



School of International Arbitration

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International Arbitration Case Law

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International Arbitration Case Law

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Award Name and Date: CEAC Holdings Limited v. Montenegro (ICSID Case No. ARB/14/8) – Award – 26 July 2016

Case Report by: Marina Kofman**, Editor Ignacio Torterola***

Summary: Claimant brought an action for relief against Montenegro pursuant to the Cyprus-Montenegro BIT ('BIT') alleging Montenegro breached, *inter alia*, fair and equitable treatment, full protection and security, most-favoured nation and expropriation protections in the BIT in relation to its investment in an aluminium plant located in Montenegro. Following preliminary objections, the Tribunal decided to have a phase of the proceedings dedicated to determining whether Claimant has a "seat" under Article 1(3)(b) of the BIT, in order to qualify for the Treaty's protections as an "investor".

Main Issues: definition of "seat" of incorporation under international law as well as under Cypriot and Montenegrin law

Tribunal: Professor Bernard Hanotiau (President), Professor William Park (Arbitrator) and Professor Brigitte Stern (Arbitrator)

Claimant's Counsel: Mr. Egishe Dzhazoyan, Mr. Thomas Sprange QC, Ms. Sarah Vasani, Mr. Grigori Lazarev, Mr. Benjamin Burnham (King & Spalding International LLP, London)

Respondent's Counsel: Mr. Christoph Lindinger, Mr. Slaven Moravčević, Ms. Anne-Karin Grill, Ms. Jelena Bezarević Pajić, Ms. Tanja Šumar, Mr. Michael Stimakovits (Schönherr Rechtsanwälte GmbH, Vienna)

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Digest:

1. Relevant Facts

CEAC Holdings Limited ('CEAC' or 'Claimant') is a company incorporated under the Laws of the Republic of Cyprus. Respondent is Montenegro ('Montenegro' or 'Respondent') (¶¶ 1-2). The underlying dispute arose out of CEAC's ownership and management of Kombinat Aluminijska Podgorica, A.D. ('KAP'), an aluminium plant located in Montenegro. The Montenegrin Government initiated a public tender process to privatize KAP. Rusal Holdings Limited ('Rusal') submitted the winning bid in 2005, and its affiliated company, CEAC, entered into a share purchase agreement ('SPA') for the purchase of the KAP shares (¶ 29). The KAP SPA was executed by multiple parties and CEAC paid €48,500,000 to acquire 65% of KAP's shares and undertook to invest a further €75,000,000 over five years (¶ 30).

CEAC invested a further €6,000,000 to purchase from the Government a minority share in KAP's main supplier of raw materials. Its parent company also bid and won a tender to purchase all of the shares of the State-owned coal-fired plant and a 31% stake in a State-owned coal mine in order to provide KAP with a dedicated source of electricity (¶ 32). The Montenegrin parliament terminated the privatisation of the plant and coal mine "based on dubious reasoning", which compromised KAP's supply of competitively priced electricity (¶ 33). In an effort to resolve these issues CEAC initiated an arbitration against the sellers and Montenegro pursuant to the KAP SPA and in 2009 a Settlement Agreement was signed. As part of the Settlement Agreement the Montenegrin Government took an equal stake in KAP and a seat on KAP's Board of Directors (¶ 34).

CEAC alleged that its attempts to restructure and modernize KAP were thwarted by Respondent, which undertook a number of actions aimed at causing KAP to default on its debts. These actions eventually caused KAP to default on its debt, which allegedly enabled the Government to seize control over CEAC's investment, with a Ministry of Finance appointed insolvency manager eventually announcing a public tender for KAP's assets without consulting the Board of Creditors (¶¶ 35-37).

Claimant brought an action for relief against Montenegro pursuant to the Cyprus-Montenegro BIT alleging Montenegro had breached, *inter alia*, fair and equitable treatment, full protection and security, most-favoured nation and expropriation protections under the aforementioned BIT (¶ 39).

