Neutral Citation Number: [2024] EWHC 708 (Comm)

Case No: CL-2022-000307

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**KING'S BENCH DIVISION**
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27/03/2024

**Before** :

**MR JUSTICE FOXTON**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **THE CZECH REPUBLIC** | **Claimant** |
| **– and –** | |
| **(1) DIAG HUMAN SE** | |
| **(2) JOSEF STAVA** | **Defendants** |

- - - - - - - - - - - - - - - - - - - - -

- - - - - - - - - - - - - - - - - - - - -

**Peter Webster** and **Katherine Ratcliffe** (instructed by **Arnold & Porter Kaye Scholer (UK) LLP)** for **the Claimant**
**Philip Riches KC** and **Kate Parlett** (instructed by **Mishcon de Reya LLP**) for **the Defendants**

Hearing date: 21 March 2024
Further evidence: 25 March 2024
Draft Judgment Circulated: 25 March 2024

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

This judgment was handed down remotely at 10.30am on 27 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE FOXTON

**The Honourable Mr Justice Foxton:**

## Introduction

1. On 8 March 2024 I handed down judgment dealing with various aspects of challenges brought by the Czech Republic under ss.67 and 68 of the Arbitration Act 1996 (**the 1996 Act**) to the substantial award in an investment treaty arbitration dated 18 May 2022 (**the Award).**

2. Shortly before the hearing which resulted in that judgment, the Czech Republic had applied for permission to amend its Amended Particulars of Claim to raise a new s 67 challenge, namely that Mr Stava is not a protected investor under the Treaty because his dominant and effective nationality is not Swiss and, if necessary, for an extension of time pursuant to s 80(5) of the 1996 Act to pursue that challenge. There was a dispute between the parties as to whether there was sufficient time (both preparatory and hearing) for that issue fairly to be addressed at that hearing. I directed that the application should be considered at a further hearing, which in the event took the best part of the day.

3. In summary, the Czech Republic contends that new grounds for jurisdictional objection became apparent when, late on 21 December 2023, for the purposes of the existing s.67 challenge, Mr Stava served a witness statement. That statement gave an address in the Turks and Caicos Islands, and in responding to a s.67 ground of challenge which I have since held is not open to the Czech Republic, stated:

> "From 1969 until 1996 I was resident in Switzerland. Since 1996, I have lived for around half of each year in Switzerland and have spent (on average) only around 10 or so weeks a year in the Czech Republic. Switzerland is still the centre of my business interests and it is where I have my family office. I have personal Swiss bank accounts but I have not kept any personal bank accounts in the Czech Republic. Until 1996 I was tax resident in Switzerland but I have never paid tax in the Czech Republic. Insofar as the Czech Republic seeks to contend that my dominant and effective nationality is Czech in reliance on some property that I own in the Czech Republic, that seems to me to be irrelevant. I own substantial property in Switzerland".

4. The Czech Republic now seeks permission to add a new paragraph 7A to the Amended Points of Claim setting out its grounds of challenge to advance the case that Mr Stava is not a protected investor under the Investment Treaty because, in order to claim under the Investment Treaty, his dominant and effective nationality needed to be Swiss; and it is not.

5. The amendment application turns on three issues:

   i) Subject to s.73(1) of the 1996 Act, does the proposed amendment have a real prospect of success?

   ii) Can the court decide now whether the proposed challenge is barred by s.73(1), and if not, does the claim have a realistic prospect of success of overcoming the Claimants' reliance on s.73(1)?

iii) Does the Czech Republic require and, if so, should it be granted an extension of time within which to bring this challenge under s.80(5) of the 1996 Act?

6. The principles governing an application for permission to amend were not in dispute. In particular, there was no dispute that the "real prospects of success" test imposes a relatively low merits threshold: *Daniels v Lloyds Bank Plc* [2018] EWHC 660 (Comm).

**Subject to the s.73(1) challenge, is the new ground of objection arguable?**

7. For the purposes of this application, the Claimants in the Arbitration (who I will refer to in this judgment as the Claimants) accept that the Czech Republic has a real prospect of establishing that Mr Stava's dominant and effective nationality was not Swiss but that he was a citizen of a British Overseas Territory, the Turks & Caicos Islands ("TCI"). I shall refer to this as "TCI nationality".

8. However, they contend that it is not arguable that this would prevent the Claimants from constituting qualifying investors under the Investment Treaty. The issue which arises is this:

   i) It is common ground that if Mr Stava did not hold Czech nationality, it would not matter which of Swiss or TCI nationality was Mr Stava's dominant and effective nationality.

   ii) The Czech Republic accepts that the effect of my judgment is that it cannot advance a jurisdictional objection premised on the fact that Mr Stava's dominant and effective nationality was Czech.

   iii) The Claimants submit that, absent an objection that Mr Stava's dominant and effective nationality was Czech, it does not matter which of Swiss or TCI nationality was his dominant and effective nationality (i.e. the position is as per i) above.

   iv) The Czech Republic argues that provided Mr Stava holds Czech nationality (as he does), then even if both his Swiss and TCI nationality were more dominant and effective than his Czech nationality, he can only bring a claim under the Investment Treaty if his dominant and effective nationality was Swiss not TCI.

