NOT YET SCHEDULED FOR ORAL ARGUMENT

Case No. 17-7154

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIAG HUMAN S.E.,	:	
	:	On Appeal From The United
Plaintiff-Appellant,	:	States District Court for the
	:	District of Columbia
v.	:	
	:	Case No. 1:13-cv-00355-ABJ
THE CZECH REPUBLIC - MINISTRY OF HEALTH,	:	
	:	Honorable Amy Berman Jackson,
	:	United States District Judge
Defendant-Appellee.	:	

BRIEF OF DEFENDANT-APPELLEE, THE CZECH REPUBLIC-MINISTRY OF HEALTH

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties and Amici

Appellant Diag Human S.E. and the Czech Republic-Ministry of Health are the parties who have appeared before the District Court and are the only parties who have appeared before this Court. No intervenors or amici have appeared before the District Court or this Court.

II. Ruling under Review

The ruling at issue in this appeal is the Memorandum Opinion and Order entered by United States District Judge Amy Berman Jackson on September 27, 2017, granting the Czech Republic's Motion to Dismiss the Amended Complaint and thereby dismissing the action before the District Court. No official citation for this Memorandum Opinion and Order exists.

III. Related Cases

The case on review was previously before this Court on an appeal from the United States District Court for the District of Columbia, styled as *Diag Human S.E. v. The Czech Republic-Ministry of Health*, Case Number 14-7142. The case on review is related to one filed previously in the United States District Court for the District of Columbia, styled as *Diag Human S.E. v. The Czech Republic-Ministry of Health*, Case Number 1:11-cv-01360-ABJ. This prior related case was voluntarily dismissed by Diag Human S.E. on July 26, 2012.

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* Authorities upon which we chiefly rely are marked with asterisks.

Other Authorities

GLOSSARY OF ABBREVIATIONS

ABBREVIATION	FULL TERM
Diag Human	Plaintiff-Appellant, Diag Human S.E.
Czech Republic	Defendant-Appellee, The Czech Republic-Ministry of Health
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, 9 U.S.C. § 201 *et seq*.
Arbitration Agreement	Arbitration Agreement entered into by and between Diag Human and the Czech Republic in September 1996 (A317-323).
Arbitration Award	Arbitration Award entered on August 4, 2008 in the Czech Republic in favor of Diag Human S.E. and against The Czech Republic – Ministry of Health (A91-316).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Appellant Diag Human S.E. ("Diag Human") commenced this action under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, 9 U.S.C. § 201 *et seq*. (the "New York Convention") seeking to enforce a foreign arbitral award entered against the Czech Republic-Ministry of Health (the "Czech Republic") on August 4, 2008 (the "Arbitration Award"). The New York Convention, as codified by the United States, provides several avenues for a district court to decline enforcement of a foreign arbitral award, such as when the award is not binding and effective for purposes of enforcement, or when the enforcement action is barred by the applicable three-year statute of limitations set forth in the statutory text. The District Court here dismissed Diag Human's enforcement action pursuant to Federal Rule of Civil Procedure 12(b)(6), finding that the Arbitration Award never became binding and effective based on the plain language of the parties' arbitration agreement and the outcome of the arbitral review proceedings. Accordingly, the sole issue before this Court is as follows:

1. Whether the District Court erred in dismissing Diag Human's enforcement action on the basis that the Arbitration Award was not capable of enforcement under the New York Convention because it never became binding and effective on the parties.

STATUTES AND REGULATIONS

Except for the following, all applicable statutes and regulations are contained in the Brief for Plaintiff-Appellant, Diag Human. Articles I(1), III and V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 are reproduced in the addendum to this Brief. Sections 2, 3, 28 and 30 of the Czech Republic Act No. 214/1994 Coll. of Laws on Arbitral Proceedings and Enforcement of Arbitral Awards are also reproduced in the addendum attached hereto.

STATEMENT OF THE CASE

I. Factual Background

A. The Parties

According to the Amended Complaint, Diag Human is a corporation organized under the laws of the Principality of Liechtenstein. (A80[1].) The Czech Republic is a foreign state, and the Ministry of Health of the Czech Republic is an agency of the state of the Czech Republic. (*Id.*)

Diag Human was engaged in a trading business based on using blood plasma to create blood plasma derivative products. (A80.) In 1989, Diag Human AG, the parent company of Diag Human, engaged in discussions with the Transfusion Service of the Czech Republic regarding possible cooperation for blood plasma

[1] Citations to "A___" are to the Joint Appendix filed with Diag Human's Brief.

processing in the Czech Republic. (A418.) Following these discussions, a "draft" Framework Cooperation Agreement regarding the potential fractionation of blood plasma in the Czech Republic was prepared in 1990 by and between the Transfusion Service of the Czech Republic and Conneco a.s., Diag Human's predecessor. (A418.)

In June 1990, the Czech Republic opened a public bid tender for cooperation proposals for blood derivatives production. (A419.) Conneco a.s. submitted a proposal for the work. (*Id*.) Shortly thereafter, in September 1990, the Czech Republic suspended announcement of the tender results. (*Id*.)

Later, in 1991, the Czech Republic opened a new bid tender for the blood plasma market to supersede the bid tender that it had previously suspended in September 1990. (A419.) Conneco a.s. again submitted proposals in response to the new bid tender. (*Id*.) The Czech Republic rejected the proposals from Conneco a.s. on the basis that the company was simply an intermediary collecting blood plasma, and not itself a fractionator of blood plasma. (*Id*.)

Diag Human subsequently claimed that it sustained damages as the result of a letter dated March 9, 1992, signed by Dr. Martin Bojar, CSc, the Czech Minister of Health at the time, and directed to NovoNordisk, in conjunction with the public bidding procedure for selection of a company for cooperation in fractionation of Czech blood plasma. (A420.) Diag Human asserted that the Bojar letter defamed

its good business name and caused NovoNordisk to discontinue cooperation with Diag Human. (*Id.*)

B. The Arbitration Agreement and Award

To decide Diag Human's claims regarding the Bojar letter, Diag Human and the Czech Republic entered into a written arbitration agreement dated September 18, 1996 ("Arbitration Agreement"). (A81; A324-352.) In the Arbitration Agreement, the parties agreed to undertake an ad hoc arbitration pursuant to Czech Republic Act No. 214/1994 Coll. of Laws on Arbitral Proceedings and Enforcement of Arbitral Awards (the "Arbitration Act"). (A81; A421.)

Three arbitrators sitting in Prague, Czech Republic, conducted the arbitration proceedings, which commenced on October 21, 1996. (A82; A421.) The arbitration panel subsequently issued an Interim Arbitration Award on March 19, 1997, which was followed by an Interim Arbitration Review issued on May 27, 1998. (A82-83; A421.) Thereafter, a Partial Arbitration Award was issued on June 25, 2002, which was followed by a Partial Arbitration Review issued on December 16, 2002. (A421.)

The Partial Arbitration Award ordered the Czech Republic to pay damages of CZK 326,608,334 within five days from the date when the award became final. (A421-422.) The Partial Arbitration Award, however, did not specify to which part of the claim the damages related. (*Id.*) When the Partial Arbitration Award was

confirmed after review, the Czech Republic proceeded to pay the full amount of the damages owed under the Partial Arbitration Award. (*Id.*)

On August 4, 2008, the arbitrators issued a decision titled "Final Award" (the "Arbitration Award"), in which they awarded certain monetary damages to Diag Human. (A84; A422.) The Arbitration Award was denominated "final" only as a means of distinguishing it from the preceding "interim" and "partial" awards, but was not an indication that it was enforceable and binding at that time. (A422.) The Arbitration Award was delivered to the parties on August 13, 2008. (A84; A422.)

