 2018) ("*Citizen Potawatomi Nation*") for the proposition that "the district court was entitled to interpret the arbitration agreement in accordance with basic U.S. contract law." (Opp. Br. 14.) But that case, which involved the interpretation of a Tribal-State Gaming Compact between the Citizen Potawatomi Nation and the State of Oklahoma, actually found that the law of the "territory where the award is relied upon" – in this case, Oklahoma – did not apply because the compact at issue was a product of and governed by federal law. Accordingly, the Tenth Circuit held that "in interpreting the Compact . . . we look to the federal common law." *Citizen Potawatomi Nation*, 881 F.3d at 1239.

Here, as CzR acknowledges, the Arbitration Agreement is a product of the Czech Arbitration Act and Czech law generally. (*See* Opp. Br. 13 ("It is true that the Arbitration Agreement expressly provides that it was '[c]oncluded under §2 of law 216/1994 on arbitration proceedings and arbitral awards.' . . . The Arbitration Agreement further provides that the dispute 'will be resolved by independent and

nonpartisan arbitrators in arbitration proceedings under law 214/1994 on arbitration and arbitral awards.'").)[4]

But even if there were no clear choice of law in the Arbitration Agreement, Czech law would still apply. Federal courts have found that in the absence of a choice of law provision, the law of the venue of arbitration and performance of the underlying agreement will govern rather than the law of the enforcement territory. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, n.13 (1974) ("Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction."); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13, n.15 (1972) (concluding that forum clause was an effort to assign applicable substantive law of designated forum); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 478 (9th Cir. 1991) (stating that arbitration agreements may "operate as both choice-of-forum and choice-of-law provisions"); *see e.g., Fertilizer Corp. of India v. IDI Mgmt., Inc.*, 517 F. Supp. 948, 960 (S.D. Ohio 1981) (where contract did not state specifically whose law would govern, but was executed and was to be performed in India, and venue of

[4] While CzR argues that "[n]othing in the Arbitration Act required the District Court to apply its provisions, or the Czech Civil Procedure Code, when interpreting the Arbitration Agreement" (*id.*), that is simply beside the point. The relevant question is not what the Arbitration Act provides, but what the agreement between the parties provides, and, as shown above, there is no dispute that the Arbitration Agreement provided for the application of Czech law and, in particular, the Act.

arbitration was expressly stated to be New Delhi, India, the law of India governed the contract rights of the parties). There is no dispute here that the venue of the arbitration was the Czech Republic, and there can likewise be no dispute that Czech law applies to the interpretation of the Arbitration Agreement.

C. The District Court's Interpretation of the Arbitration Agreement Is Wrong Ur Czech Law.

CzR asserts that the district court's interpretation of the Arbitration Agreement is actually "in line with the Arbitration Act" (Opp. Br. 15), apparently for the sole reason that Article V is modeled after Sections 27 and 28 of the Act. But that fact does not compel the result CzR urges. As Diag established in its opening brief, under Czech law and wholly apart from Sections 27 and 28 of the Act, if an arbitration proceeding ends without an express change to the award under review, as here (where the Final Award was not even mentioned in the Resolution) "that award comes into effect." (Br. 24.) CzR's quotation of Section 28 of the Act and its conclusory assertion that the district court's interpretation is "in line" with the Act do nothing to salvage the district court's error in failing to interpret the Arbitration Agreement under the Act, the Czech Procedural Code and Czech law generally.

II. DESPITE CzR'S CONTRARY ASSERTION, THE DISTRICT COURT'S INTERPRETATION OF THE ARBITRATION AGREEMENT LEADS TO AN ABSURD RESULT UNDER CZECH OR U.S. LAW

As Diag demonstrated in its opening brief, even if it is examined under U.S. principles of contract construction, the district court's interpretation of the Arbitration Agreement was wrong because it leads to an absurd result. (Br. 25-26.) In response CzR argues, without citation to any caselaw, that the district court's interpretation does not, in fact, lead to an absurd result because the scenario Diag posited to demonstrate the absurdity of the district court's logic did not actually occur here. (Opp. Br. 18.) Notably, CzR does not dispute either (1) that under the logic of the district court's interpretation of the Arbitration Agreement, the mere filing of a review request, even if later withdrawn, itself prevents an award from becoming enforceable; or (2) that this would be an absurd and completely unintended result.