9. The Investment Treaty defines the concept of investor solely by reference to whether the investor is a national of a Contracting Party. I accept, however, that it is arguable that this concept falls to be interpreted by reference to the customary international law rule regarding dual nationals (*Ruiz v Spain* Award of 13 March 2023 (Kaufmann-Kohler, Park and Mourre), [461]). I also accept that it is arguable that the objection raised would go to jurisdiction for the purposes of s.67 of the 1996 Act.

10. In considering what customary international law requires, the appropriate starting point is the *Nottebohm* case (*Nottebohm Case (second phase)*, [1955] ICJ Rep 4), although strictly this was not a dual nationality case. Liechtenstein asserted rights of diplomatic protection against Guatemala in respect of Guatemala's treatment of Mr Nottebohm, asserting that Mr Nottebohm was a Liechtenstein citizen and that Guatemala's treatment of him was contrary to international law. German-born Nottebohm was a long-term

resident of Guatemala who had obtained Liechtenstein nationality in 1939. The issue before the ICJ was whether Nottebohm's Liechtenstein nationality "bestows upon Liechtenstein a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala" (17). At 21-22, the ICJ noted that issues arising from conflicting nationalities had arisen before arbitrators, and also before the courts of a third state (albeit not "in connection with the exercise of protection"), and that both international arbitrators and the courts of third states generally preferred "the real and effective nationality". That is the test which the ICJ applied. It should be noted that the issue before the ICJ raised the question of dual nationality in an essentially bilateral context, with the issue being whether Nottebohm had closer ties to the claimant state, or the respondent state.

11. In 1958, the International Law Commission, which works to encourage the development and codification of international law, published the Third Report on International Responsibility by Mr FV Garcia-Amador, as Special Rapporteur. Article 20 addressed the circumstances in which the State of nationality could bring a claim to obtain reparation against another state for an injury conferred on one of its nationals, and Article 21 addressed the issue of dual and multiple nationality in that context. Article 21(1) addressed the issue of a continuing nationality requirement, and Article 21(4) provided:

> "In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal and other ties".

12. Article 21(4) can be read as not simply requiring the injured alien to have stronger legal ties with the claimant state than the respondent state, but as requiring that the ties with the claimant state are stronger than with any third state. The commentary to that Article, at paragraph 25, states that the Article "specifies what State really has the right to bring an international claim in keeping with the principle on which the doctrine of diplomatic protection is based", referring to the *Nottebohm* case as the source of the rule relied upon, and concluding:

> "This clause provides that the right to bring a claim is exercisable only by the State with which the alien has the stronger and more genuine ties of nationality."

13. I accept that this 1958 report provides some support for an interpretation of customary international law by which only a state with which the injured alien has stronger ties of nationality can bring a claim for reparation, rather than simply a state with which the injured alien has stronger ties of nationality than with the respondent state. I would note, however, that the Czech Republic does not rely upon an interpretation of international law which accords with that interpretation of Mr FV Garcia-Amador's report, because it accepts that the interpretation for which it contends would only apply where the injured alien is also a national of the respondent state, whereas the Third Report does not stipulate such a requirement.

14. In *Olguin v Paraguay* Case No ARB/98/5, Award 26 July 2001 (Oreamuno, Rezek and Mayora Alvarado), an investment treaty tribunal hearing a claim under a BIT between Peru and Paraguay referred to as the CPI had to consider the consequences of the fact that the claimant held both Peruvian and US nationality and was domiciled in the US. The tribunal rejected a challenge to the claimant's right to sue on that ground at [61]-[62]:

> "What is important in this case, in order to ascertain if the Claimant has access to the jurisdiction of arbitration based on the CPI, is solely to determine if he holds Peruvian nationality and if this nationality is in effect. As regards that there was no doubt. There was no dispute that Mr Olguin holds dual nationality, and that both nationalities were effective. One of his two nationalities, or the other, or perhaps both, on for example the exercise on the part of that person of political rights, civil rights, responsibility for diplomatic protection and the importance of domicile for the determination of such rights lacks importance, given the legitimate, legal fact that Mr Olguin actually holds both nationalities. For the Tribunal it is sufficient that he has Peruvian nationality to decide that he may not be excluded from the protection of the CPI regime.
>
> In the case of diplomatic protection of a person holding dual nationality, either of his States can act in his favour against a third State, and the latter does not have to invoke, on the international plane, norms which in the domestic law of the protecting State serve to transfer the burden of protection—which furthermore is not obligatory—to the co-national State on account of the domicile of the person or for any other similar reason. The third State, the hypothetical author of the illegal act which will have caused damage to the foreigner, will only be authorized by international law, in this precise domain, to deny the legitimacy of the diplomatic protection, when an effective nationality link between the person and the protector State is missing; never on account of rules of domestic law which in both the States serve to regulate the exercise of the said rights and which, moreover, could be shown to be mutually inconsistent. But even if this were not so, domestic rules of such a nature, relevant to the grant of diplomatic protection to private persons, and therefore to that which by international law is a prerogative of the home State, cannot apply by analogy to the case of access to the ICSID forum, which has as one of its most important and specific objectives the grant of a right of action to a private person, excluding from the legal process the endorsement of his claim and any other initiative of his native State, which is only required to be a party to the 1965 Convention and the relevant CPI".