C. The Parties' Requests for Review of the Arbitration Award

As part of the Arbitration Agreement, Diag Human and the Czech Republic agreed to a review procedure for arbitration awards. (A82.) Section 27 of the Arbitration Act provides that parties to an arbitration agreement can agree that an arbitration award can be reviewed by a separate panel of arbitrators at the request of one or both parties to the arbitration proceedings. (A422.) Diag Human and the Czech Republic agreed to use this review mechanism in Article V of the Arbitration Agreement, which provides:

> The parties have also agreed that the arbitral reward will be submitted to a review by other arbitrators whom the parties appoint in the same manner if an application for review has been submitted by the other party within 30 days from the date of which the applicant party received the arbitral award.

(A82; A320; A422.) Pursuant to this review mechanism, the interim and partial awards issued earlier in the arbitration proceedings were reviewed by panels of review arbitrators. (A83; A421.)

Following receipt of the Arbitration Award, Diag Human and the Czech Republic both requested review of the Arbitration Award under Article V of the Arbitration Agreement. (A85; A423.) Pursuant to the agreed-upon procedure, each appointed its designated arbitrator for purposes of the review proceedings. (A422-423.)

The two selected review arbitrators could not agree on a third review arbitrator within the specified time, so the Czech Republic commenced court proceedings pursuant to Article II of the Arbitration Agreement to have a Czech court appoint the third review arbitrator. (A423-424.) In a decision issued on November 27, 2008, the District Court for Prague 6 appointed Petr Kuzel to serve as the third review arbitrator, but Diag Human appealed that decision to the Municipal Court in Prague. (A424.)

By a decision dated April 29, 2009, the Municipal Court in Prague affirmed the District Court for Prague, which resulted in a full, three-member final arbitration review panel at that time. (A424.) However, Diag Human again appealed the decision appointing Petr Kuzel as the third review arbitrator to the Supreme Court of the Czech Republic. (A424-425.) Subsequently, by a decision dated October 14,

2010, the Supreme Court reversed the lower court decisions on the basis that the District Court for Prague 6 lacked jurisdiction, and remanded the case to the Municipal Court in Prague for further proceedings. (*Id.*)

The proceedings regarding the appointment of Petr Kuzel as the third review panel arbitrator were pending before the Municipal Court in Prague at Case Ref. No. 22 Cm 10/2011 and the High Court in Prague under Case Ref. No. 3 Cmo 64/2012. (A425.) Diag Human participated vigorously in these appointment proceedings during the several years they were pending. (*Id.*) Eventually, the Municipal Court in Prague (as a Court of First Instance) appointed Petr Kuzel to the arbitration review panel, and the High Court in Prague (as a Court of Appeal) affirmed this decision on October 22, 2012. (*Id.*)

While the Supreme Court of the Czech Republic reviewed the appointment of Petr Kuzel, Diag Human withdrew its Application for Review of the Arbitration Award on March 29, 2010. (A425.) On the following day, March 30, 2010, Diag Human delivered the resignation of its appointed review panel arbitrator, Damiano Della Ca. (*Id.*) Pursuant to the Arbitration Act, the Czech Republic then pursued court appointment of a replacement for Mr. Della Ca after the parties did not agree on a substitute review arbitrator to take his place. (A425-426.) The court proceedings, requesting the appointment of Jiri Schwarz in place of Mr. Della Ca, were pending in the Municipal Court in Prague at Case Ref. No. 28 CM 223/2010.

(A426.) The Municipal Court in Prague (as a Court of First Instance) later appointed Jiri Schwarz to the arbitration panel, and the High Court in Prague (as a Court of Appeal) affirmed this decision on March 27, 2013. (*Id*.)

The arbitration review panel thus became complete upon the judgment of the High Court in Prague on March 27, 2013 confirming Jiri Schwarz as the third and final member of the panel. (A426.) After a lengthy stay due to the resignation of Diag Human's original nominee, Mr. Della Ca, and the court proceedings regarding the appointment of the missing members of the arbitration review panel, the arbitration review proceedings resumed. (A427.)

However, because Diag Human had withdrawn its Request for Review, the arbitration review proceedings only addressed the Czech Republic's Request for Review and arguments related thereto. (A427.) On July 23, 2014, the review arbitration tribunal issued a resolution whereby they discontinued the arbitration proceedings (the "Resolution"). (A427; A527-563.) During the arbitration review proceedings, the Czech Republic asserted a straightforward legal argument regarding the legal effect of the Partial Arbitral Award based on the well-established doctrine of *res judicata*. More specifically, as the review arbitration tribunal observed in the Resolution, the Czech Republic argued "that the matter had in fact been resolved in 2002 and there were thus no matters to be discussed and all the

subsequent decisions were null and void and all the subsequent procedural acts ineffective." (A427; A527-563.)

The review arbitration tribunal found that a "partial" decision may only be rendered in certain scenarios—*i.e.*, where a decision is being rendered on one of several claims or as to one of several defendants or plaintiffs. (A427; A556.) However, "[t]he case at hand clearly does not involve several plaintiffs or several defendants, or a counterclaim or joint cases," and "[i]t is also true that the Partial Arbitral Award does not specify in any manner whatsoever what part of the enforced claim it covers." (A556.) The review arbitration tribunal further found that a decision "must be assessed from an objective viewpoint according to its contents;" in other words, a court or tribunal must look at substance over form. (A557.) Therefore, the review arbitration tribunal agreed with the Czech Republic and ruled that the Partial Arbitral Award from 2002, though designated as "partial," was in fact a complete and final decision with full legal force based on the substance of that award. (A427.)

II. Procedural Background

On November 14, 2016, Diag Human filed its Amended Complaint seeking to enforce the foreign Arbitration Award entered against the Czech Republic on August 4, 2008. (A78-90.) The enforcement action was brought pursuant to the

New York Convention. (A79.) The Arbitration Award and the Arbitration Agreement were attached to the Amended Complaint. (A87.)

On January 10, 2017, the Czech Republic filed a Motion to Dismiss the Amended Complaint on multiple grounds, including that enforcement of the Arbitration Award under the New York Convention would be inappropriate because the Arbitration Award is not effective and capable of enforcement considering the Resolution issued by the arbitration review tribunal. (A410-415.) On September 27, 2017, the District Court entered an Order and Memorandum Opinion dismissing the enforcement action under Rule 12(b)(6) of the Federal Rules of Civil Procedure based on the plain language of the Arbitration Agreement and the outcome of the arbitral review proceedings. (A1341-1353.) Diag Human thereafter filed a Notice of Appeal from the Order of the District Court on October 27, 2017. (A1354.)

SUMMARY OF ARGUMENT

Diag Human sought to enforce the Arbitration Award pursuant to the New York Convention. (A78-79.) It is axiomatic under the plain language of the New York Convention that a foreign arbitration award must be final, binding and capable of enforcement for a district court to enter an order enforcing the award. As part of the Arbitration Agreement, Diag Human and the Czech Republic agreed to a review procedure for the Arbitration Award in Article V of the Arbitration Agreement:

> The parties have also agreed that the arbitral reward will be submitted to a review by other arbitrators whom the parties appoint in the same manner if an application for review has been submitted by the other party within 30 days from the date of which the applicant party received the arbitral award. Articles II-IV of this agreement apply similarly to the review of the arbitral award. If the review application of the other party has not been submitted within the deadline, the award will enter into effect and the parties voluntarily undertake to implement it within the deadline to be determined by the arbitrators, in default of which it may be implemented by the competent court.

