School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Capital Financial Holdings Luxembourg SA c. République du Cameroun (ICSID Case No. ARB/15/18), Award, dated June 22, 2017 (*rendered in French*)

Case Report by: Sergey Alekhin**, Editor Diego Luis Alonso Massa***

Summary:

In *Capital Financial v. Cameroon*, the Tribunal deemed that it did not have jurisdiction over a dispute opposing the Claimant, a Luxemburg-incorporated holding company, and the Republic of Cameroon under the Belgo-Luxembourg Economic Union (hereinafter "BLEU")-Cameroon BIT. In particular, the Tribunal found that Claimant's "*siège social*" was not located in Luxemburg; that it had neither *ratione personae* nor *ratione materiae* jurisdiction over the controversy, and that the attempts that were made by the Claimant to "revive" its dormant company with sporadic economic activities, in the wake of the investment dispute with Cameroon, amounted to an abuse of right.

In passing, the Tribunal also deemed that Claimant did not make a qualifying investment, as it failed to undertake an economic contribution into the host State, and thereby did not bear any associated risk.

Notably, Claimant-appointed arbitrator, Mr. Alexis Mourre, disagreed with the majority's finding on jurisdiction, arguing that Claimant was a qualifying investor under the BIT, and that it did make a qualifying investment under the treaty.

Main issues: jurisdiction *ratione personae*, jurisdiction *ratione materiae,* definition of "investment", BLEU-Cameroon BIT, abuse of right, *siège social* vs. *siège statuaire*, economic contribution and risk, origin of funds, consent to ICSID arbitration

Arbitrators: Pierre Tercier (President), Alexis Mourre (appointed by Claimant), and Alain Pellet (appointed by Respondent)

Claimant's Counsel: Jones Day (Michael Bühler, Pierre Heitzmann, Nicole Dolenz, Claire Habibi, and Ileana Smeaureanu)

Respondent's Counsel: Curtis Mallet-Prevost Colt & Mosle (Peter Wolrich, Nadia Darwazeh, Gabriela Alvarez-Avila, Virginie Liautaud, Marie-Odile Trouvé, Jeremy Bocock), Ministry of Justice of the Republic of Cameroon (Gaston Kenfack Douajni, Laurent Esso) Ministry of Finance of the Republic of Cameroon (Mougnal Sidi)

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Digest:[1]

1. Factual background and Procedural History

The present case concerns the alleged expropriation of the Claimant's shares in Commercial Bank Cameroon ("CBC"), established by a Cameroonian business family, the Fotso family, in the late 1990s. Claimant, Capital Financial Holdings Luxembourg SA ("Capital Financial"), is a Luxembourg-incorporated company that owned a 46.57% stake in CBC and also lent certain funds to CBC (¶¶ 5, 30-35).

In 2009, CBC was reportedly nearing insolvency, which led to the appointment of provisional receiver by the Central Bank regulator. In the same timeframe, it was reported that CBC suffered from mismanagement and disappearance of bank funds – allegations that CBC and Capital Financial denied in the subsequent arbitration proceedings (¶¶ 36-40). Subsequently, in the course of 2013, Capital Financial's stake in CBC was put under receivership by the Ministry of Finance of the Republic of Cameroon, and CBC's capital was reduced to zero (¶¶ 54-59). According to Claimant, its resulting loss amounted to approximately EUR 105 million (¶¶ 58-59).

In July 2014, Capital Financial notified Cameroon of the alleged investment dispute under the BLEU-Cameroon BIT (¶ 68). Failing any response from the State, Capital Financial initiated ICSID arbitration proceedings in April 2015 (¶¶ 70, 73). The Tribunal decided to bifurcate the proceedings into jurisdictional and merits stages in December 2015 (¶ 91). Following hearings in October 2016, the Tribunal issued its Award in July 2017.

1 For convenience purposes, the Tribunal's findings on jurisdiction are presented without specifying the exact point from which Mr. Alexis Mourre dissented. This approach is further justified as the main text of the Award does not specify whether a certain finding was made by the full Tribunal, or just by the majority. Mr. Mourre's dissenting opinion is summarized in Section IV below.

2. Tribunal's findings on jurisdiction

2.1. The burden of proof with respect to the Tribunal's jurisdiction is shared between the Parties

In the Tribunal's view, both Parties have to contribute to the search of the truth, including as regards establishing the Tribunal's jurisdiction (¶¶ 130, 135). While Claimant must prove the facts upon which it relies to demonstrate that the Tribunal does have jurisdiction over the dispute, the Respondent needs to establish the facts that it raises in arguing the Tribunal's lack of jurisdiction (¶¶ 136, 138).

2.2. Cameroon consented to ICSID arbitration

Under Article 10(1) of the BIT, investment disputes "*shall preferably be resolved amicably, by direct agreement between the parties to the dispute and, failing this, by conciliation between the Contracting Parties through the diplomatic channel*."[2] Objecting to the Tribunal's jurisdiction, Cameroon argued that Claimant's home State failed to attempt inter-State conciliation thus rendering the present dispute premature for arbitration (¶ 141).

The Tribunal dismissed this argument, deeming the pre-arbitration inter-State conciliation requirement as an obligation of conduct ("*obligation de moyens*"), as opposed to an obligation of result ("*obligation de résultat*"). Indeed, it would seem impossible in the Tribunal's view, to have the investor somehow force its home State to participate in the dispute resolution (¶¶ 157, 159).