2. Procedural History

Claimant filed a Request for Arbitration on 11 March 2014, which was registered by ICSID on 20 March 2014 (¶¶ 4-5). The Tribunal was constituted on 14 July 2014 (¶ 7). The first session was held by means of a telephone conference on 10 September 2014 and a hearing on Respondent's Preliminary Objections was held on 11 December 2014 in London (¶ 9). On 27 January 2015, the Tribunal issued its decision dismissing Respondent's Objections and decided to have a phase of the proceedings dedicated to determining whether Claimant has a "seat" under Article 1(3)(b) of the BIT (¶ 10). On 22 April 2015 Claimant filed a Challenge to Professor Brigitte Stern and, having been referred to the Chairman of the Administrative Council for ICSID, on 12 June 2015 the Chairman rejected the claimant's Challenge (¶ 20). Claimant filed its Memorial on the issue of "seat" on 16 June 2015. Respondent filed its Counter-Memorial on 30 September 2015, and Respondent filed its Rejoinder on 31

December 2015. The hearing on the issue of seat was held on 22-23 March 2016 in Paris. Claimant and Respondent submitted their respective Costs submissions in 13 April 2016 (¶¶ 22-27).

3. Positions of the Parties

3.1 Claimant's Position

Claimant submitted that CEAC has an established seat in Cyprus within the meaning of Article 1(3)(b) and is therefore an investor under the BIT. Claimant submitted the meaning of the term “seat” could not be interpreted autonomously under the Treaty and must be determined by *renvoi* to Cypriot municipal law, and under Cypriot municipal law the term “seat” means “registered office” (¶ 50).

3.1.1 The meaning of “seat” under Article 1(e)(b) of the BIT should be determined by a *renvoi* to municipal law

Claimant argued since the BIT does not define the term “seat” and nor is there a uniformly accepted definition under international law, the meaning must be determined by a *renvoi* to Cypriot municipal law (¶ 51). Claimant submitted that “seat” was a legal term of art with distinct and specific legal meanings within different municipal law systems (¶ 60). The Cypriot municipal law follows the incorporation theory, in which a company is governed by the law where it has been constituted (¶ 55). CEAC further argued that the BIT's context, object and purpose support a *renvoi* to Cypriot municipal law (¶ 57) and this would not contravene the principle of reciprocity in the BIT's Preamble (¶ 59).

3.1.2 An “autonomous” interpretation of “seat” is incorrect as a matter of international law

Claimant argued that an autonomous interpretation of “seat” with the term requiring a “real connection” or “genuine link” between the investor and the host State is incorrect as a matter of international law because it is premised on the assumption that “seat” is a practical concept rather than a legal term of art (¶ 62). Further, such an interpretation would in practice nullify the BIT protections for most Cypriot investors, which are holding companies. In Claimant's view, the fact that the term “investors” will have a different meaning with respect to each State does not contravene the *effet utile* principle (¶ 72).

CEAC argued that in any event it satisfied the requirements of customary international law, which determines nationality by reference to the place of incorporation, and of the ILC Articles on Diplomatic Protection, in the event the Tribunal found them applicable, which provide that the incorporation and the existence of a registered office are sufficient to establish a company's nationality. Claimant argued that the ICJ in *Diallo* had rejected the theory that the ILC Articles on Diplomatic Protection require a “close connection” or “genuine link” between a legal entity and its State of Nationality (¶ 67). Further, that the *Nottembohm* case only applies to natural persons and then only to a limited extent (¶ 68).

3.1.3 Under Cypriot law, a company's seat is determined by the location of its registered office

Claimant submitted that when including the term “seat” in the BIT, Cyprus could only have meant “registered office” (¶ 71). Claimant emphasized that Cyprus follows the incorporation

theory with respect to determining the *lex societatis* of a company, and does not recognise the concept of “real seat”. The Cypriot legal concept that most resembles “seat” is a company’s registered office (¶ 72). In Cypriot law, every Cypriot company must maintain a registered office in Cyprus and keep its registers there (¶ 73).