The cannon of construction at issue here is not dependent on the specific facts of the case, but rather on the logic of the interpretation. Indeed, courts routinely find a contract interpretation absurd – and therefore unenforceable – merely because the logic of an interpretation, like the district court's here, "*could* lead to absurd results." *Sinclair Oil Corp. v. Texaco, Inc.*, 94 F. App'x 760, 768 (10th Cir. 2004) (rejecting interpretation of contract based on hypothetical example that demonstrated possibility of absurd result) (emphasis added); *see also Nextel Spectrum Acquisition*

Corp. v. Hispanic Info. & Telecommunications Network, Inc., 503 F. Supp. 2d 334, 339 (D.D.C. 2007) (rejecting party's contractual interpretation, because "[c]arried to its logical conclusion, NAC's argument would lead to absurd results."). Accordingly, even if U.S. law were applicable, the district court's interpretation of the Arbitration Agreement is erroneous because it could lead to an absurd result.

The district court's construction of the Arbitration Agreement as contemplating the undoing of the final and binding nature of an award potentially in perpetuity (as it concluded occurred here) through the simple filing by any party of a review request should be viewed as a more radical conclusion than its erroneous view of the effect of the Resolution on the Final Award.

As discussed *infra* (at Argument Section III(A)) the district court in a footnote also expressed the firm conclusion that the Resolution "clearly and unequivocally" ruled that the Final Award was not final and binding. This view is untenable under Czech law. As discussed in Diag's opening brief, the only thing that clearly and unequivocally emerges from the Resolution is that the review panel concluded that it lacked any effective review request that would enable it to review the Final Award at all and thus it had to, under Czech law, discontinue the review proceedings. The Final Award was not mentioned in the Resolution at all, let alone nullified. The district court's role as an enforcement court was to confirm the award as presented unless the opponent proved a ground not to do so under the Convention. *See Int'l*

Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech., 763 F. Supp. 2d 12, 20 (D.D.C. 2011) ("The Court also must remain mindful of the principle that 'judicial review of arbitral awards is extremely limited,' and that this Court 'do[es] not sit to hear claims of factual or legal error by an arbitrator' in the same manner that an appeals court would review the decision of a lower court."), *quoting Teamsters Local Union No. 61 v. United Parcel Serv., Inc.*, 272 F.3d 600, 604 (D.C. Cir. 2001).

Faced with this reality, the district court's stated conclusion that the Resolution itself *did* tacitly nullify the Final Award would amount to an imposition of the district court's conjecture of what the Resolution really "meant" to do, but did not: explicitly state in its decretal paragraphs that the Final Award "is hereby nullified"—something the Resolution itself *nowhere* did or purported to do (as recognized by the affixation by the administrative arbitrator of a clause of legal effect on it).

As discussed in Diag's opening brief (at 40-44) any such emendation of the Resolution read into it that nullifies the Final Award would have the following additional substantive, and absurd, effects under Czech law: (1) it would deprive the confirmed 2002 Partial Award of its own *res judicata* effect; (2) because the Partial Award unequivocally stated that it was *not* determining the full extent of the Diag's claim or its legal entitlement to interest (both on the Partial Award and on the Final Award assuming the remainder of Diag's claim was validated as it ultimately

was), it would deprive Diag of its fundamental right under Czech law to a determination of the entirety of its claim; and (3) it would amount to a decision *by the district court* to deny the portion of Diag's claim left undecided by the Partial Award in the guise of refusing enforcement of the Final Award, which was wholly unaffected by the Resolution *as rendered*.

III. CzR MISSTATES DIAG'S POSITION ON THE APPLICATION OF CZECH LAW TO THE RESOLUTION, MISCONSTRUES THE ANALYSIS PUT FORWARD BY DIAG'S EXPERTS AND FAILS TO EXPLAIN THE RELEVANCE OF THE FOREIGN DECISIONS IT DISCUSSES FOR SIX PAGES

A. Diag Argued that the District Court Improperly Interpreted the Effect of the Resolution Under Czech Law, Not, as CzR Claims, that the District Court was Required to "Determine if the Review Tribunal's Findings in the Resolution were Correct."