It is relevant to note that in *Olguin*, the claimant was not alleged to have host state nationality.

15. In *Soufraki v UAE* Case No ARB/02/7, Award of 7 July 2004 (Fortier, Schwebel and El Kholy), a dual Canadian-Italian national sought to invoke the Italy-UAE BIT. The UAE raised an objection that the claimant "did not possess effective Italian nationality under international law so as to entitle him to invoke the BIT". The BIT excluded dual nationals of both Contracting Parties from the scope of the protection afforded by the BIT, but there was no suggestion that Mr Soufraki was a UAE national. One of the arguments advanced was that, if Mr Soufraki was a dual national, his dominant nationality was Canadian, but the tribunal did not find it necessary to decide the issue.

16. In 2006, the ILC published "Draft Articles on Diplomatic Protection with Commentaries." The issue of dual or multiple nationality is addressed in Articles 6 and 7. Article 6 provides:

> "Multiple nationality and a claim against a third State
>
> 1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.
>
> 2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national".

17. Article 6 clearly does not adopt a principle that, where the victim of a wrongful act has two or more nationalities, only the state of his dominant or effective nationality may exercise the right of diplomatic protection. The commentary (para (3)) notes that although there is support for the contrary view, the weight of authority "does not require such a condition" and notes:

> "Unlike the situation in which one State of nationality claims from another State of nationality in respect of a dual national, there is no conflict over nationality where one State of nationality seeks to protect a dual national against a third State".

18. Article 6 does not address the position where the victim is also a national of the respondent state, which is dealt with by Article 7. This provides:

> "Multiple nationality and a claim against a State of nationality
>
> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim."

19. The key issue is whether Article 7 requires predominance as between the claimant state and the respondent state, or also requires predominance as between the claimant state and any other state. The accompanying commentary can be read in a way which supports both interpretations.

20. In *David Aven et al v Republic of Costa Rica* Case No UNCT/15/3, Award of 18 September 2018 (Siqueiros, Baker and Nikken) the tribunal considered a claim brought by a dual US/Italian national under a Free Trade Agreement between the US and a number of Central American states including Costa Rica. Costa Rica challenged the tribunal's jurisdiction on the basis that the claimant's dominant and effective nationality was not US but Italian. The relevant treaty expressly limited the treaty's application by reference to an investor's "dominant and effective nationality". Reference was made to Article 6 of the ILC's Draft Articles. The tribunal accepted that the customary international rule which Article 10.28 of the treaty was found to be a reference to "would preclude an investor possessing the nationality of Party A from pursing a claim against Party B in the event that his dominant and effective nationality was that of Party B".

21. Finally, I was referred to *Ruiz v Spain* Award of 13 March 2023 (Kaufmann-Kohler, Park and Mourre). That was not a case in which there were competing claimant state

nationalities. There is language in the case consistent with the view that it is the comparative strength of connection between the claimant and the respondent state which matters, e.g. [478]:

> "In the Tribunal's view, requiring an individual, who is a national of both the home State and host State, to have a stronger connection with the former is the position most in accord with the purpose of international investment agreements, including this Treaty, which is to provide a level playing field to foreign investors who are regarded as disadvantaged vis-à-vis domestic investors."

22. It will be apparent that, at least on the materials available to me, international law offers no unequivocal answer on this point, and that points can be made on both sides, albeit there are two treaty awards which support the Claimants' argument. It can be said that the goal of the investment treaty regime of protecting only foreign, rather than domestic, investments is advanced by applying a relative test of effective nationality as between the Contracting Parties, and that a multi-nationality investor should not be worse off by reason of a subservient nationality of the home state, when such an investor without such a nationality could bring claims by reference to all their nationalities. Equally, however, it can be said that a state may only be prepared to curtail its sovereign authority over its own nationals in favour of a single state of universally predominant nationality.