3.1.4 Under Cypriot law, “seat” cannot be understood to mean “real seat”

Claimant rejected the evidence that Respondent raised in order to demonstrate that the concept of “real seat” was known to Cypriot law. It stated Respondent’s argument was flawed, as it was based on an interpretation of the Treaty as if it were a Cypriot domestic instrument, and that the sources relied on by Respondent were irrelevant (¶¶ 79-81).

3.1.5 The Recast Brussels Regulation supports a finding that CEAC has a seat in Cyprus

Claimant argued that its interpretation of “seat” was confirmed by the Cypriot rules on the conflict of laws and by the Recast Brussels Regulation.

3.1.6 The treaty practice of Cyprus and Montenegro confirms that “seat” means “registered office”

Claimant submitted that of 27 Cypriot BITs, 13 contain language substantially identical to the present BIT and another six refer only to “incorporation” or similar without more. Five others refer to additional requirements such as “control” or “real business activities”. Similarly, three Montenegrin BITs contain express references to the ultimate “control” of national investors and three more expressly require the investor to carry out “real” or “substantial” business activities in the host State (¶ 86). Claimant interpreted this to mean that when Cyprus and Montenegro have intended more stringent requirements than proving the existence of a “seat”, they have employed express language to that effect (¶ 87).

3.1.7 CEAC has its “seat” in Cyprus as a matter of Cypriot law

Claimant further argued that CEAC has its seat in Cyprus as a matter of Cypriot law, because it maintained its registered office in Cyprus at all relevant times (¶ 89). Claimant submitted that if the BIT requires a “real connection” or “genuine link” test, or that CEAC have its central management and administration in Cyprus, it met this too (¶ 90). Claimant pointed to the Cypriot nationality of its sole director and secretary, its assets and liabilities in Cyprus, its engagement of professional service providers in Cyprus, and its tax residency in Cyprus (¶¶ 91-94).

4. Respondent’s position

Respondent considered that the term “seat” should be interpreted autonomously under the Treaty and that it requires something more than incorporation and an address under both international law and Cypriot law. In Montenegro’s view, “seat” under the BIT is the place where a legal entity is effectively managed and financially controlled and where it carries out its business activities (¶ 97).

4.1 The term “seat” should be interpreted autonomously under the BIT

In Respondent’s view, any question on the interpretation of the BIT has to be read in accordance with the rules in Articles 31-33 of the Vienna Convention on the Law of Treaties (‘VCLT’). There is no reference there to national law so the term needs to be interpreted autonomously under the Treaty, without a *renvoi* to municipal law (¶ 98). In contrast to Cyprus, Montenegro has adopted the “real seat” theory of incorporation. The object and purpose of the BIT do not support a *renvoi* for the term “seat”, and this would defeat the overarching purpose of reciprocity. The “seat” test needs to fulfil its function in an even manner, and were it otherwise, it would mean the circle of protected Montenegrin investors would be different to the circle of protected Cypriot investors (¶¶ 100-101).

The purpose of developing economic relations would not be served if Cypriot special purpose vehicles, used as pass through entities, were protected as investors under the BIT (¶ 104). Respondent argued that in the present case, the investment decisions and any managerial or entrepreneurial initiative was all done outside of Cyprus (¶ 105).

Respondent denied Claimant’s contention that the BIT reflects the Cypriot government’s policy of creating a business-friendly environment for holding companies, arguing if this were the case, it would have used the term “registered office,” whereas it has used the term “seat” 18 times (¶¶ 107-109).