In its opening brief, Diag explained why the district court's footnoted statement – that "the tribunal ruled clearly and unequivocally that the purported 'Final Award' lacked legal validity and effect, and it was for that reason, and no other reason, that the Third Review Tribunal declared the proceedings to be discontinued" (JA1352, n.9) – was "dead wrong" under Czech law. Diag in effect argued that the Resolution discontinued the proceedings not because of any issue with the Final Award (which the Resolution does not even mention), but rather because the Review Panel lacked jurisdiction to conduct a review at all after

concluding there was no effective review request before it.[5] (*See* Br. 28.) Because it has no answer for the unambiguous statement in the Resolution that its review request was ineffective,[6] CzR misrepresents Diag's argument as taking issue with

[5] This conclusion is supported by the letter sent from former arbitrator Schwarz of the Review Panel to Dr. Rusek, the former administrative arbitrator of (and CzR's nominee to) the arbitral panel that had rendered the Final Award. Mr. Schwarz's letter was in response to Dr. Rusek's request to Mr. Schwarz, as the administrative arbitrator of the Review Panel, to provide information on the course of the review proceedings, of which the former members of the original panel at that point knew nothing. JA1147-1150. On April 15, 2015, Mr. Schwarz responded to Dr. Rusek's query as follows:

> We decided that we did not have jurisdiction to review the final award dated 4 August 2008 and the above proceedings were stayed by a resolution on staying. *The award dated 4 August 2008 was not annulled, modified or upheld. In my legal opinion, it became binding and came into legal force as it was not challenged judicially within the relevant time-limits* . . . A request of an administrative act is obvious from the letter by JUDr. Kalvoda sent by yourself – attaching a clause of legal force. I personally believe it is not prevented by anything.

JA1152 (emphasis added).

[6] "The objection of the Claimant [that CzR's review request was not executed by a competent actor] cannot be agreed to in this request. This does not change anything about the fact [that] the request for review of the arbitral award is procedurally ineffective, however, on completely different grounds (see below)." JA390. Rather than contend with the plain language of the Resolution, CzR instead mistakenly argues that Diag's own expert Dr. Bányaiová finds the Review Panel's statement on its own jurisdiction "not completely clear". (Opp. Br. 35 (quoting JA911).) As Dr. Bányaiová states in the paragraph of her opinion from which CzR cherrypicked its quotation:

(*footnote continued*)

the underlying decision of the Review Panel rather than the district court's interpretation of its effect on the enforceability of the Final Award. As Diag explained at length in its opening brief, under Czech law any "ruling" of the Review Panel affecting the Final Award had to appear in the decretal paragraphs of the Resolution.[7] (*See, e.g.*, Br. 31.) What Diag did clearly argue was that the district court's "statement" (as CzR refers to it in its Opposition (at 18-19)) concerning what

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> Based on the wording of points 4.2 and 4.5 it can be derived that the review arbitral tribunal reached a conclusion that they lack jurisdiction to review the Final Award that lead them to discontinuing the review proceeding. This would mean that by negating their own jurisdiction to review the Final Award they merely discontinued the review proceeding and did not touch upon the Final Award [sic] stands unaffected at all. Thus, in this case, the Final Award stands and is in full force and effect.

JA911 at ¶ 60.

[7] On this point, CzR cites colloquy during argument in this Court on the prior appeal (Opp. Br. 24-25) to support a claim that Diag's counsel agrees with CzR's interpretation of the Resolution as canceling the Final Award because the Review Panel found the Partial Award to be of *res judicata* effect. That colloquy, which CzR misreads, ensued from a thoroughly improper revelation and argument to this Court that there had been a development in the Czech Republic that had nullified the Final Award – despite the fact that not a single word about this development or its meaning was contained in the record before the Court at that time or, for that matter, in the district court. The Court is invited to review the transcript of argument to review CzR's conduct and for Diag's counsel's full remarks after CzR's improper surprise argument. JA692-730. Diag and its counsel's fully informed view of the Resolution is set forth in this appeal and was before the district court on CzR's motion to dismiss.

the district court termed the "clear and unequivocal" ruling of the Review Panel (although nowhere stated in the Resolution) could not be correct under Czech law because it did not appear in the decretal paragraphs. In fact, it appears *nowhere* in the Resolution.