(A320.) Pursuant to the plain language of the Arbitration Agreement, if a timely application for review ***is*** submitted by one of the parties, then the Arbitration Award will not enter into effect at that time. Both parties submitted applications for review, and the Arbitration Award underwent review proceedings. On July 23, 2014, the arbitration review tribunal issued the Resolution discontinuing the arbitration proceedings and nullifying the Arbitration Award. (A527-563.) Based on the parties' Arbitration Agreement and the outcome of the arbitral review proceedings, the Arbitration Award did not become binding and effective for purposes of enforcement under the New York Convention. The District Court properly reached this conclusion and dismissed the enforcement action. Moreover, although not directly relying on them in reaching its decision, the District Court noted that several foreign jurisdictions have already declined to enforce the Arbitration Award based on the outcome of the arbitral review proceedings and the language of the Resolution.

ARGUMENT

I. Standard of Review

The standard of review for a district court's grant of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is *de novo*. *See Ctr. For Auto Safety & Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 805 (D.C. Cir. 2006) (citing *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726, 731 (D.C. Cir. 2003)) and *Wiley v. Glassman*, 511 F.3d 151, 155 (D.C. Cir. 2007).

II. The District Court Correctly Ruled that the Arbitration Award Never Became Effective and Binding for Purposes of Enforcement under the New York Convention.

A. The District Court Correctly Interpreted the Arbitration Agreement.

Diag Human contends that the District Court erred in its interpretation of the Arbitration Agreement because it did not refer to Czech law. (Brief for Plaintiff-Appellant, at p. 19.) Diag Human asserts that the District Court's conclusion "ignores the generally applicable procedures and provisions of the Arbitration Act and CPC." (*Id.*, at p. 22.) However, a reading of the Arbitration Act does not comport with Diag Human's assertions, and Diag Human does not cite any federal case law that supports its argument. To the contrary, Diag Human cites federal cases addressing basic contract interpretation principles that actually support the District Court's plain language reading of the Arbitration Agreement.

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." (A319.) 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." (*Id.*) Sections 2 and 3 of the Arbitration Act relate to the creation of an arbitration agreement. (*See* Docket No. 60-4, Motion to Dismiss Amended Complaint, at Ex. D.) These sections do not address what law shall be applied in enforcement proceedings in a foreign country pursuant to the New York Convention, nor do they provide any principles regarding contract interpretation. Additionally, while Section 30 of the Arbitration Act calls for the application of the Czech Civil Procedure Code, it only mandates its application in the underlying arbitration proceedings: "Unless otherwise stated herein, the arbitrators shall apply the provisions of the Civil Procedure Code to proceedings pending before them as appropriate." (Docket No. 60-4, Motion to Dismiss Amended Complaint, at Ex. D.) Nothing in the Arbitration Act required the District Court to apply its provisions, or the Czech Civil Procedure Code, when interpreting the Arbitration Agreement. In fact, all of Diag Human's references to the Arbitration Act and Czech law apply only to the underlying arbitration proceedings, not enforcement proceedings in another jurisdiction.

Moreover, the New York Convention provides specifically 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***, under the conditions laid down in the following articles." N.Y. Convention, art. III (emphasis added). Considering this provision of the New York Convention, federal courts have held that the law of the enforcing jurisdiction applies in an enforcement proceeding. *See CBF Industria de Gusa v. AMCI Holdings, Inc.*, 850 F.3d 58, 75 (2d Cir. 2017). Diag Human's arguments regarding application of Czech law therefore completely miss their mark.

In an enforcement proceeding to confirm an arbitral award, the District Court is governed by the Federal Arbitration Act, which codifies the New York Convention into U.S. law. The New York Convention provides several grounds for courts to refuse recognition of a foreign arbitral award. One such ground is that the arbitral award has not become binding on the parties. *See* N.Y. Convention, art. V.1(e). An arbitration agreement is just like any other contract, so the District Court is entitled to interpret the arbitration agreement in accordance with basic U.S. contract law. In this regard, federal courts have held that "arbitration is a matter of contract." *Citizen Potawatomi Nation v. Oklahoma*, 2018 U.S. App. LEXIS 2867, *27 (10th Cir. 2018) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)). "'The FAA . . . places arbitration agreements on equal footing with other

contracts and requires courts to enforce them according to their terms.'" *Id.* "Under federal contract principles, if the terms of a contract are not ambiguous, this court determines the parties' intent from the language of the agreement itself." *Id.* at *28. Notably, Diag Human does not in its Brief appear to dispute that an arbitration agreement is subject to basic principles of contract interpretation.

Consistent with basic contract interpretation principles, the District Court reviewed the plain language of the Arbitration Agreement. Section V of the Arbitration Agreement provides: "If the review application of the other party has not been submitted within the deadline, the award will enter into effect and the parties voluntarily undertake to implement it within the deadline to be determined by the arbitrators, in default of which it may be implemented by the competent court." (A320.) This language is not ambiguous. If an application for review ***is*** timely submitted (which occurred in this case), then the Arbitration Award will not enter into effect. Moreover, in spite of Diag Human's complaints to the contrary, this interpretation is actually in line with the Arbitration Act. Section 28 of the Arbitration Act provides: "Upon being served the award ***that is not subject to revision under Section 27 hereof or in respect of which the term for lodging the application for revision under Section 27 expired without such application being lodged***, shall become legally valid and shall become enforceable by the Courts of law." (Docket No. 60-4, Motion to Dismiss Amended Complaint, at Ex. D

(emphasis added).) Here, the Arbitration Award did not become binding and enforceable due to the timely submission of applications for review by an arbitration review tribunal. As the District Court correctly noted, the Resolution subsequently discontinued the arbitration proceedings in their entirety. Based on the plain language of the Arbitration Agreement, the Arbitration Award never came into effect under these circumstances. Because the New York Convention allows a court to refuse enforcement where an award has not become effective and binding on the parties, the District Court did not err when it dismissed the action.

In its attempt to obtain a reversal of the District Court, Diag Human tries to distort the District Court's straightforward contract interpretation. In this regard, Diag Human argues that the District Court concluded that the Arbitration Award was "nullified" simply by the act of submitting a review request. (Brief of Plaintiff-Appellant, at p. 22.) However, the District Court did not go so far in its reasoning. Rather, the District Court simply held that the submission of a review application prevented the award from taking effect at that time, and that the subsequent discontinuation by the Resolution thereafter ended the arbitration. (A1352.)

Diag Human also argues that "[u]nder the Arbitration Act and Czech law, invocation of an arbitral review simply suspends the underlying award's effectiveness during the pendency of the review proceedings." (Brief of Plaintiff-Appellant, at p. 23.) Again, despite Diag Human's contentions, the District Court's

ruling and rationale is not inconsistent with these stated principles. Based on the plain language of the Arbitration Agreement, the Arbitration Award never came into effect because a review request was submitted. The Arbitration Award was, therefore, not binding and capable of enforcement during the pendency of the arbitral review proceedings. Had the Arbitration Award been affirmed after review by the arbitration review tribunal, it would have then gone into effect. However, that was not the case here. Instead, for the reasons set forth in the Resolution, the arbitration review tribunal discontinued the arbitration proceedings entirely after considering the Czech Republic's request for review. Therefore, the Arbitration Award never became effective and binding for purposes of enforcement under the New York Convention, and the District Court's dismissal should be affirmed.