4.2 The term “seat” cannot be construed to mean incorporation and address

Respondent noted that every legal entity incorporated in Cyprus must have a registered office. Therefore, interpreting the term “seat” to mean “registered office” would render part of Article 1(3)(b) redundant and would be contrary to the *effet utile* principle. Respondent concluded that, because a registered address is simply a necessary consequence of incorporation, an interpretation of Article 1(3)(b) of the BIT in accordance with the *effet utile* principle requires that a “seat” have a more substantial meaning (¶¶ 112, 114)

4.3 Under Cypriot law, the term “seat” requires more than incorporation and address

Respondent argued that the term “registered office” is better reflected in the term “statutory seat” and not the term “seat”. Respondent added that the Recast Brussels Regulation employs the term “statutory seat” and not “seat”. It also serves an entirely different object and purpose from the BIT and expressly excludes from its sphere of application the liability of the State for acts and omissions of State authority and arbitration (¶ 118).

4.4 The meaning of the term “seat”

Respondent argued that the Article 9 of the ILC Articles on Diplomatic Protection supported the conclusion that management and financial control are the decisive factors for linking a legal entity to a specific jurisdiction (¶ 121). Respondent further cited the *Nottembohm* case in support that the main seat of interests and the centre of interests and business activities are relevant to determining an entity’s seat (¶¶ 121-122). Respondent submitted this interpretation of seat is also confirmed by the *AFT v. Slovakia* tribunal and other sources such as the UNCTAD Series on Issues in International Investment Agreements II (¶¶ 125-127). Respondent submitted that the term “seat” is used very frequently in Cypriot law, with 130 laws and 150 regulations attributing the term various meanings. Respondent argued that the

Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company served a comparable purpose to the BIT, and that regulation adopts the “real seat” theory, so the term “seat” as used in the BIT must have a comparable meaning (¶ 128).

4.5 Claimant does not have a “seat” in Cyprus

Respondent argued that the alleged office located at the registered address did not have the substance to qualify as a registered office within the meaning of Cypriot law (¶ 130). Respondent disputed that certificates of registered office issued by the Registrar of Companies are conclusive evidence to the contrary (¶ 131). Respondent presented evidence that the building of the registered address has no street number and no brass plate for CEAC, that courier delivery had failed on two occasions to that address, that the property was not an office and there was no evidence that Claimant had a presence at the premises, which appeared to be unoccupied and no registries for inspection were made available there (¶¶ 132-135).

4.6 Tax residency is not equivalent to “seat” and CEAC is not a tax resident

Respondent disagreed with Claimant’s argument that Article 1(3)(b) of the BIT could mean tax residency pursuant to Cypriot law and added that, even if the Tribunal were to hold otherwise, CEAC is not a tax resident of Cyprus (¶ 137). According to Respondent, evidence in the record demonstrated that CEAC was not effectively managed or financially controlled in Cyprus and that it did not run its business in Cyprus at the time the Request for Arbitration was filed (¶ 141).

5. Tribunal’s analysis

The Tribunal concluded that CEAC did not have a “seat” in Cyprus at the relevant time. As a result, the Tribunal found that CEAC was not an “investor” under the BIT, and the Tribunal therefore lacked the jurisdiction to hear the case (¶ 143). The Tribunal did not consider it necessary to determine the precise meaning of the term “seat” as employed in the BIT because the evidence on the record did not support a finding that CEAC had a registered office in Cyprus at the relevant time, and nor was it managed and controlled from Cyprus. Equally, the term “seat” could not be equated with tax residency (¶ 148).

5.1 Whether Claimant had a registered office in Cyprus on 11 March 2014

The Tribunal stated that the presentation of factual evidence in this case brought to light certain elements that made the Tribunal doubt whether Claimant had a registered office in Cyprus at the relevant date (¶ 153). The probative value of the certificates of registered office had to be determined in the international legal order and in line with earlier decisions they constitute only *prima facie* evidence of the facts they attest to (¶¶ 154-155). The Tribunal relied on the *Flutie* and *Sufraki v. UAE* cases in support (¶¶ 156-159). It ultimately found that even under Cypriot law, certificates of registered office are not conclusive evidence that a registered office exists (¶ 160). Respondent’s expert gave evidence that the Registrar of Companies does not carry out any official and independent verification as to whether the declaration made by the company concerning the registered office corresponds to reality. Claimant’s expert did not rebut this (¶ 166). The Tribunal preferred the evidence of Respondent’s expert and found that under Cypriot law, a certificate of registered office is not

conclusive evidence of the existence of a registered office, but merely confirms that a filing to this effect has been made (¶ 168).