B. CzR Misrepresents Professor Bělohlávek's Opinion to Claim that He Unequivocally Opined that an Arbitral Award May Be Canceled by a Resolution Under Czech Law Under any Circumstance.

As Diag acknowledged in its opening brief (at 33-34, n.13), Professor Bělohlávek, in contrast to Dr. Bányaiová, does believe that it is possible in limited circumstances to cancel an arbitral award by means of a resolution, though *only* where a review panel, after assessing its own jurisdiction, finds that the first-instance panel did not have jurisdiction to issue the contested award, and *only* where the cancellation is expressly stated in the operative part of the resolution, meaning the decretal paragraphs. JA1284-1285 at ¶¶ 49-50.[8] Ignoring the express limitations of

[8] CzR tries to seize on this position (Opp. Br. 31-32, n.4) – then quoting out of context, what is in itself a cropped quotation of Professor Bělohlávek's book from its own experts' opinion – to argue that Professor Bělohlávek himself "disputes the legal force of the Arbitration Award" in a futile attempt to undermine the importance of the clause of legal force that was applied to the Final Award *after* the Resolution was issued. (*Id.*)

As the full quotation provided in Professor Bělohlávek's own opinion demonstrates, Professor Bělohlávek was merely explaining that there are situations where no clause of legal force will be applied. For instance, where a review panel, after assessing its own jurisdiction to review an award determines that the initial panel did

(*footnote continued*)

the use of resolutions to cancel an award expressed in *all* of Professor Bělohlávek's opinions on this point,[9] CzR seizes on this aspect of Professor Bělohlávek's opinion as somehow proving that the Resolution here *did* cancel the Final Award. (Opp. Br. 21.) However, because the Resolution does not contain any reference to the Final Award at all, let alone to a cancellation in its decretal paragraphs, it is clear that under all of Professor Bělohlávek's opinions the Resolution here is incapable of cancelling the Final Award as a matter of Czech law.[10]

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not have jurisdiction to issue the award under review (*i.e.*, if it determines that the underlying arbitral agreement did not allow for arbitration on the matter decided below—a purely procedural determination). In such a case neither the resolution that review panel issues, nor the award under review, are affixed with a clause of legal force. JA1283-84 at ¶¶ 48-49. The situation here is clearly different as the Review Panel only found *itself* without jurisdiction, not the first instance panel, which explains why the Final Award *did* receive a clause of legal force.

[9] CzR makes a point of Diag's decision not to submit the particular opinion it cites in other jurisdictions after it was submitted in a Dutch confirmation proceeding in 2015. (Opp. Br. 21.) That opinion, however, also made clear that a resolution is available to cancel an award only under the circumstance described above and only where the cancellation is expressly stated in the decretal paragraphs of the resolution. JA1284-85 at ¶ 50.

[10] Notably, CzR does not deny that under Czech law only the decretal paragraphs of the Resolution are "operative", and that one may only resort to the reasoning portion to interpret the decretal paragraphs if they are ambiguous. (*See* Opp. Br. 22-23.) CzR claims that Diag has somehow admitted that the decretal paragraphs of the Resolution are unclear and that resort to the reasoning of the Resolution is appropriate here. (*Id.*) To the contrary, Diag nowhere argued that the decretal paragraphs' ruling was at all ambiguous, and the "extensive expert analysis" (Opp. Br. 22) CzR seems to deride plainly demonstrates that, barring such ambiguity, it was error for the district court to review the reasoning at all. In any event, that

(*footnote continued*)

C. CzR's Extensive Citations to Irrelevant Foreign Decisions on the Effect of the Resolution are Not Tied to Any Legal Argument and CzR Fails to Acknowledge That the Most Recent Decision Confirmed the Final Award.

