CEAC v. Montenegro
Separate Opinion of William W. Park

I. Notions of Registered Office

1. The Award declines to determine the meaning of "seat" in the 2005 investment treaty concluded by Cyprus with Serbia and Montenegro, yet nevertheless finds that CEAC has no seat in Cyprus, dismissing all claims and ordering CEAC to bear full costs. The Award reasons that the record fails to support a finding of seat according to any interpretation put forward.

2. In reaching that conclusion, the Award purports to consider Claimant's position on registered office, but in fact adopts Respondent's formulation, which not surprisingly fails to carry the day.

3. Claimant argued that "seat" corresponds to "registered office" in Cypriot law, defined as an office that has been registered. CEAC counsel stated, "Under our scenario, all you need to be satisfied of is that we have … incorporation [Sections 3 and 15 of the Companies Law] and a certificate of registered office [Section 102 of the Companies Law]." Again he said, "[A]ll you need is compliance with [Sections 3, 15 and 102], which is beyond doubt."[1]

4. Section 3 of the Cypriot Companies Law says persons associated for any lawful purpose may form a limited liability company by subscribing to a memorandum of association and "complying with the requirements of this Law in respect of registration." Section 15 provides for company creation to be certified by the Registrar on registration of the memorandum and articles of association. Section 102 requires a registered office in Cyprus "to which all communications and notices may be addressed."[2]

5. CEAC was incorporated and its memorandum and articles of association were filed with the Registrar, who was informed of the office at 4 Dimosthenous Street in Nicosia,[3] to which notices were delivered on multiple occasions, including sixteen communications from Respondent.[4]

6. Respondent's expert, Mr. Kypros Ioannides, proposed a more elaborate test of registered office, hemmed by a half dozen conditions, including physical premises, right to use property, public accessibility, amenability to service, presence of company registers, and a name plate.

---

[1] Mr. Sprange, Transcript Day 2, pages 93 and 97.

[2] At commencement of this arbitration, a registered office could be filed within fourteen days from incorporation. During the proceedings, the law changed to require simultaneous filing, a practice also followed before amendment. Expert Opinion of Alecos Markides, 12 June 2015, paragraph 39.3.

[3] Certificates of Registered Office were dated 29 August 2005 (C 20), 29 October 2010 (C 95) and 16 November 2011 (C 56).

[4] Witness statement of Mr. Nicos Chrysanthou, 19 December 2014, paragraphs 17-20, testifying that CEAC regularly receives correspondence at its registered office, including at least sixteen letters from Montenegro and its counsel between January 2009 and April 2013, three of which were delivered through DHL. Although these deliveries do not themselves prove a registered office in March 2014 when the Arbitration Request was filed, no evidence suggests that the office was abandoned following the deliveries, a question of fact to be determined by the record in this case.

7. By contrast, Claimant's expert, Mr. Alecos Markides, endorsed none of these criteria as prerequisites to the existence of a registered office, but carefully distinguished conditions to the existence of a registered office (incorporation and registration) from the various purposes an office serves.[5]

8. Mr. Markides served for eight years as Attorney General of Cyprus. In that capacity he led the Cypriot Law Office in harmonizing national law with European Union regulations, an experience providing a unique qualification to understand the relationship of Cypriot corporate law with Continental analogues. No reason exists to discredit the expert testimony of Mr. Markides.

9. Based on the test proposed by Respondent (not Mr. Markides) the Award denies the existence of a registered office for CEAC, stressing that the office was not always open. Although doubtless the case, no evidence supports the position that constant accessibility constitutes a precondition to a registered office, or that inability to remain open triggers disregard of the office by the Register.[6]

10. Defective compliance with corporate obligations (such as name plate, ledgers and accessibility) may result in fines, but does not make the office disappear. Failure to comply with Respondent's six-part test does not rob CEAC of a registered office on Dimosthenous Street.

11. The Award notes that domestic authorities cannot determine jurisdiction for purposes of international treaties. While true, the observation does not lead to any determination of whether the registered office on Dimosthenous Street meets Treaty requirements, a matter to which we now turn.

II. Notions of Seat

12. To qualify as an investor under Article I(3) of the Treaty, a company incorporated in one contracting state must have its "seat" in the territory of that state. Seeking content to this requirement, arbitrators begin with Article 31 of the Vienna Convention on the Law of Treaties, calling for an "ordinary meaning" to be given to terms in context and in the light of treaty object and purpose. The relevant sources of international law, listed in Article 38 of the Statute of the International Court of Justice, include conventions, international custom and general principles of law, as well as judicial decisions and teachings of highly qualified publicists. None of these sources provides an "ordinary meaning" for seat in the context of this investment treaty and its objects.[7]

---

[5] Expert Opinion of Alecos Markides, 12 June 2015, paragraph 44. This testimony separates the conditions for existence of a registered office (Section V.B) from its purposes (Section V.C). The keeping of ledgers, receipt of communications, and creation of judicial jurisdiction, were all included in Part V.C (purposes), not in Part V.B (conditions).