B. The District Court's Interpretation of the Arbitration Agreement Does Not Lead to an Absurd Result.

Diag Human further challenges the District Court's interpretation of the Arbitration Agreement by contending that it leads to an absurd result. (Brief of Plaintiff-Appellant, at p. 24.) In support of this argument, Diag Human cites general contract interpretation cases that rebuke the absurd interpretation of a contract. However, simply because Diag Human does not agree with the District Court's interpretation of the Arbitration Agreement does not mean that interpretation leads to an absurd result. To try to generate a purportedly absurd result, Diag Human takes the District Court's ruling far beyond the four corners of the Memorandum Opinion

by imputing to the District Court a contract interpretation it did not make. In this regard, Diag Human contends that the District Court interpreted the Arbitration Agreement such that "the mere filing of a review request prevents the award to be reviewed from *ever* becoming effective, making it possible to thwart reaching a final and binding arbitration award by simple subterfuge of the losing party: serving a review request that it later withdraws." (Brief of Plaintiff-Appellant, at p. 25.) Yet, the District Court never reached this conclusion based on its interpretation of the Arbitration Agreement, nor could it. This factual scenario was not present before the District Court. Both Diag Human and the Czech Republic submitted timely requests for review. While Diag Human later withdrew its request, the Czech Republic did not. (A1344.) The arbitration review tribunal issued the Resolution after considering the Czech Republic's request for review. As such, the District Court never concluded, nor can its ruling be interpreted to conclude, that the mere filing of a request for review, by itself, prevents an arbitration award from *ever* becoming effective as Diag Human postulates.

III. The Arbitration Award Is Not Final, Binding and Effective.

Although the primary focus of its decision was on the terms of the Arbitration Agreement, the District Court nonetheless stated in its Memorandum Opinion 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." (A1352.) This statement by the District Court is consistent with the substance of the Resolution. Diag Human takes issue with the District Court's statement largely because it disagrees with the findings of the arbitration review tribunal set forth in the Resolution. Yet, courts are not permitted to address the merits of an arbitration decision during enforcement proceedings. *See Teamsters Local Union No. 61 v. United Parcel Serv., Inc.*, 272 F.3d 600, 604 (D.C. Cir. 2001) (holding that courts "do not sit to hear claims of factual or legal error by an arbitrator as [we would] in reviewing decisions of lower courts"). As such, it was not the District Court's job to apply Czech law and determine whether the arbitration review tribunal's findings in the Resolution were correct. Diag Human also notes that the "extensive expert analyses" demonstrate that the ruling of the arbitration review tribunal was not clearly and unequivocally stated in the Resolution. However, the expert analyses demonstrate nothing more than a difference of opinion by the affected parties as to the effect of the Resolution. As set forth below, and evidenced by the decisions of foreign courts in similar enforcement proceedings, the Resolution nullified the Arbitration Award such that there is no binding and effective award for any court to enforce.

A. Arbitral Proceedings Under Czech Law.

Diag Human argues that, under the Arbitration Act, arbitral proceedings may result in only one of two types of decisions—an arbitral award or a resolution. Diag Human contends that only an arbitral award can be a decision on the merits whereas a resolution is limited to a procedural decision that cannot affect the substantive rights of the parties. (Brief of Plaintiff-Appellant, at p. 28.) Diag Human also argues that a resolution, as a procedural decision, is not subject to review by a court, which allegedly supports Diag Human's claim that it cannot be issued as a decision on the merits. (*Id.*, at p. 31.)

In support of these arguments, Diag Human relies on several legal opinions from various authors, one of whom is not even licensed to practice law in the Czech Republic (Prof. Dr. Georg E. Kodek, L.L.M.). However, the legal opinion of Prof. Dr. Alexander Belohlavek, the most renowned author referenced by Diag Human with respect to Czech Arbitration Law, actually cuts against Diag Human's arguments. For example, in his legal opinion dated September 14, 2015, Prof. Belohlavek admits that, "It is true that the Arbitration Act does not explicitly stipulate in which cases the arbitrators are required to issue an award and, similarly, in which cases a resolution suffices." (A929.) Moreover, Prof. Belohlavek notes that theory can differ from practice, and he discusses a case where arbitrators issued a resolution affecting the substantive rights of the parties. (A931-932.) The

resolution in that case was submitted to the Constitutional Court of the Czech Republic for review, and Prof. Belohlavek explains that "the Constitutional Court held that it would breach the fundamental rights of the party concerned if that party was (in this individual case) denied the opportunity to pursue its claim before the courts." (*Id.*) Therefore, while Prof. Belohlavek does not personally believe that an arbitral award should be cancelled by a resolution, he admits that "the review arbitrators may in theory indeed proceed in this way." (A933.) He further admits that "given the rather inconsistent practice, I would not go as far as to say that under no circumstances can an award be set aside by a resolution." (A935.)

Along similar lines, Professor Belohlavek was even more specific in a legal opinion submitted by Diag Human in Dutch enforcement proceedings in April 2015. In that legal opinion, Professor Belohlavek was asked: "Can an arbitral award in arbitral review proceedings be cancelled or otherwise made ineffective via an arbitral resolution in such arbitral review proceedings?" (A1283.) His answer at that time was quite unambiguous: "Yes, an award can be cancelled in the review proceedings (either by a resolution or by an award). This conclusion is consistent with my commentary on the Czech Arbitration Act." (A1286.) Interestingly, since then, Diag Human has not submitted that particular legal opinion in any other jurisdiction. Accordingly, despite Diag Human's argument to the contrary, its own legal expert explicitly concedes that an arbitral award ***can*** in fact be set aside by a

resolution. As discussed further below, several courts in similar enforcement proceedings throughout Europe have already held that the Resolution nullified the Arbitration Award.

B. The Dispositions Available to the Arbitration Review Tribunal.

Despite the concessions of Prof. Belohlavek in his legal opinion, Diag Human continues to argue that whenever an arbitral panel cancels an arbitration award, such a decision must be set forth in an arbitral award and must be contained in the "operative" part of the award. (Brief of Plaintiff-Appellant, at p. 33.) Diag Human further argues that a review panel's disposition may not be set forth or inferred from the reasoning portion of the decision. (*Id.*) However, the legal opinions submitted by Diag Human do not support this assertion. Prof. Belohlavek again concedes that "since the Arbitration Act does not provide for a specific list of situations where it is sufficient to issue a resolution, it would be problematic to argue that a resolution which sets an arbitral award aside directly violates any provision of the Arbitration Act." (A935-936.) Similarly, Prof. Dr. Georg E. Kodek opines that the operative part of the decision is decisive for interpretation of judgments and hence also of arbitral awards. (A973-974.) At the same time, Prof. Dr. Kodek concedes that a review of the reasoning portion of a decision is appropriate to interpret the operative part where it is unclear or ambiguous. (A974.) Diag Human argues in its Brief that the "extensive expert analyses" apparently demonstrate that the Resolution was ***not***

clear and unequivocal. (Brief of Plaintiff-Appellant, at p. 27.) Therefore, by Diag Human's own admission, a review of the reasoning portion of the Resolution is appropriate in this case. As discussed below, the reasoning portion of the Resolution reflects clearly that the arbitration review panel discontinued the arbitration proceedings because the Arbitration Award lacked legal effect.

