ICSID TRIBUNAL DECLINES JURISDICTION DUE TO LACK OF "SEAT"

CEAC Holdings Limited v. Montenegro (ICSID Case No. ARB/14/8)

INTRODUCTION

In an award dated 26 July 2016, an ICSID Tribunal considered what constituted the "seat" of a company for the purposes of determining whether the company could be considered an investor and thus entitled to the protection of the bilateral investment treaty between Cyprus, and Serbia and Montenegro (the "BIT").

BACKGROUND

The dispute in these proceedings arose out of CEAC's (the Claimant) ownership and management of an aluminum plant located in Montenegro. On 11 March 2014, the Claimant filed a request for arbitration with ICSID, in which the Claimant alleged that Montenegro was had breached various provisions of the BIT, including the provision of fair and equitable treatment, full protection and security, national and most-favoured-nation treatment and an agreement not to expropriate.

Following dismissal of Montenegro's 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. If the Claimant's seat was not in Cyprus, then the Claimant could not claim protection under the BIT. Article 1(3)(b) provided:

"3. The term 'investor' shall mean:

[…]

(b) a legal entity incorporated, constituted or otherwise duly organized in accordance with the laws and regulations of one Contracting Party, having its seat in the territory of that Contracting Party and making investments in the territory of the other Contracting Party".

The Claimant took the position that the meaning of seat under Article 1(3)(b) of the BIT should not be determined simply by reference to the BIT, but by reference to municipal law. Under Cypriot law, a company's seat was determined by the location of its registered office (and was not understood to mean "real seat"), and the treaty practice of Cyprus and Montenegro confirmed that "seat" means "registered office" with regard to Cypriot investors. This interpretation was supported by the Recast Brussels Regulation. Accordingly, the Claimant had its seat in Cyprus as a matter of Cypriot law.

The Respondent's position was that the term of seat had to be interpreted autonomously under the BIT. "Seat" could not be determined solely on the basis of incorporation and address, and under Cypriot law, required more than that. Furthermore, tax residency was not equivalent to seat (and in any case, the Claimant was not tax resident). Accordingly, the

Respondent submitted that the Claimant did not have a seat in Cyprus and was therefore not entitled to the protection of the BIT.

DECISION

The majority of the Tribunal (Professor Bernard Hanotiau, President and Professor Brigitte Stern) held that the Claimant did not have a "seat" in Cyprus and did not qualify as an "investor" for purposes of Article 1(3)(b) of the BIT, and that the Tribunal did not have jurisdiction to hear the case.

In handing down its award, the majority of the Tribunal held that it the Tribunal did not consider it necessary to determine the precise meaning of the term "seat" as employed in Article 1(3)(b) of the BIT on the basis that the Claimant did not satisfy any of the interpretations of "seat" put forward by the parties (those being that it had a registered office at the relevant time, was managed and controlled from Cyprus; or that it was tax resident in Cyprus). Accordingly, the Claimant was not an "investor" within the meaning of the BIT, and the Tribunal lacked jurisdiction to hear the case.

Professor William W. Park issued a four page separate opinion, in which he observed that 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 [the Claimant] has no seat in Cyprus, dismissing all claims and ordering [the Claimant]to bear full costs."*

Professor Park observed that the parties had advanced three tests of "seat", and considered each in turn:

- *"One looks to a relatively deep level of economic penetration implicating management and control in Cyprus."* To adopt this interpretation, he found, would require the Tribunal to rewrite the contracting states' bargain – had the negotiators of the BIT wished to require investors to prove management and control, they could have done so by adding the relevant wording.
- *"The second imposes multiple criteria in determining registered office, and presumes that an office ceases to be registered in the event of defective compliance with corporate formalities."* Adoption of this standard, he said, would require arbitrators to assume a policy making mission in excess of their authority, and had no support in either domestic or international law.
- *"The final test rests on a registered office in the plain meaning of that terms: an office that is registered."* This test best matched the meaning of "seat" in Cyprus as used in this specific BIT, and under this standard, the Claimant appeared to possess a seat (which precluded dismissal of the arbitration on this ground alone).

23rd August 2016