23. In his reply submissions, Mr Webster for the Czech Republic submitted that it would be "bold" for the court to determine this issue on a final basis. Advocates should always be wary of how tempting it is for some judges faced with a submission of that kind to rise to the epithet. Nonetheless, he has persuaded me that the position here is unclear, and one which it would be inappropriate for a court to seek to determine finally within the confines of a permission to amend application in which time for argument has been heavily constrained. I do, however, wish to record my appreciation of the quality of the submissions which both Mr Webster and Ms Parlett made to the court.

24. There is, however, an important consequence of the manner in which the Czech Republic now puts its paragraph 7A case – the ground of challenge (a Czech national cannot bring a claim under the Switzerland-Czechoslovakia Investment Treaty unless his dominant and effective nationality is Swiss) is very closely allied to the issue which I have held the Czech Republic is not permitted to raise (a Czech national cannot bring a claim under the Switzerland-Czechoslovakia Investment Treaty if, although Swiss, his dominant and effective nationality is Czech). The s.73(1) issue falls to be approached in that context.

## Section 73(1)

### *The legal principles*

25. It is common ground that the burden is on the Czech Republic to establish that, at the time it took part or continued to take part in the arbitral proceedings, it did not know and could not with reasonable diligence have discovered the grounds for the objection it now seeks permission to advance.

26. The authorities on the "reasonable diligence" proviso to s.73 establish a number of propositions:

i) Where a party neither believes nor has grounds to suspect the existence of particular facts, it would usually be wrong to find that it could with reasonable diligence have discovered those facts: *Sumukan Ltd v Commonwealth Secretariat* [2007] EWCA Civ 1148, [36] and [38], particularly where it could reasonably think that the other party had taken all appropriate steps to address the issue which is relied upon to challenge the award ([62]). This conclusion can be seen to reflect the two-stage analysis which has come to be adopted under s.32 of the Limitation Act 1980 as set out at [29] below.

ii) "It is incumbent on a party seeking to bring a claim based on new materials to condescend to real particularity" in its evidence, and "normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. Thus if an applicant does not do this, the court is entitled to count any periods where no good excuse is established as being periods lacking in good reason. So too may it draw an inference when issues go un-dealt with" (*ZCCM Investments Holdings plc v Kanshani Holdings Plc* [2019] WHC 1285, [218]).

27. Authorities dealing with the "reasonable diligence" requirement in s.32 of the Limitation Act 1980 are also of assistance. While Mr Webster suggested that the context of s.32 (which determines when what is usually a 6-year period for commencing proceedings will start to run) and s.73 (which decides whether a legitimate objection has already been lost) differ, the policy of "speedy finality" reflected in the strict time limits underpinning the 1996 Act does not support the conclusion that "reasonable diligence" involves a lesser standard in the latter context. The relevance of the authorities addressing s.32 of the Limitation Act 1980 to s.73 of the 1996 Act is supported by Mr Justice Robin Knowles in *Federal Republic of Nigeria v Process & Industrial Developments Limited* [2023] EWHC 2638 (Comm), [536].

28. Professor Andrew McGee *Limitation Periods* 9th Ed (2022) summarises the applicable law relating to s.32 as follows:

i) "[A] claimant is not required to do everything possible but only to do what an ordinary prudent person would do having regard to all the circumstances." ([20-004].

ii) The issue is whether the relevant matter "could" be discovered, not "should" (ibid).

iii) The concept of "reasonable diligence" carries with it the notion of a desire to know and, indeed, to investigate (ibid).

iv) Citing *Paragon Finance Plc v DB Tharekar & Co* [1999] 1 All ER 400, the party must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take.

29. It is clear that while the requirement of reasonable diligence is a continuing one, the duty will become more exacting in what it requires if there has been what has sometimes been referred to as a "trigger", an event or fact which ought reasonably to lead that party to undertake some form of active investigation: *OT Computers Ltd v Infinoeon Technologies AG* [2021] EWCA Civ 501, [47]:

> "although the question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section."

30. Finally, reliance was placed by the Czech Republic on cases which had addressed the position when it is said that a party should have exercised reasonable diligence so as to ascertain that the other party had put forward a dishonest claim or position (I consider the issue of whether this issue is engaged on the facts in this case below).

31. In *Takhar v Gracefield Development Ltd* [2019] UKSC 13, proceedings were brought to set aside a judgment on the basis that it had been procured by fraud, and the issue arose of how far the claimant's failure to exercise reasonable diligence to discover the fraud could provide an answer to such a claim.

    i) The Supreme Court held that the claimant was not required to show that the fraud could not have been uncovered by reasonable diligence before the earlier judgment in cases in which no allegation of fraud had been made at the original trial ([54]).

    ii) At [55], the Supreme Court left open the approach to be adopted when fraud had been alleged at the original trial and, also in the case where "a deliberate decision may have been taken not to investigate the possibility of fraud in advance of the first trial, even if that had been suspected."

    iii) Lord Sumption added some further observations. At [63], he noted that "the basis on which the law unmakes transactions, including judgments, which have been procured by fraud is that a reasonable person is entitled to assume honesty in those with whom he deals. He is not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows that they are." He observed that "unless on the earlier occasion the claimant deliberately decided not to investigate a suspected fraud or rely on a known one, it cannot be said that he 'should' have raised it."