C. Substance and Legal Effect of the July 23, 2014 Resolution of the Arbitration Review Tribunal.

During the arbitration review proceedings, the Czech Republic asserted a straightforward legal argument regarding the legal effect of the Partial Arbitral Award based on the well-established doctrine of *res judicata*. (A555-556.) More specifically, as the review arbitration tribunal observed in the Resolution, the Czech Republic argued "that the matter had in fact been resolved in 2002 and there were thus no matters to be discussed and all the subsequent decisions were null and void and all the subsequent procedural acts ineffective." (A556.) The review arbitration tribunal found that a "partial" decision may only be rendered in certain scenarios—*i.e.*, where a decision is being rendered on one of several claims or as to one of several defendants or plaintiffs. (*Id.*) However, "[t]he case at hand clearly does not involve several plaintiffs or several defendants, or a counterclaim or joint cases," and "[i]t is also true that the Partial Arbitral Award does not specify in any manner whatsoever what part of the enforced claim it covers." (*Id.*) The review arbitration tribunal further found that a decision "must be assessed from an objective viewpoint

according to its contents;" in other words, a court or tribunal must look at substance over form. (A557.)

Therefore, the review arbitration tribunal found in favor of the Czech Republic that the Partial Arbitral Award from 2002, though designated as "partial," was in fact a final decision with full legal force based on the substance of that award. (A557.) As such, the Partial Arbitral Award had *res judicata* effect. It is axiomatic that where a matter has already been resolved, the matter cannot be heard again, and any subsequent decisions on the same matter lack any legal effect. (*Id.*) The Arbitration Award violated the doctrine of *res judicata* and, therefore, lacks any legal effect.

In view of the finding that the entire case was resolved, and the arbitral proceedings ended in 2002 when the Partial Arbitral Award came into legal force, and that the Arbitration Award has been null and void from the very moment it was issued, the review arbitration tribunal thereupon issued a Resolution as a new final decision of the arbitration by which the arbitral proceedings were discontinued instead of the Arbitration Award being confirmed. Diag Human does not dispute the substance of the Resolution. Indeed, during a prior oral argument before this Court, the panel asked counsel for Diag Human to give them the "bottom-line" on what the Resolution says. (A722.) Counsel for Diag Human responded: "What it said was that the award which was rendered in, as I understand it the award that was

rendered in 2002, namely this $10 million interim award, that was the final award because under Czech law you couldn't have anything after that." (A723.) Further, when asked if there may be no other award (after the 2002 Partial Arbitral Award), counsel for Diag Human replied: "If that appeal panel is a valid one and its ruling was correct, and there were no ways to upset that - - it's conceivable." (A724.)[2] While Diag Human disputes the effect of the Resolution and argues that the arbitration review tribunal's findings are incorrect under Czech law, Diag Human does not and cannot dispute what the Resolution says.

It is important to note that three decisions have been previously rendered by courts in Amsterdam, Brussels and Liechtenstein regarding the effect of the Resolution issued by the review arbitration tribunal. The Czech Republic argued in these jurisdictions that the Arbitration Award is neither legally binding nor enforceable based on the Resolution. In support of its argument that the Resolution nullified the Arbitration Award, the Czech Republic submitted the joint legal opinion

[2] Indeed, there is no legitimate dispute as to the intent of the review arbitration tribunal to nullify the Arbitration Award. In an October 3, 2014 letter to the Czech Republic, the review arbitrators wrote to request their arbitrators' fees and costs. (*See* A731-735.) In the letter, they state: "The proceedings in the above case were discontinued as a whole and, therefore, the only final and enforceable decisions in the above-specified case are the Partial Arbitral Award (issued on 25 June 2002) and the resolution of our arbitral tribunal, discontinuing the whole arbitration proceedings that followed after the date of the Partial Arbitral Award." (A733.)

from Prof. JUDr Ales Gerloch, CSc. and Doc. JUDr Vladamir Balas, CSc. (*See* A564-603.)

The joint legal opinion addresses several questions with respect to the effect of the Resolution. First, the legal opinion concludes that the Resolution is both binding and final. The Resolution is binding because it has the same effect of a judgment. (A575-576.) The finality of a decision depends primarily on whether an appellate remedy is available to challenge the decision. (A576.) Prof. Gerloch and Doc. Balas conclude that the only possible remedy, a request to set aside the Resolution by a court of jurisdiction, must have been exercised within three months of service of the Resolution. (A577.) Diag Human did not file a request in a court to set aside the Resolution. "Consequently, it can be concluded that the issued Resolution is not only binding on, but also final for the parties since the law provides the parties to the proceedings with no remedy whereby they could change the Resolution." (A578.)

Prof. Gerloch and Doc. Balas further explain that the Resolution discontinued the arbitration proceedings in whole (*i.e.*, not just the review proceedings as some purportedly separate process, but the whole arbitration), and, more importantly, the Arbitration Award never existed since it was nullified at inception. (A582.) However, because the review arbitration tribunal only reviewed the Arbitration Award, the 2002 Partial Arbitral Award remains in legal force. Provided that the

Czech Republic paid the amount of damages awarded in the 2002 Partial Arbitral Award (which it did), the Czech Republic has no further payment obligation to Diag Human. Because the damages set forth in the 2002 Partial Arbitral Award have been paid by the Czech Republic, and because the Arbitration Award is null and void, there is nothing for a court to enforce.

Consistent with the joint legal opinion of Prof. Gerloch and Doc. Balas, courts in Amsterdam, Brussels and Liechtenstein have held that the Resolution nullified the Arbitration Award[3]. The Amsterdam District Court agreed with the Czech Republic and entered a decision on November 12, 2015 dismissing the enforcement proceedings in Amsterdam. (*See* A613-634.) The Amsterdam District Court held that "[t]he [2002] Partial Award is legally not a partial award but a final award that acquired the status of *res judicata*." (A622.) Further, because it is not possible to hear a settled matter a second time, the procedural actions carried out after entry of the 2002 Partial Arbitral Award, most notably, entry of the Arbitration Award, are without legal effect. (*Id.*) The Court therefore concluded that the arbitration proceedings following the 2002 Partial Award are discontinued and without effect. (*Id.*)

[3] The decisions rendered in Amsterdam, Brussels and Liechtenstein have each been appealed, and, as of the date of this Brief, those appeals are still pending.