The Tribunal found the testimony of Respondent’s expert to be particularly useful. He set out what were, in his view, the minimum requirements that an office should fulfil if it is to be considered a company’s registered office within the meaning of Cypriot Companies Law (¶ 171). The Tribunal observed that it had expressly indicated that Parties were to present all the evidence and arguments pertaining to the issue of “seat” during this stage of the proceedings (¶ 182). Observing that it would have been relatively easy for Claimant to demonstrate that building at the registered address served as its registered office, it had not done so. It did not rebut the evidence of Respondent’s witnesses who gave evidence that the building was inaccessible and appeared unoccupied on the several occasions they had visited (¶¶ 184-188), and nor gave any plausible explanation for the state of the building (¶ 191). It appeared that an employee of the law firm Chrysanthou & Chrysanthou LLC regularly picked up the correspondence from the address to deliver it to the offices of the firm (¶ 192). Taking all of the evidence together, the Tribunal concluded that CEAC’s registered office address did not meet the requirement specified in the Companies Law that it should be accessible to the public for purposes of inspecting the company’s registers (¶ 193). Based on the evidence in the record the Tribunal could not determine whether CEAC’s registers were actually kept at the registered office or not (¶ 197).

The Tribunal found that Claimant had not proven with evidence that the building stated as its registered address was accessible to the public for the purpose of inspecting the company’s registers, that CEAC was amenable to service there, that the company’s records were kept there or that the address bears a plate with CEAC’s name (¶ 199). The Tribunal concluded that CEAC did not have a registered office in Cyprus at the time the Request for Arbitration was filed, which was a sufficient for a conclusion that CEAC is not an “investor” under the Treaty and the Tribunal has no jurisdiction (¶ 201).

5.2 Whether Claimant was managed and controlled from Cyprus in March 2014

Out of an abundance of caution the Tribunal considered whether the evidence on the record supported that CEAC was managed and controlled from Cyprus, which corresponded to Respondent’s definition of “seat” (¶ 202). The Tribunal observed that the record was very poor when it came to evidence attesting to CEAC’s management (¶ 204). Despite representing that it had in its possession hundreds of documents, very few documents were submitted, and none more recent than 2007. The Tribunal therefore found that Claimant had not met the definition of “seat” put forward by Respondent (¶¶ 203-208). The Tribunal also concluded that under Cypriot law “seat” could not be equated with tax residency (¶ 209).

6. Costs

The Tribunal ordered CEAC to bear the full costs and expenses incurred by ICSID in connection with the arbitration proceedings, and to reimburse Montenegro its legal costs and expenses minus the legal costs and expenses incurred in connection with Montenegro’s Preliminary Objections (¶ 226).

7. Separate Opinion of William Park

William Park opined that defective compliance with obligations (such as name plate, ledger and accessibility) may result in fines, but does not make the office disappear. Failure to comply with Respondent's six-part test as set out by Respondent's expert does not rob CEAC of a registered office (¶ 10). The Treaty wording did not adopt the language of "real seat". International law provides no uniformly adopted ordinary meaning of corporate seat. The term "seat" remains essentially a municipal law concept derived from Continental systems, whereas Claimant's incorporation occurred in a common-law country lacking such notions as such (¶ 18). The parties advanced three tests of "seat". The first test, mandating management and control, was absent from the treaty text. The second test, the one proposed by Respondent's expert, which defines registered office according to six criteria, and finds that non-observance of these leads to disregard of the office, finds no support in either domestic or international law. The third test, looking to the plain meaning of registered office, best matches the meaning of "seat" in Cyprus as used in the Treaty. Under that standard, Claimant appears to possess a seat, precluding dismissal of the arbitration on this ground alone (¶¶ 20-22).