In its opening brief (at 5, n.2), Diag acknowledged decisions in the Netherlands, Belgium and Liechtenstein which declined to enforce the Final Award (all of which are currently on appeal by Diag). Diag accurately noted that the district court expressly denied relying upon those decisions in coming to its conclusion. JA1353, n.10. Yet, without tying those decisions to any of its legal arguments or the Opinion, CzR spends nearly six pages of its Opposition relating them in detail.[11] (Opp. Br. 25-30.) Even then, however, CzR (like the district court) fails to even mention the most recent foreign decision interpreting the effect of the Resolution on the Final Award, a decision that Diag put before the district court. (JA1309-JA1329.)

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analysis demonstrates that the Resolution, even were its reasoning to be (improperly) visited, nowhere evinces any ruling to nullify the Final Award, let alone the "clear and unequivocal" one the district court perceived.

[11] CzR notes that (Opp. Br. 25-27, 30-31), in these jurisdictions it submitted the Joint Legal Opinions of its experts Professors Gerloch and Balaš (available at JA565-JA612). CzR here appears to rely on these opinions solely to dispute the effect of the clause of legal force on the Final Award (Opp. Br. 30-31). While much could be said about the inconsistencies of the CzR's various expert opinions submitted in various jurisdictions, Diag will simply note that prior to its attachment to the Final Award here, CzR argued that the Final Award was not enforceable *because* it lacked a clause of legal force which "certifies that the Award is a legally effective and binding decision." JA72 ¶ 151.

On April 27, 2017, the Supreme Court of Justice of the Grand Duchy of Luxembourg issued a decision rejecting the Czech Republic's arguments concerning the Resolution's effect (similar to those it made in the district court) and finding that the Final Award was fully enforceable and unaffected by the Resolution. Specifically, the Supreme Court of Justice found as follows:

> As the review requests did not result in a decision to revise and replace the award of 4 August 2008, but instead to a decision to end the review proceedings, and as no review application is pending, the award of 4 August 2008 has acquired force of res judicata.
>
> The ground for refusing the enforcement based on the non-existence of the award of 4 August 2008 and on the lack of legal effects attached thereto, due to its replacement by the resolution of 23 July 2014, is unfounded.

JA1327.

While Diag cannot say on what basis CzR felt these foreign decisions relevant to the matter now before this Court, because they have done so, Diag felt it necessary to ensure that the international landscape was accurately represented.

IV. CzR CANNOT HIDE FROM ITS IMPROPER, *EX PARTE* CONTACT WITH THE REVIEW ARBITRATORS CONCERNING A UNILATERAL THIRTY-SEVEN-FOLD INCREASE IN THE ARBITRATORS' FEES

While CzR attempts to trivialize its meddling in the process by which all three of the arbitrators of the Review Panel were appointed by pointing to the fact (which Diag does not dispute) that each of CzR's appointees were later approved by the Czech courts, it is careful to omit (1) that its court proceeding to appoint of the third

arbitrator, Mr. Kuzel, was made *despite* the fact that Mr. Kindl and Mr. Della Ca, the party appointees, had actually already agreed to the appointment of a third arbitrator as required by the Arbitration Agreement (JA46 at ¶ 75);[12] and (2) that Diag's appointed arbitrator, Mr. Della Ca, resigned due to the pressure put upon him by CzR to rule in its favor (as he detailed in a letter sent to the Prime Minister of the Czech Republic). JA48-49 at ¶80.[13]

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[12] CzR also fails to acknowledge that the prime reason Messrs. Kindl and Della Ca did not agree on this appointment within the prescribed thirty-day period was because Mr. Kindl, CzR's appointed arbitrator, was "incommunicado during a three week vacation to Central America." JA46 at ¶ 75.