The Amsterdam Court of Appeal affirmed the order of the Amsterdam District Court dismissing Diag Human's enforcement proceedings in Amsterdam. (*See* A1287-1296.) In the decision, the Amsterdam Court of Appeal begins its analysis by stating what is required under the New York Convention for enforcement: "Article II, first sentence, of the New York Convention presupposes the existence of an arbitral award that is valid under the applicable arbitration law. For these proceedings, what it comes down to is whether the Final Award of 4 August 2008 is a legally valid, final, and binding arbitral award that is susceptible to recognition and enforcement in the Netherlands." (A1294.) The decision goes on to hold that "It is apparent from the content of the Resolution that the Final Award has lost its legal force." (*Id*.) With respect to the discontinuation of the arbitration proceedings, the Amsterdam Court of Appeal concluded: "Contrary to what Diag has argued, said discontinuation concerns not the review proceedings as such but, according to the phrasing used, viewed against the background of the finding in Section 4.4 of the Resolution, the entire arbitration proceedings after the Review Partial Award. The Resolution thus side-lined the Final Award and the Final Award cannot be regarded as an irrevocable final arbitral award, binding on both parties, within the meaning of the New York Convention." (*Id*.) The Amsterdam Court of Appeal further concluded: "That the Resolution does not state explicitly in its operative part that the

Final Award has been set aside as Diag has argued, does not detract from the foregoing." (*Id.*)

Similarly, on July 19, 2016, the Court of First Instance in Brussels entered a judgment regarding the effect of the Resolution. (*See* A635-654.) In the decision, the Court first concluded that a resolution is binding on the parties. (A643.) Therefore, the Resolution is a part of the arbitration proceedings, "with the review arbitrators rendering a new ruling on the same case and finding that in fact the arbitrators who rendered a ruling on 4 August 2008 should not have done so due to the award rendered on 16 December 2002 (the Partial Award) …." (*Id.*) The Court held that the Arbitration Award was replaced in its entirety by the Resolution, as the review arbitrators concluded that the arbitration had actually come to an end after entry of the 2002 Partial Arbitral Award. (*Id.*) The Court concluded that leave to enforce could not be granted under the New York Convention given that the Arbitration Award had never acquired finality and had been annulled by the Resolution. (A643-644.)

Interestingly, the very country in which Diag Human is incorporated (Liechtenstein) came to the same conclusion. On November 4, 2016, the Princely Court of Justice in Liechtenstein entered a judgment that addressed the effect of the Resolution. (*See* A655-690.) In that decision, the Court noted that both parties had requested that the arbitral proceedings be terminated for different reasons. (A671.)

The Czech Republic requested that the proceedings be terminated because the case had already been decided in 2002 and all subsequent decisions were null and void. (*Id.*) The Court acknowledged that "in the event a case has already been decided, it cannot be considered again and any subsequent associated decision, with which something that has already been adjudicated is decided, can have no legal force." (*Id.*) With respect to the Partial Arbitration Award, the Court noted that it must be evaluated from an objective point of view according to its content, and the Court agreed with the Czech Republic's plea that the Partial Arbitration Award is not really a "partial" award. (A672.) As far as the effect of the Resolution, the Court found as follows: "From the entire content of the termination order, in the opinion of the court, it is clear that the final arbitral ruling of 08/04/2008 was 'replaced' by the termination order, and from this, [Diag Human] can assert no enforceable claim infringing the principle of res judicata, and this final arbitral ruling was set aside by the termination order." (A684.) Accordingly, the Court held that "[Diag Human] thus (no longer) has any legally binding award and enforceable claim from the final arbitral ruling of 08/04/2008." (*Id.*)

D. Effect of the Handwritten "Clause of Legal Force" on the Arbitration Award.

With respect to the reference in Diag Human's Brief to a purported "clause of legal force," such clause neither alters the effect of the Resolution nor revives the nullified Arbitration Award. As discussed in the May 16, 2016 legal opinion of Prof.

Gerloch and Doc. Balas, the Arbitration Award could only come into legal force and become enforceable if (i) none of the parties initiated review proceedings in accordance with the Arbitration Agreement, or (ii) the arbitration review tribunal confirmed the Arbitration Award. (*See* A609.) However, neither of these situations occurred. (*Id*.) Therefore, as the District Court correctly determined, the Arbitration Award never came into legal force. The fact that one of the original arbitrators (not a review arbitrator) added a handwritten clause of legal force to the Arbitration Award does not bestow any sort of legal effect on the award. Indeed, decisions from the Czech Supreme Court hold that attaching a clause of legal force to a decision that never became enforceable does not remedy the lack of legal force of that decision. (A609.) The Resolution discontinued the arbitration proceedings and nullified the Arbitration Award because the case was finally resolved as of 2002, which means that the original arbitrators no longer had jurisdiction or authority to add a clause of legal force to the award. Surely, one original arbitrator, who had already lost jurisdiction, acting alone, cannot add legal force to a document by handwriting such a clause on the document when he lacks the authority to do so. Accordingly, the handwritten clause of legal force was attached to the Arbitration Award in error and it is not effective[4].

[4] One of Diag Human's own experts acknowledged that attaching a clause of legal force is improper in the instant case. In this regard, Prof. Belohlavek commented: "It is therefore possible that while the original arbitrators declare themselves

This conclusion is consistent with the judgment of the Court of First Instance in Brussels. During the proceedings in Brussels, Diag Human argued that the handwritten clause of legal force made the Arbitration Award enforceable. However, even after considering Diag Human's argument regarding the alleged effect of the clause of legal force, the Court in Brussels still determined that the Arbitration Award was nullified by the Resolution and is not capable of enforcement.

IV. The District Court Properly Relied on the Reasoning in the Resolution to Find that the Resolution Nullified the Arbitration Award.

As discussed above, a review of the reasoning portion of the Resolution (which, similar to American case law, comprises the majority of the opinion) establishes that the arbitration review tribunal discontinued the arbitral proceedings in their entirety and set aside or nullified the Arbitration Award. While Diag Human tries to unnecessarily complicate the effect of the Resolution, its plain language shows that the review arbitration tribunal determined that the Arbitration Award was precluded by the well-established doctrine of *res judicata*. Because the Partial

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competent (having jurisdiction) and issue an arbitral award [Section 23(a) of the Arbitration Act], the review arbitrators declare their lack of competence and terminate the proceedings by issuing a resolution [Section 23(b) of the Arbitration Act]. In such a case, neither of the decisions comes into legal force and, naturally, no clause of legal force is affixed on any of the decisions." (A581-582.) Contrary to Diag Human's position, it is clear that Prof Belohlavek disputes the legal force of the Arbitration Award based on the outcome of the arbitral review proceedings.

Award was in fact a final decision, it had *res judicata* effect. Therefore, a subsequent decision on the arbitration lacked legal effect. The District Court appropriately referred to the reasoning of the Resolution and correctly found that it invalidated the Arbitration Award.

Diag Human disagrees with the District Court's review and interpretation of the Resolution, as well as the conclusions reached by the arbitration review tribunal in the Resolution. (Plaintiff-Appellant's Brief, at p. 39.) However, Diag Human's disagreement with the Resolution and the District Court's interpretation of its findings is of no moment. First, mere dissatisfaction with a district court's ruling is not grounds for reversal on appeal. Second, neither the District Court nor this Court are permitted to review the merits of the underlying arbitration proceedings. As Diag Human argued below, and as the District Court correctly noted in its Memorandum Opinion, courts do not sit to hear claims of factual or legal error by an arbitrator as they would in reviewing decisions of lower court. (A1349.) It is neither the job of the District Court nor this Court to determine the correctness of the arbitration review panel's findings in the Resolution. Rather, just as the courts in Amsterdam, Brussels and Liechtenstein did, the District Court applied the plain language of the Resolution and found that the Resolution nullified the Arbitration Award.

Despite the language of the Resolution and the decisions out of Amsterdam, Brussels and Liechtenstein, Diag Human argues that the arbitration review tribunal discontinued the proceedings because they lacked competence to act on the request for review. (Plaintiff-Appellant's Brief, at pp. 34-35.) However, this argument is not supported by the language of the Resolution or the legal opinions submitted by Diag Human in the District Court.