[6] Apparently FedEx could not make a delivery on 30 January 2014 and DHL could not make its delivery on 6 February 2014. Exhibits R-1 and R-2 respectively.

[7] Significantly, the ILC Draft Articles on Diplomatic Protection state that "international law has no rules of its own for the creation, management and dissolution of a corporation or for the rights of shareholders and their relationship with the corporation, and must consequently turn to municipal law for guidance on this subject." ILC, 58th Sess. (A/61/10), 2006 Yearbook International Law Commission (Vol. II, Part 2). Although useful in some situations, UNCTAD pronouncements carry no authority as a source of international law. In this context, both sides have referenced the UNCTAD Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (Volume 2, 2001), RL-96, which does not purport to confirm any rule of international law, but simply mentions (page 83) that "generally speaking" a seat connotes place of effective management, adding that some investment agreements require "real economic activities" or "business activities".

13. The notion of corporate seat derives from the civil legal tradition, as a connecting point with a national legal order. Continental jurisdictions invokes terminology such as siège (France), Sitz (Germany), sede (Italy), domicilio (Spain) and sede (Portugal).

14. Although notions of "seat" are alien to the English tradition from which Cyprus derives its Companies Law, analogues can be found in the Bruxelles Regulation, providing that for Cyprus a statutory seat means, alternatively, registered office, place of incorporation or the place under the law of which the company formation took place. [8] CEAC appears to have a seat in Cyprus under any of these tests.

15. The Bruxelles Regulation also provides that "rules of private international law" determine seat for purposes of judicial jurisdiction over company creation.[9] In the English tradition of Cyprus, those rules look to either (i) place of incorporation and registered office or some other official address, or (ii) central management and control.[10] CEAC meets the first test, and thus has its seat in Cyprus.

16. Sometimes "seat" marries with a qualifier to become *siège réel* or "real seat". This Treaty did not adopt such language. An arbitral tribunal would be bold indeed to add adjectives on its own initiative. The Treaty drafters introduced no such additional requirements.

17. A different exercise for linking companies and legal orders might commend itself for claimants from Continental jurisdictions where notions of seat form an integral part of national corporate law.[11]

III. A Test That Fits the Context

18. The jurisdictional question in this case does not yield to facile analysis. International law as it currently stands provides no uniformly accepted "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.

19. Apart from tax residency, the Parties advanced three tests of "seat" for consideration. One looks to a relatively deep level of economic penetration implicating management and control in Cyprus. The second imposes multiple criteria in determining registered office, and presupposes that an office ceases to be registered in the event of defective compliance with corporate formalities. The final test rests on a registered office in the plain meaning of that terms: an office that is registered.

---

[8] Article 63(2), Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Bruxelles Regulation), 12 Dec. 2012, EU Regulation No. 1215/2012.

[9] Article 24, Bruxelles Regulation, granting exclusive jurisdiction to courts where a company has its seat.

[10] DICEY, MORRIS & COLLINS, CONFLICTS OF LAW (15th ed. 2012), paragraph 11-079. Noting that "seat" has no precise equivalent in Britain, the treatise continues (citing § 42 of the1982 Civil Jurisdiction and Judgments Act) that for the Bruxelles Convention (predecessor to the Bruxelles Regulation) a company has a seat in the UK if *either* (i) incorporated under UK law with registered office or some other official UK address or (ii) possessing central management and control exercised in the UK.

[11] A different exercise for linking companies to legal orders might commend itself for claimants from civil law jurisdictions where notions of seat form an integral part of national law. See Tenaris et al v. Venezuela, ICSID Case No. ARB/11/26 (29 January 2016), with investors from Luxembourg and Portugal, where (as noted in para. 148 of that decision) company formation requires a "siège" or a "sede" respectively. Tests might also differ when touching goals other than investment, such a tax, judicial jurisdiction, trading with enemies, litigation venue, and standing before the International Court of Justice.

20. The first test, mandating management and control in Cyprus, imports into the Treaty an obligation of substantial economic activity similar to "denial of benefits" provisions of free trade agreements and treaty shopping rules in tax treaties. However desirable such standards might be from a policy perspective, an arbitral tribunal bears a duty of fidelity to the treaty text as drafted, and cannot rewrite the contracting states' bargain. If the negotiators of this Treaty had wished to require investors to prove "management and control" they could have done so by adding those three words.

21. The second test finds no support in either domestic or international law. The test defines registered office according to six criteria, and posits that non-observance of these factors leads to disregard of the office. Adoption of that standard would require arbitrators to assume a policy-making mission in excess of their authority.

22. The third test, looking to the plain meaning of registered office, best matches the meaning of "seat" in Cyprus as used in this particular Treaty. Although international law does not currently permit a uniform definition of seat for treaty purposes, the last test commends itself in the configuration of this dispute. Under that standard, Claimant appears to possess a seat, precluding dismissal of the arbitration on this ground alone.

[signed]

4 July 2016