32. The principal basis on which *Takhar* was decided – that a party bringing proceedings to set aside a judgment procured by fraud does not need to show that it could not have ascertained the true position in time through the exercise of reasonable diligence – does not apply to s.73(1), which imposes a statutory "reasonable diligence" requirement. In *The Federal Republic of Nigeria v Process & Industrial Developments Limited* [2020] EWHC 2379 (Comm), Sir Ross Cranston distinguished between the position before the

arbitral award is published (when s.73 applies) and the position thereafter, when the issue is whether the party seeking to challenge the award should be given an extension of time for doing so under s.80(5). While he would have preferred the view that the approach in *Takhar* was appropriate at the s.80(5) stage, it did not apply when the court had to consider the position prior to the publication of the award ([183]). That distinction was confirmed by Mr Justice Robin Knowles in *The Federal Republic of Nigeria v Process & Industrial Developments Limited* [2023] EWHC 2638 (Comm), [529]-[531].

33. That does not, of course, preclude the operation of the less-hard edged principles confirmed by *Thakar*: that people are entitled to proceed on the basis that those they are dealing with have acted honestly, that in many contexts the more serious the allegation, the less likely it is to have occurred (*In re H (Minors (Sexual Abuse: Standard of Proof)* [1996] AC 583, 586) and for these reasons the court should not lightly hold that reasonable diligence required a party to take steps actively to investigate the possibility of fraud. I prefer that formulation to the approach adopted by Mr Justice Burton in *HJ Heinz Co Ltd v EFL Inc* [2010] EWHC 1203 (Comm), [33] that "in a case of concealed fraud (concealed forgery) it may be, particularly where the source of the evidence is contained in the opposite camp, that, upon analysis of the facts an approach more favourable to the party defrauded in respect of what is due, or reasonable diligence, may be adopted" and the suggestion by Mr Justice Robin Knowles in *Stati v Republic of Kazakhstan* [2017] 2 Lloyd's Rep 201, [73] that "the Claimants, if dishonest, are not to escape if the right stone was not turned over by the State."

***Is there a prima facie case that Mr Stava gave a deliberately misleading presentation of his connections to Switzerland in the arbitration?***

34. I would note that this is not a case in which it is alleged that the Claimants procured the Award by fraud (given the absence of any attempt to challenge the Award under s.68(2)(g) of the 1996 Act) but one in which an allegation that the Claimants sought dishonestly to misrepresent the extent of Mr Stava's links to Switzerland and to conceal what is now alleged to be his dominant and effective TCI nationality is relied upon to assist the Czech Republic in meeting the "reasonable diligence" requirement.

35. While it is neither necessary nor appropriate for me to decide that issue on a final basis, before according any weight to this factor, I do need to consider whether the allegation has a real prospect of success. As noted by Mr Justice Flaux in *JSC Bank of Moscow v Kekhman* [2015] EWHC 3073 (Comm), [20]:

> "The claimant does not have to plead primary facts which are only consistent with dishonesty. The correct test is whether or not, on the basis of the primary facts pleaded, an inference of dishonesty is more likely than one of innocence or negligence. As Lord Millett put it, there must be some fact 'which tilts the balance and justifies an inference of dishonesty.'"

36. In this case, a fair summary of the Czech Republic's position is as follows:

    i) The Memorial and Mr Stava's first witness statement stated that he "left Czechoslovakia in 1968 and settled in Switzerland".

ii) Witness statements signed by Mr Stava and served in the arbitration gave his address as Belsitostrasse 5, 8044, Zurich, (including the second and third witness statements signed in the Czech Republic).

iii) On 15 March 2020 Mr Stava wrote to the Czech Republic in relation to the dispute on a letter giving Belsitostrasse as his address (as explained below, that is the address at which at least one shareholders' meeting of Diag SE was held. I should note that the Claimants point to the fact that the letter also referred to Mr Stava holding citizenships (plural) in addition to Czech citizenship).

iv) Two Powers of Attorney signed by Mr Stava and deployed in the arbitration gave his address or residence at the same Belsitostrasse address, one of which was signed elsewhere.

v) Various contemporaneous documents produced in the arbitration identify Mr Stava as having Swiss residence, both before and after 1996. These included documents relating to the incorporation or board meetings of companies (which will necessarily reflect the position when they were prepared). In terms of documents produced after 1996:

a) There is a share purchase agreement dated 6 April 2001 and accompanying notarial documents, which give a Swiss address in Biogno-Beride, Casa Morone for Mr Stava and the same address is given in documents effecting the merger of Diag AG and Kolinea AS to form Diag SE in 2006. However, it is not suggested that Mr Stava did not have a home there.