In Section 4.2 of the Resolution, the arbitration review tribunal addresses the parties' requests for review of the Arbitration Award. (A550-552.) The arbitration review tribunal disagreed with Diag Human's objection that the pleading to commence the review proceedings was invalid. In this regard, the Resolution provides that "the arbitrators are of the opinion that the circumstances surrounding the signature of the request for review of the Arbitral Award are in actuality irrelevant." (A551.) The review arbitrators then proceeded to make their *res judicata* determination in the immediately following section, Section 4.4. (A555-557.) As conceded by Diag Human in its Appellate Brief, Section 4.4 of the Resolution states that the obstacle of *res judicata* was effectively established by the issuance of the Partial Arbitral Award. (Plaintiff-Appellant's Brief, at p. 39.) Therefore, despite any alleged procedural defects, the arbitration review tribunal considered the Czech Republic's request for review and reached a decision on the *res judicata* effect of the Partial Award.

This conclusion is supported not only by the Resolution itself, but also by certain concessions made in one of the legal opinions submitted by Diag Human. In the legal opinion of JUDr. Alena Banyaiova, the author discusses the alleged procedural deficiencies in the Czech Republic's request for review. (A910-911.) However, JUDr. Banyaiova applies the Czech Procedural Code and notes that "the review arbitral tribunal should have been obliged to notify the Czech Republic of the deficiencies of its request for review" but "[t]he review tribunal has not done so and thus practically accepted such request." (A911.) JUDr. Banyaoiva then concedes that the review arbitration tribunal accepted the allegedly defective motion for review filed by the Czech Republic. (*Id*.) As to Diag Human's argument that the review proceedings were discontinued because of lack of jurisdiction to consider the request for review, JUDr. Banyaiova clearly does not share this interpretation of the Resolution when she states that the review tribunal "was wrong in its assessment of the *res judicata* argument raised by the Czech Republic and thus was wrong to discontinue the proceedings for reasons set out in the Final Review Resolution." (A910.) Further, in her legal opinion she admits that "it must be pointed out that it is not completely clear what is the position of the review arbitrators regarding their own jurisdiction to review the Final Award." (A911.) Therefore, Diag Human's argument is not supported by the language of the Resolution, as illustrated by its own legal expert.

Diag Human concedes in its Brief that Section 4.4 of the Resolution does in fact provide that the obstacle of *res judicata* was effectively established by issuance of the Partial Arbitral Award. (Plaintiff-Appellant's Brief, at pp. 39-40.) However, Diag Human contends that the arbitration review tribunal's conclusion is wrong under Czech law. Diag Human then goes on at length to explain its application of Czech law and why it believes the arbitration review tribunal made a legal error in Section 4.4 of the Resolution. As addressed above, however, claims of legal error by the arbitration review tribunal are not properly before this Court. Whether the arbitration review tribunal was correct in its application of the law and the facts was not at issue in the court below. Section 4.4. of the Resolution says what it says, and Diag Human does not dispute its plain language. Accordingly, the District Court correctly found in its Memorandum Opinion that the Arbitration Award lacked legal validity and effect based on the findings set forth in the Resolution.

V. The Arbitration Award Should Not Be Enforced by Order of This Court.

In seeking a reversal of the District Court's ruling, Diag Human also asks this Court to direct the District Court to confirm the Arbitration Award on remand. (Plaintiff-Appellant's Brief, at p. 45.) This request is premature and improper. First, as discussed at length herein, the District Court's dismissal of the enforcement action was proper. Based on the plain language of the parties' Arbitration Agreement and the Resolution, the Arbitration Award did not become effective and binding for

purposes of enforcement under the New York Convention. Second, the District Court's ruling did not address all of the arguments raised by the Czech Republic in opposition to the enforcement of the Arbitration Award. In this regard, the Czech Republic sought dismissal of the Amended Complaint on several grounds, including that the Resolution nullified the Arbitration Award, that the claims are barred by the doctrines of *res judicata* and international comity, and that the claims are barred by the applicable statute of limitations. Because the District Court did not address the merits of these other arguments, an order directing the District Court to confirm the Arbitration Award would be improper. In other words, this case can still be dismissed as a matter of law pursuant to the statute of limitations or *res judicata.* Therefore, if this Court reverses the District Court's order of dismissal, this case must be remanded to proceed on the remainder of the Czech Republic's arguments in opposition to enforcement under the New York Convention.

VI. The Resolution Is Not in Violation of the Public Policy of the United States.

Diag Human argues that, if the Resolution did set aside the Arbitration Award, then the District Court abused its discretion by declining to recognize the Resolution as repugnant to United States public policy. (Plaintiff-Appellant's Brief, at p. 46.) In support of this argument, Diag Human relies on *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007). However, the D.C. Circuit in *TermoRio* makes it clear that extraordinary circumstances are required for the

enforcing court to decline to acknowledge the setting aside of an award based on public policy grounds.

In *TermoRio*, the appellants argued that the court has discretion to enforce an award despite annulment in another country because "a state is not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests." 487 F.3d at 936. The D.C. Circuit found, however, that the "[a]ppellants' characterizations of the applicable law [were] understated and thus misguided." *Id.*

The D.C. Circuit found that the New York Convention policy in favor of enforcement does not swallow the command of Article V(1)(e). In this regard, "'[t]he Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.'" *TermoRio*, 487 F.3d at 937. Further, "[t]he Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary State has lawfully acted pursuant to 'competent authority' to 'set aside' an arbitration award made in its country." *Id.* The D.C. Circuit concluded that the appellants went "much too far in suggesting that a court in a secondary State is free as it sees fit to ignore the judgment of a court of competent

authority in a primary State vacating an arbitration award." *Id.* "It takes much more than a mere assertion that the judgment of the primary State 'offends the public policy' of the secondary State to overcome a defense raised under Article V(1)(e)." *Id.*

In *TermoRio*, the D.C. Circuit ultimately held that the appellant's public policy claim failed. 487 F.3d at 939. The appellants did not allege nor provide any evidence to suggest that the parties' proceedings in the primary State or the judgment of the State violated any basic notions of justice to which the court subscribes. *Id.*

The additional case law that Diag Human cites in its Brief is also unpersuasive, as it is easily distinguishable from the instant case. In *Corporacion Mexicana de Mantenimiento Integral, S. De R.L. de C.V. v. Pemex-Exploracion y Produccion*, 832 F.3d 92 (2d Cir. 2016), the enforcing court declined to recognize a foreign judgment setting aside an arbitration award on public policy grounds because the foreign court made its decision based on the enactment of retroactive legislation. It is easily understood how a federal court in the United States would find such a situation violative of public policy considering the protections afforded under the Contract Clause of the United States Constitution. A similar situation is not present in the instant case.

Similarly, in *Chromalloy Aeroservices, A Division of Chomalloy Gas Turbine Corp. v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996), the enforcing court confirmed an arbitral award that had been set aside by a judgment, but under circumstances completely different than the instant case. In *Chromalloy*, the parties' arbitration agreement expressly provided that the arbitrators' decision "shall be final and binding and cannot be made subject to any appeal." 939 F. Supp. at 912. Therefore, the appeal to an Egyptian court and the order setting aside the arbitral award violated the terms of the arbitration agreement. To the contrary, in the instant case, the Arbitration Agreement expressly allows for review of the arbitration award by a panel of review arbitrators. Because the Czech Republic followed the procedure for arbitral review set forth in the Arbitration Agreement, there is no violation of contract by way of the issuance of the Resolution.