[13] Mr. Della Ca's letter reads, in part:

> In the final analysis, I did not want to be part of criminal activities, in particular to oppose the verdict of the Supreme Court of the Czech Republic in order that the arbitration files cannot be forwarded to it.
>
> . . .
>
> [Mr. Della Ca then referred to a statement made by the spokesman for the [CzR] on Czech television on 30 March 2010.]
>
> Mr. Šnajdr said (I quote): "The arbitrator Della Ca does not act in the interests of the Czech tax payers". I am shocked by this official statement. An arbitrator – also according to Czech legislation – has the responsibility to judge unbiasedly and independently, whereas both parties are on a par with each other. This is a basic requirement . . . If a government official indicates that an arbitrator is expected to advocate mainly the interests of the state, it does not argue for a fair law-suit.

JA48-49 at ¶ 80.

Regardless of whether the appointment of the Review Panel Arbitrators was tainted, CzR does not deny that it had *ex parte* communications with the Review Panel Arbitrators concerning their exorbitant fee increase. (*See* Opp. Br. 42.) In an effort to deaden the impact of this fact, CzR speculates that it had these conversations in an *ex parte* fashion because "Diag was not interested in splitting" the unilaterally increased fee CzR offered the arbitrators (*id.*) – an ironic point given CzR now informs the Court it is currently in a dispute with at least one of the Review Panel Arbitrators concerning that increased fee arrangement (Opp. Br. 43). None of this changes the fact that it participated in objectively improper, *ex parte* conversations with the Review Panel Arbitrators that ultimately resulted in a unilateral thirty-seven-fold increase in the fees it would pay the Review Panel *during the pendency of the arbitration*. *See* JA760-767 ¶¶ 66-86.

It is indisputable that *ex parte* communications between arbitrators and litigants are uniformly considered to be improper. *See*, *generally*, UNCITRAL Arbitration Rules, Art. 17.4 (2013) ("All communications to the arbitral tribunal by one party shall be communicated by that party to all other parties."); International Bar Association Rules of Ethics for International Arbitrators, Art. 5.3 ("Throughout the arbitral proceedings, an arbitrator should avoid any unilateral communications

regarding the case with any party, or its representatives.").[14] Such *ex parte* communications, especially in the context of a demand for increased fees from arbitrators before they will hand down an award have been held to be against public policy. *See, e.g., Double-M Const. Corp. v. Cent. Sch. Dist. No. 1, Town of Highlands, Orange Cty.*, 61 A.D.2d 982, 982 (N.Y. App. Div. 1978) (holding that arbitrators' practice of asking for increased fees during the pendency of an arbitration is "contrary to public policy and should not be sanctioned. Parties should not be placed in a position where they feel compelled to accede to the demands of the arbitrators for fear of adverse consequences."); *Matter of Catalyst Waste-to-Energy Corp. of Long Beach (City of Long Beach)*, 164 A.D.2d 817, 820 (N.Y. App. Div. 1990), *app. dismissed without opinion*, 76 N.Y.2d 1017 (N.Y. 1990) (vacating award where arbitrators requested a higher fee in the midst of proceedings, engaged in *ex parte* communications with the parties, and accepted additional fees from one party without the other party's knowledge). Accordingly, to the extent the district court permissibly found that the Resolution *did* nullify the Final Award, it was error for it to fail to consider whether the Resolution (and the circumstances leading to it)

[14] Notably, Art. 6 of the International Bar Association Rules of Ethics for International Arbitrators also provides that "Unless the parties agree otherwise or a party defaults, an arbitrator shall make no unilateral arrangement for fees or expenses."

are repugnant to U.S. public policy, and whether the Final Award thus should nevertheless be confirmed.[15]

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment dismissing this action and either (1) confirm the Final Award, or (2) remand the case for further proceedings.

Dated: March 28, 2018

Respectfully submitted,

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[15] Diag notes that it argued in its opening brief (at 47) that this – the district court's failure to even consider whether the Resolution violates U.S. public policy – was error, not, as CzR has misrepresented Diag's argument, "the District Court's recognition of the Resolution". (Opp. Br. 44.)

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **6,166** words (based on the Microsoft Word word-count function), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using **Microsoft Word** in **14-point Times New Roman**.

Date: March 28, 2018

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 28, 2018, the REPLY BRIEF FOR PLAINTIFF-APPELLANT was electronically filed and served on all parties or their counsel of record through the CM/ECF system, pursuant to D.C. Circuit Rule 25.

Date: March 28, 2018

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