b) There are Czech Commercial Registry documents in 2006 showing Mr Stava with a Schaffhausen address from 1992 to 1999, a Biogno-Beride address in 2001 and also a Czech address. Once again, there is no suggestion that these were not places where Mr Stava had home or office addresses.

c) There are the minutes of a 2014 shareholders' meeting held at Belsitostrasse, Zurich.

d) An except form the Swiss Commercial Registry for Zurich in 2017 refers to Mr Stava as a "Czechoslovak citizen, in Schaffhausen", Switzerland. As set out at [40] below, Mr Stava also gave a TCI address on documents of a similar kind entered on the arbitral record.

vi) Those documents combined to represent a strength of connection between Mr Stava and Switzerland which can be shown to be false by his evidence served in December that:

> "From 1969 until 1996 I was resident in Switzerland. Since 1996, I have lived for around half of each year in Switzerland and have spent (on average) only around 10 or so weeks a year in the Czech Republic. Switzerland is still the centre of my business interests and it is where I have my family office. I have personal Swiss bank accounts but I have not kept any personal bank accounts in the Czech Republic. Until 1996 I was tax resident in

> Switzerland but I have never paid tax in the Czech Republic. Insofar as the Czech Republic seeks to contend that my dominant and effective nationality is Czech in reliance on some property that I own in the Czech Republic, that seems to me to be irrelevant. I own substantial property in Switzerland".

vii) It can be inferred that this was a deliberate attempt by Mr Stava to mislead the Czech Republic and the tribunal as to the strength of his links to Switzerland for the purposes of making out a claim under the treaty (albeit neither of the two law firms or any of the counsel who represented the Claimants in the arbitration were parties to that dishonest attempt) even though:

a) As explained at [40] below, the Claimants produced a number of documents in the arbitration giving a TCI address for Mr Stava or members of his family.

b) It was Mr Stava himself who revealed the alleged dishonesty, by serving a statement seeking to address an issue which essentially concerned the same matters he had set about dishonestly misrepresenting or concealing.

37. I am not persuaded that this establishes an arguable case that Mr Stava made dishonest statements in the arbitration, nor indeed an arguable case that he made statements which were false:

i) The statement that in 1969 he settled in Switzerland after leaving Czechoslovakia is not falsified by the fact that, from 1996, he spent half the year in Switzerland and half in at least two other countries (and a maximum of 16 weeks a year in the TCI), nor by the fact that he moved his tax domicile in 1996.

ii) The giving of addresses in Switzerland which the Czech Republic has adduced no evidence suggesting are not in fact among his addresses does not arguably involve a false representation of the kind alleged.

iii) The suggestion that this involved an attempt at deception by Mr Stava, without the involvement of his legal team, to present a false picture which he then exposed himself is also not arguable.

38. Nonetheless, I am willing to proceed on the basis that I should approach the reasonable diligence issue on the assumption that something was necessary objectively to signal the desirability of looking into this issue. I am not, therefore, persuaded that this *Takhar* detour is ultimately of great significance.

***The position in the arbitration***

39. It is not suggested that the Czech Republic did not know or could by exercising reasonable diligence have been aware prior to the Award that Mr Stava's dominant and effective nationality was not Swiss but Czech (and, for that reason, there was no attempt to rely upon the "reasonable diligence" proviso in support of the Czech Republic's Ground 7 at the last hearing). The ground the Czech Republic now seeks to advance – that in circumstances in which Mr Stava held Czech nationality, he would not be able to claim under the Investment Treaty if he had another nationality which was more predominant

than his Swiss nationality – is very closely related to that objection. Lawyers specialising in investment treaty arbitration (as the Czech Republic's did) would or ought to have been aware of this possible variant to that argument.

40. I am satisfied that there was more than enough material in the arbitration to alert the Czech Republic and its legal team that, if the argument had legal merit, it was worth investigating. In particular:

    i) The Czech Republic filed evidence in the arbitration raising an issue as to the Zurich address and Mr Stava's whereabouts. The statement of Mr Jakub Matecjek dated 27 May 2019 stated:

> "In the UK enforcement proceedings, Mr. Stava provided the Swiss address Belsitostrasse 5, 8044 Zurich. The Czech Republic attempted to serve documents on Mr. Stava at that address through the Royal Courts of Justice Group Foreign Process Section. But the Swiss authorities returned the documents unserved, advising that the addressee was not registered as a resident at that address and was not officially registered as a resident in the database of the Citizens Registry Office of the city of Zurich. The Swiss authorities also confirmed that Mr. Stava's current whereabouts were unknown. The Czech Republic has also attempted to serve Mr. Stava's registered place of residence in the Czech Republic at Bechyne Castel, Zamek 1, 39165 Bechyne on multiple occasions. However, Mr. Stava has never been present to acknowledge receipt."

