Company's Right to Choose Its Nationality (With Analysis on the Case of Centros Limited V Erhvervsog Selskabsstyrelsen (1999) Ecr I-1459)

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This paper examines the reasons for choosing the nationality of a company. i.e. where the company will be incorporated. There are various reasons for choosing a particular country to incorporate. Some of the reasons are due to favourable incorporation laws, other reasons are taxation, among others. The practicality of these will be looked into to give insight vis-à-vis laws and regulations and the reality that exist by looking at decisions of courts in situations where 'critics' were of the opinion that the nationality of a company was used as a tool to circumvent laws and regulations.

Keywords: company nationality, incorporation, taxation, EU law, case law, international corporations, foreign investment, Danish law, UK law, transnational Law, international law

INTRODUCTION

Just like we regard humans as persons, so also Companies are regarded as a person with nationality, who can sue and be sued in its name. (American Constitution, 1787; Vagts, Koh & Buxbaum, 2014)

In Belgium v Spain (1970), in the Barcelona Traction case, The International Court of Justice held that only Canada has the locus to bring a claim on behalf of a company incorporated in Canada even though 88% of the shareholders are Belgian nationals. Nationality plays a role in every transaction especially in regards to the law that governs its incorporation & law governing its internal affairs (rights and duties of Board of Directors, shareholders etc.), regional & international bodies (like NAFTA or EU laws), Taxation (this can be based on where the company is incorporated like we have in the United States which attract worldwide taxation unlike the United Kingdom which concerns itself with where it's day to day activities takes place) and also some special nationality rights (in the United States foreign corporations cannot hold broadcast licence by virtue of the Communication Act, 1934). In Mexico there is a regulation on channelling foreign investment (Foreign Investment Act, 1933), in Nigeria there is a law in the oil and gas industry which gives first preference to Nigerian companies (Nigerian Oil and Gas Industry Content Development Act, 2010). All these reflects the importance of Nationality of a company.

Please find below some expositions on the nationality of a company which reflects the practicality of nationality vis-à-vis the company (and its sponsors or agents) and Nationality of companies across borders.

THE TESTS OF NATIONALITY

Nationality of shareholders, directors, officers, and employees. The test of nationality is usually brought about in situations where it is suspected that some nationals of a country seek to circumvent rules and regulations. This can be seen in the case of Sumitomo Shoji America Inc v Avagliano (1982), which involved employees of an New York corporation which was a subsidiary of a Japanese company, and the American civil right Act (1967) was held as the valid law instead of a treaty between America and Japan (Treaty of friendship, Commerce and Navigation between the United States and Japan,1953). Also, in the case of De Beers Consolidated Mines Limited v Howe (1906), the court held that for Taxation purpose the company head-office was anywhere real control is exerted.

Nationality can also be tested in situations of debt obligations, patents or trademarks and base of its industrial and commercial activities

However, the above tests posit a problem because there are no clear-cut rules in uniformity among nations and each situation must be investigated in light of individual facts which is not great news to investors who want to be able to predict with certainty the nationality of a company.

THE DECISION IN THE CENTROS CASE (1999) WHICH PROVIDED SOME INSIGHTS ON THE EUROPEAN UNION MEMBERS STATES AND THE EUROPEAN UNION COUNCIL

First, is the situation of incorporation laws whereby the Danish requirement of DKK 200,000 is required as minimum capitalization did not correspond with the provisions of the laws of England which did not require a minimum share capital. The laws are made by the legislature who are regarded as the representatives of a nation and its citizens which are meant for their protection and a conflict with the law of European Union creates a divide between the law of the community and the Sovereign law of a country.

Secondly, the Danish government felt that the owners of Centros (Mr and Mrs Bryde) sole purpose of incorporating in England and without conducting any business in the United Kingdom was a deliberate act to circumvent the laws on the formation of company in Denmark and that it should be seen as an abuse of the freedom of establishment (Vagts et al, 2014) and that an investigation into the reasons for the steps they took by incorporation under the English law should be sufficient for the European court to require Centros to show cause why they acted in that manner.

The above Danish positions were with the intention to 'reinforce financial soundness of those companies to protect public creditors against the risk of seeing the public debts owing to them become irrecoverable' and to protect its citizens especially against the risk of bankruptcy and insolvency because of the inadequate minimum share capital (Vagts et al, 2014, p 167).

The Centros case shows that the protection of the members states is subject to the European Union which unfortunately does not have a proper protection in place for the shareholders, creditors and the public of each member state. The European Union should work towards the Harmonization of the Company laws across all members state (even if it is only in regards to the minimum share capitalization and incorporation laws) for uniformity

In any further analysis of the case of Centros Limited v Erhvervsog Selskabsstyrelsen (1999) it is imperative to state that the Centros case is as good as any case on the freedom of establishment as preached by the European Commission/court through its Treaty and court decisions (X v Rikssakatteverket, 2002; Cadbury Schweppes Plc v Revenue and Customs Comrs, 2006; Cartesio Oktato es Szolgaltato bt, 2008; Easynet Global Services Ltd v Secretary of State for Business, Energy & Industrial Strategy, 2018). An analysis of this Centros case will be provided below.

Issue

Centros Limited, was formed by Danish nationals- Mr and Mrs Bryde who resided in Denmark but incorporated Centros in England without carrying out any actual business in the United Kingdom. They attempted to register a branch of the company and conduct business in Denmark but were refused by the

Danish agency in charge of the registration (Danish Trade and Company Board) because Centros did not meet up with the requirement of the Danish law which requires a minimum share capital of DKK 200,000.

However, it is pertinent to note that under the English law, which Centros was incorporated, there was no requirement for such a company to provide or have a minimum share capital. In this case, the company's share capital was GBP 100 which was not paid-up or made available to the company.