Diag Human also contends that the Czech Republic "operated to deprive Diag Human of the benefit of the 'contractual undertakings' that the parties had agreed to." (Plaintiff-Appellant's Brief, at p. 47.) Diag Human argues that this Court should be "offended by the circumstances under which CzR was able to nominate all three arbitrators to the Review Panel." (*Id.*) In reality, it was the conduct of Diag Human which precipitated the procedures for the naming of the review arbitrators. As noted above, the Arbitration Agreement provides that, upon a request for review by either or both parties, each party will select one review arbitrator and those

arbitrators will then select the third review arbitrator. If the two appointed review arbitrators do not timely select the third review arbitrator, then a court of the Czech Republic is to appoint the third review arbitrator upon the application of either party or the two review arbitrators already appointed. (A422.)

Following the resignation of Diag Human's appointed arbitrator, Damiano Della Ca, the parties did not reach agreement to appoint a substitute arbitrator to the arbitration review panel. (A425.) Pursuant to the Arbitration Agreement, the Czech Republic submitted its application for appointment of a replacement arbitrator on May 11, 2010, after more than a month of inactivity by Diag Human. (A426.) Diag Human participated in the appointment proceedings before the Municipal Court in Prague as to the appointment of a replacement review arbitrator. (*Id.*) The Municipal Court appointed Mr. Jiri Schwarz to the arbitration review panel, and this decision was affirmed by the High Court in Prague. (*Id.*) The Czech Republic did not undermine Diag Human's contractual rights—rather; it proceeded in accordance with the provisions of the Arbitration Agreement and the Arbitration Act. As such, the court appointment of a replacement arbitrator under circumstances where Diag Human actively participated in the proceedings can hardly be said to violate basic notions of morality and justice. Moreover, Diag Human voluntarily dismissed its objections against the court appointment of Arbitrator Schwarz when it withdrew its

appeal to the Czech Supreme Court and its other procedural remedies lodged in that respect. (A570-571.)

Lastly, Diag Human argues that correspondence between the review arbitrators and the Czech Republic regarding the arbitrators' fee evidences "partiality or corruption in the arbitrators" in violation of public policy. (Brief of Plaintiff-Appellant, at p. 48.) However, Diag Human goes much too far in its characterization of these communications. As can be understood from a review of the correspondence, which Diag Human submitted to the District Court (*see* A1181-1191), Diag Human was included in the conversation regarding the increased arbitrators' fee. While Diag Human describes the conversation regarding the increased fee as "unilateral" and states that it only received the "full" correspondence after the Resolution, the reality is that most of the correspondence took place prior to the issuance of the Resolution, and many of the letters were addressed to Diag Human as well. (*See* A1181-1246.) Furthermore, any fee discussions that took place solely between the Czech Republic and the arbitration review tribunal likely occurred because Diag Human had no interest in seeing the arbitration review proceedings move forward. Many of the letters show that Diag Human was not interested in splitting the arbitrators' fee at all and that Diag Human did not believe the review proceedings should proceed. (*See* A1184-1187; A1192-1195; and A1208-1218.) Because Diag Human was in fact included in the discussion by both

the Czech Republic and the review arbitrators, these communications in no way violate the basic notions of morality and justice.

While Diag Human takes issue with the increase in the arbitrators' fee, the correspondence shows that the increase was not arbitrary. Rather, the increased fee matched the charge for arbitration set before the only standing court of arbitration established by law in the Czech Republic—namely, the Court of Arbitration attached to the Economic Chamber of the Czech Republic and Agricultural Chamber of the Czech Republic. (*See* A1219-1227, A1232- 1255.) In fact, the review arbitrators concluded that the 1996 agreement regarding the original arbitrators' fee no longer applied because the review arbitrators were not parties to that agreement. (*Id.*) Whether that approach was correct or not is now the subject of a dispute between Arbitrator Schwarz and the Czech Republic pending before the District Court for Prague 2. Nonetheless, the review arbitrators did not consider themselves to be bound by the amount of remuneration set forth in that agreement and invited the parties to reach a new agreement on the review arbitrators' fees. (*Id.*) As stated by the review arbitrators, under the circumstances, the most applicable schedule of charges to be applied was that of the Court of Arbitration. (*Id.*) Interestingly, in the original arbitration proceedings, Diag Human previously agreed to an increase in the original arbitrators' fees under the schedule of fees used by the Court of Arbitration. (*See* A160-161.) Since Diag Human was amenable to this fee approach in the

original arbitration proceedings, its current argument that the increased fee now evidences "partiality or corruption in the arbitrators" is meritless.

Accordingly, the District Court's recognition of the Resolution did not violate U.S. public policy, and the Czech Republic respectfully requests that this Court affirm the dismissal order of the District Court.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment dismissing this action pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

BABST, CALLAND,
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Dated: March 14, 2018

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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 10,413 words (based on the Microsoft Word word-count function), excluding the parts of the Brief exempted by Fed. R. App. 32(a)(7)(B)(iii) and Circuit Rule 32(e)(1).
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 with sans using Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 14, 2018, the BRIEF FOR DEFENDANT-APPELLANT was electronically filed and served on all counsel of record through the CM/ECF system, pursuant to D.C. Circuit Rule 25. A courtesy paper copy will also be mailed within two business days of the electronic filing via Federal Express to counsel of record as follows:

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Unless otherwise noted, eight (8) paper copies of the above-referenced document will be filed with the Court via Federal Express, addressed to the Clerk, within two business days of the electronic filing.

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ADDENDUM

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Article I(1)

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Article III

Each Contracting 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, under the conditions laid down in the following articles. There 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.

Article V(1)(e)

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.

Section 2

(1) Parties may agree to submit property disputes between themselves with the exception of disputes relating to the enforcement of decisions as well as of disputes arising as a result of bankruptcy or composition proceedings, which would otherwise lie within the jurisdiction of ordinary Courts of law, to one or more arbitrators or to a permanent arbitration court (arbitration agreement).

(2) An arbitration agreement may be validly entered into, if the parties are free to conclude settlements in respect of the subject matter of their dispute.

(3) The arbitration agreement may relate to

a) an individual, already existing dispute (compromissum), or

b) all disputes that might arise in future out of a given legal relation or of several defined legal relations (arbitration clause).

(4) Unless otherwise stated in the arbitration agreement, it shall cover both rights directly arising out of said legal relations and legal validity of these legal relations as well as rights connected thereto.

(5) Unless expressly excluded by the arbitration agreement, the latter shall bind the legal successors of the said parties thereto.

Section 3

(1) The arbitration agreement shall be made in writing otherwise it shall be void. Arbitration agreement made by telegram, telex or by electronic means enabling to provide a record of the agreement, i.e. catch the contents thereof, and to determine the persons, having entered into it, shall be deemed to be made in writing.

(2) If the arbitration agreement is inserted into (general) terms and conditions governing the main contract, covered by the said arbitration agreement, then the latter shall be deemed to be validly concluded, if the offer of the main contract including the arbitration agreement made in writing is accepted by the offeree by way of implication in a way casting no doubt as to its acceptance of the arbitration agreement.

Section 28

(1) The written award shall be served on the parties. The award shall be upon its service provided with the legal validity clause.

(2) Upon being served the award that is not subject to revision under Section 27 hereof or in respect of which the term for lodging the application for revision under Section 27 expired without such application being lodged, shall become legally valid and shall become enforceable by the Courts of law.

Section 30

Unless otherwise stated herein, the arbitrators shall apply the provisions of the Civil Procedure Code to proceedings pending before them as appropriate.