    ii) An early focus of the Czech Republic, in the Request for Bifurcation, was the incorporation by Mr Stava of Diag Human Holding SE in the TCI, which company, the Czech Republic noted, had held the majority of shares in Diag SE until 2006. The record in the arbitration included a Certificate of Incumbency for that company which named Mr Stava as a director and gave his address as "International Drive, Cherokee Road, Providenciales" in the TCI.

    iii) Shareholder minutes dated 26 April 2010 for Diag SE gave Ms Silvia Stava's address as Providenciales, TCI. She is one of Mr Stava's daughters. The commercial record for Diag SE, which was sent under cover of a settlement letter to the Czech Republic and placed on the record in the arbitration identified Mr Stava and Ms Silvia Stava as directors, giving addresses in Providenciales for them.

    iv) The documents concerning the Lawbook transaction which featured prominently in the Czech Republic's Rejoinder all gave Mr Stava's address as International Drive, Providenciales, TCI: the Deed of Assignment; the Purchase Price Agreement; the Share Purchase Agreement; and the Agreement Regarding Conditions Subsequent.

    v) Documents relating to the Koruna Trust which were disclosed in response to the Czech Republic's request and featured in its Rejoinder included a Trustee's Resolution of 24 March 2014 signed by Mr Stava giving his address as Providenciales, TCI and a Declaration of Acceptance which gave Mr Stava's address as Providenciales, TCI. The disclosed documents identified the settlor of Koruna Trust, Kingfish Financial Ltd, as a TCI company.

vi) The Czech Republic adduced into the record two press reports which contained material prejudicial to Mr Stava. A 12 July 1999 article in *Der Spiegel* stated that Mr Stava had homes in Ticino in Switzerland, the Czech Republic and the Caribbean. An 18 October 2008 article referred to Mr Stava having moved one of his companies to the TCI, with a vague suggestion he was living there. Mr Stava was cross-examined about both articles and when cross-examined about the *Der Spiegel* article, the passage about his three homes was read into the record by the cross-examiner.

vii) At the start of Mr Stava's evidence, the President made reference to his having British and Canadian nationality (it is not clear what prompted the question). When cross-examined by a line of questioning clearly intended to emphasise his Czech nationality, he was asked what other nationalities he held and he confirmed he held those of Switzerland, the Czech Republic, Canada and of a UK independent territory. I regard the suggestion – against the background of disclosure – that this involved a lack of frankness that the UK independent territory referred to was the TCI as wholly unreal. That evidence was given in June 2020, and it was not until May 2022 (and two rounds of Post Hearing Briefs) that the Award was issued.

viii) The Czech Republic was aware, and sought to make something of the fact that, Mr Stava spent substantial time in the Czech Republic (and hence outside Switzerland), as was apparent from his cross-examination.

ix) It was a consistent theme of the Czech Republic's case in the arbitration that the ownership structure of Diag SE and for Mr Stava's assets were obscure and complex, the Czech Republic referring to a "web of opaque trust structures" involving "family members". The prospect that Mr Stava might hold assets in a fiscally optimal manner using offshore jurisdictions was obvious.

x) The premise of the Czech Republic's case throughout was that Mr Stava was an untrustworthy individual.

41. So far as the evidence served by the Czech Republic to address the reasonable diligence issue is concerned:

i) There is no first-hand evidence from the lawyers conducting the arbitration (both Arnold & Porter and the Czech lawyers).

ii) The hearsay evidence given addresses the knowledge of the Arnold & Porter team only and states that they did not know Mr Stava was not resident or tax resident in Switzerland, or that he was spending only half of each year in Switzerland or that his main home was in the TCI.

iii) Further hearsay evidence confirmed that there was "no documentary record of any discussions of Mr Stava having a home or house in the T&CI". That evidence confirmed that the TCI address featuring on documentation in the arbitration had been seen by members of the Arnold & Porter teams and the Czech Ministry of Finance. It was also confirmed that there was an awareness of "potential Canadian nationality" on Mr Stava's part (i.e. that he may have had three nationalities).

42. There was no suggestion that if the Czech Republic had looked into this issue, it could not have ascertained whether Mr Stava held TCI nationality, whether he had a home there, how long he spent in Switzerland and where his tax domicile was. These are issues which could have been the subject of document production requests in the arbitration.

43. When listing the application for permission to amend, I made it clear that the Czech Republic was being given an opportunity to "finalise" its evidence on this issue, which would not "go off to June" (Day 5/12:23-5/13:11). On the basis of the material before me, I am satisfied that the proposed challenge is barred by s.73(1), and it was not suggested that further material might come to light at some later stage which could assist the Czech Republic. While the evidential position might get worse from the Czech Republic's perspective, it is not going to get better.