Rules

The tussle between the Danish government and Mr and Mrs Bryde is centred on the interpretation of Articles 49, 52 and 54 of the Treaty on the functioning of the European Union (1957) concerning the rights and freedom of establishment and if it could be relied on by Centros.

Article 49 of the Treaty provides that there should not be any restriction on the freedom of establishment of nationals of a member state in the territory of another state. While Article 54 of the Treaty provides that in situations where the companies or firms are registered under the law of a member state and have its central administration or principal place of business within the European Union, they should be treated in another member state the same way as natural persons who are nationals of the member states will be treated.

The Danish government's position was that the Articles of the Treaty should not be used to circumvent the national laws on the formation of companies which will lead to an abuse of the freedom of establishment and also relied on Article 52 of the Treaty which provides that any measure taken should not prejudice national laws, regulations or administrative actions on the ground of public policy, security or health

Application

The European Court stated that the Articles 49 and 54 of the Treaty plays a strong part in the case and opined that the refusal to register a branch of the company in Denmark after the company was incorporated in accordance with the law of another member state is against the freedom of establishment championed by the Treaty. The court was also of the opinion that Article 54 of the Treaty required a company to be treated in the same way a national of the member state where a branch or subsidiary is established.

The court went further to state that though a member state is entitled to take measures to prevent and protect its people and certain nationals from attempting to hide under the cover of the Treaty or to circumvent national laws through fraudulently taking advantage of the provision of the Treaty against member states, it should be looked at on a case to case basis which will be based on evidence that is objective. This can be buttressed by the provision of Article 52 of the Treaty which offers protection in situations of public policy, public security, and public health.

Court Decision

The European Court of Justice concluded on the supremacy of the freedom of establishment provisions in the Treaty especially regarding the registration of a company already validly incorporated in a member state as supported by Articles 49 and 54 and this was the response of the court to the issue/question from the Danish appellate court.

The court held that Centros did not fall into exception categories provided in Articles 52 of the Treaty which bothered on public policy, security and health, nor was the defence of protection against circumvention of national laws or safeguarding of public interest by ensuring the financial soundness of the companies and protection of public creditors valid before the court, who felt that the creditors ought to keep the status of the company formation and also the English law requirements on formations in perspective before conducting business.

It was ruled that Centros be allowed to set up a branch in Denmark and to set a different rule of incorporation is an attempt to curtail the right of freedom of establishment the company is entitled under the Treaty by pushing for harmonization of the company laws across the members state

A SUMMARY OF THE INSPIRE ART CASE

It is pertinent to state that there was a similar case to Centros with the difference that while the Centros case involved incorporation in the United Kingdom with an attempt to open a branch in Denmark, the Inspire Art Case also had to do with incorporation in the United Kingdom but with an attempt to open a branch in Netherlands (Kamer Van koophandel en Fabrieken Voor Amsterdam v Inspire Art Ltd, 2003). In the Inspire Art case the court upheld the European principle of the freedom of establishment notwithstanding the classification that the company was a 'Pseudo-foreign' company with certain requirements and capital expenditure required under Dutch laws which shows the European Court of Justice consistency when it comes to freedom of establishment despite efforts by the Danish and Dutch members states favouring the contrary (Ryan, 2004).

DELAWARE COMPANY REGISTRATION AND EUROPE

Delaware is a state in America which is particularly known for its corporate laws and courts which is regarded as a corporate haven with its main aim to attract business. Delaware laws are generally seen as favourable to do business especially because it does not collect taxes from Delaware corporations that do not do business in Delaware and also does not collect tax payment on intangible assets (Haskins, 2020).

On the reformation of the corporate laws in the Netherland or Denmark to attract re-incorporation and emerge as Delaware of Europe, as we can see in the Centros and Inspire Art cases, it will be difficult to foresee if these two states will be willing to emerge as a Delaware of Europe.

But never-say-never, countries have been known to change policies overnight especially based on political power change (new governments sometimes bring new policies) who may see the beauty in reforming the corporate law and policies which may involve relaxing regulations on the mode of conducting business, tax system, etc. It is important to state that any reformation to the corporate law will bring more business activities and revenue for the government and private consultants which will turn Netherlands and Denmark into a corporate hub and increase their status in the Regional and International community. However, this must be weighed against their existing corporate law advantages like taxation benefits and the need to safeguard creditors, citizens and other economic factors.

Also, any reformation to its corporate laws cannot exist without the approval of the European community represented by the European Union. Netherland and Denmark can open its borders to everyone, but it is expected that the other European members states should be carried along through the European union to make a success of a declaration of a country as a Delaware of Europe.

In addition to the obstacle in the preceding paragraph, Netherland and Denmark will have to improve the image of its judiciary and legal system to promote it as a shield for the protection of business owners and to convince the outside world that it is now pro acceptance against its earlier stance as seen in the Inspire Art and Centros cases (Jensen, 2006).

CONCLUSION

In concluding, the writer is of the opinion that whatever divide you belong to from the diverse opinions that exist on nationality of companies, be it 'moral' justification or criticism that nationality of companies should not be used by the company and its agent to circumvent a law of a given country or be it the opinion of the states like Denmark and Holland that have similar opinion to uphold their internal laws to the exclusion of decisions or regulations of regional bodies and free trade agreement, to the opinion of proponents who view that using the 'opportunity' of a 'loop-hole' in a law is ok because no law was broken and the legality cannot be questioned since it is backed-up by precedents from the law court, it is important to note that the decision on where to set up a nationality of a company is solely the decision of the owners, investors and agents to the exclusion of any state and this is the core of transnational business and international trade which regard businesses as a global market place across any tribe or ethnicity and language.

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