44. Against that background, I am satisfied that I can finally decide the s.73(1) issue now and I hold that the proposed new ground of objection would be barred by s.73(1). On that basis, I refuse permission to amend, and no order for disclosure is appropriate in relation to the proposed challenge.

## The extension of time application

45. In view of my finding on s.73(1), this issue does not arise. However, as the point was argued, I will address it anyway.

### *Is an extension of time needed?*

46. The Czech Republic contended that no extension of time under s.80(5) was necessary when a party seeking to challenge an award had issued a s.67 or s.68 challenge in time, and then sought to amend that application to add a new ground. Mr Webster relies upon the fact that s.70(3) provides that "any application or appeal must be brought within 28 days of the date of the award", and the fact that only one arbitration claim form had been issued.

47. I can deal with this matter briefly. An attempt to raise a new ground of objection, as opposed to an amendment to an existing objection not amounting to a new ground of objection, involves an "application" for the purposes of s.70(2). Were matters otherwise, the policy of speedy finality, which underpins the challenge provisions in the 1996 Act, would be seriously undermined. It would mean that a party who had brought a timely s.67 or s.68 challenge which was susceptible to strike out or barred by s.73(1) could, for that reason, avoid the application of the s.70(2) time limit for a new challenge.

48. The same result can be achieved by conditioning the exercise of the court's discretion to grant permission to amend by reference to the 28-day time limit in s.70(2), save in cases in which an extension of that time period would be appropriate.

### *Extension of time – the relevant principles*

49. The relevant factors are summarised in *Terna Bahrain Holding Company v Bin Kamil* [2012] EWHC 3283 (Comm), [27]:

i) The length of the delay (although as noted in *Minister of Finance (Incorporated) 1 Malaysia Development Berhad v International Petroleum Investment Company* [2021] EWHC 2949 (Comm), [127] "the facts of the individual case must be considered with care. There is no principle of law that any particular length of delay either cannot ever be justified, at one extreme, or will always be unjustified, at the other extreme").

ii) Whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so (which encompasses the question whether the party has acted intentionally in making an informed choice to delay making the application: *Terna Bahrain,* [30]).

iii) Whether the respondent or the arbitrator caused or contributed to the delay.

iv) Whether the respondent would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed.

v) The strength of the application (although unless it can be seen to be either strong or intrinsically weak, this will not be a factor which is treated as of weight in either direction: *Terna Bahrain,* [31]).

vi) Whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

50. I will consider the factors in turn.

51. As to delay, the extension is for a significant period, the 28-day period having expired in June 2022, and the application to amend being issued on 26 January 2024 – a period of some 18 months.

52. As to whether the Czech Republic acted reasonably, if the Czech Republic had overcome the s.73(1) bar, then the issue would have fallen to be considered by reference to the position after the Award was issued. This was not investigated in any depth at the hearing. The one issue which gives me cause for concern is the letter sent by Arnold & Porter to Mishcon de Reya on 15 November referring to attempts to obtain German court records and stating:

> "the Munich Court has tried to contact Mr Stava to obtain his views on our client's request for the judgment, but Mr Stava has not responded. The Munich Court also sought the Swiss Court's assistance, but noted on 10 November 2023 that the Swiss Court stated that Mr Stava now resides in Turks and Caicos, not Switzerland."

53. Against the background of the arbitration, this communication might well have been thought to raise issues requiring investigation in relation to the proposed new ground prior to the service of Mr Stava's witness statement in the evening on 21 December 2023. However, the matter was not explored in argument and I shall not consider it further.

54. As to whether the Claimants contributed to the delay, I have already rejected the suggestion that it is arguable that Mr Stava dishonestly misled the Czech Republic as to the position in the arbitration. However, I accept that the Claimants' contributed to the late emergence of this point through the late service of Mr Stava's witness statement, which required an extension of time for it to be admitted in evidence, and which came some time after the deadline for serving evidence to respond to the s.67 challenge. I have already found that the Czech Republic was also partly responsible for the late service of that evidence, by taking a lengthy and unexplained period to plead allegations of bribery against Mr Stava.

55. As to irremediable prejudice to the Claimants, none was suggested, and I am not persuaded there would be any.

56. As to the strength of the application, I have concluded it is arguable as a matter of law, and it is not suggested it was not arguable as a matter of fact. Had I been unable to determine the s.73(1) issue at this stage, it would have presented a significant obstacle to making the paragraph 7A objection good. The factual case that Mr Stava's dominant and effective nationality had become TCI is also not straightforward. In summary, the point would have been arguable but certainly could not be described as strong.

57. Finally, so far as fairness is concerned, I am not persuaded that there is an arguable case that Mr Stava deliberately misled the tribunal. However, this is a substantial award against the Czech Republic, and if there was an arguable case that it had been made without jurisdiction, the court of the seat would not lightly shut the challenge out.

58. In summary, had the issue of extension of time been a live one, I would on balance have been persuaded to grant it on the material before me.