Procedurally, the Tribunal noted, Claimant dispatched its notice of dispute and a follow-up letter to, *inter alia*, the Ambassador of Cameroon to Belgium, thereby performing its obligation of conduct with respect to initiation of inter-State conciliation (¶¶ 161-163, 166). Moreover, in the Tribunal's view, Cameroon should have raised this argument earlier in the course of the dispute if it deemed inter-State conciliation to be an important step in dispute resolution under the BIT. Rather, Cameroon ignored Claimant's notices and letters (¶¶ 165, 167).

2.3. No "foreign investor" as the Claimant's corporate seat (siège social) was not located in Luxembourg

Under Article 1(2) of the BIT, the term "companies" shall mean, with regard to BLEU, "*any corporation constituted in accordance with Belgium or Luxemburg law and having its head office in the territory of Belgium or Luxemburg*."[3] Cameroon's jurisdictional objection in this regard was that despite being constituted under Luxembourg law, Claimant's corporate nationality was *not* Luxembourgish (¶ 183). The Tribunal dealt with this objection undertaking the following four-prong analysis.

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[2] English translation of the BIT as published in United Nations – Treaty Series, Vol. 1284 (1982), p. 142. The original French text of the BIT reads: "*Tout différend relatif aux investissements fera l'objet d'une notification écrite, accompagnée d'un aide-mémoire suffisamment détaillé, par l'investisseur de l'une des Parties Contractantes à l'autre Partie Contractante. Ce différend sera, de préférence, réglé à l'amiable par un arrangement à intervenir directement entre les parties au différend, et à défaut, par la conciliation entre les Parties Contractantes par la voie diplomatique*."

[3] English translation of the BIT as published in United Nations – Treaty Series, Vol. 1284 (1982), p. 139. The original French text of the BIT reads: "[e]*n ce qui concerne l'Union Economique Belgo-Luxembourgeoise, toute personne morale constituée conformément à la législation de Belgique ou du Luxembourg et ayant son siège social sur le territoire de Belgique ou du Luxembourg*."

First, the Tribunal deemed that Luxembourg law – as opposed to international law – governs the determination of Claimant's corporate nationality, and in particular its corporate seat ("*siège social*") – despite the lack of definition of corporate nationality in the BIT. In the Tribunal's view, it would be incoherent to use different legal bases to determine: (i) the place of the company's initial constitution (Luxemburg law, as explicitly stated in the BIT), and (ii) the place of the company's "*siège social*" (no legal regime specified in the BIT). To support its finding, the Tribunal relied on, *inter alia*, the findings in *Abaclat v. Argentina*, *SOABI v. Senegal* and *Gaeta v. Guinea* (¶¶ 204-211).

Importantly, the Tribunal made a *dictum* to the effect that its findings under Luxemburg law would only have effect within the limits of the present arbitration, without any impact or bearing on Luxemburg courts (¶¶ 212-213).

As a related point, the Tribunal ruled that under the ICSID Convention, it is again the domestic law of the home State of the investor that would govern the determination of the investor's corporate nationality.

Second, the Tribunal observed that under Luxemburg law, a substantive inquiry into the place of effective management of the company is needed to establish its corporate seat (the "*siège réel*" approach, as opposed to the "*siège statuaire*" approach) (¶¶ 226-228, 233). Such an inquiry would include the consideration of the place of board and shareholder meetings, the place where corporate records are held, and where accounting is done, and the place(s) where the company's physical offices are located (¶¶ 235-241, 243).

Third, in a *dictum*, the Tribunal noted that its conclusions with respect to Claimant's corporate nationality would be no different purely under international law, as the same practical criteria of determination of the "*siège social*" would apply (¶¶ 265-268).

Fourth, applying the criteria of corporate nationality under Luxemburg law, the Tribunal determined that:

- In violation of Luxemburg law, Claimant's ordinary shareholder meetings were only held sporadically (although physically in Luxemburg) (¶ 297);
- Only a few of Claimant's board meetings were physically held in Luxemburg, and most board resolutions were passed solely in writing (¶¶ 314-316);
- Claimant's board only approved its 2007 – 2015 accounts in 2015 (although the said accounts were prepared and filed in Luxemburg) (¶ 317);
- Moreover, Claimant's board was in fact not validly constituted between 2010 and late 2014, due to expiry of the directors' mandates (¶ 326);
- While Claimant was domiciled in Luxemburg via a corporate services company, it lacked dedicated offices and communication means until late 2014 (¶¶ 335, 338, 347-348).

Overall, the Tribunal deemed that Claimant's corporate seat ("*siège social*") was not in Luxemburg at the date of the notice of arbitration, and Claimant was therefore not a protected investor under Article 1 of the BIT and the ICSID Convention (¶¶ 355-357).

2.4. Attempts to "revive" a Luxemburg-incorporated holding company in the wake of a dispute deemed "abuse of right"

The Tribunal further deemed the fact that Claimant was a dormant company up until the dispute with Cameroon arose, constituted an abuse of right, merely aimed at gaining BIT protection (¶ 362). Of note, the Tribunal distinguished the present case from earlier awards where claimant companies were *created* in order to initiate investment arbitration proceedings (¶ 361). Here, while Claimant was established in Luxembourg years before the dispute arose, it was "revived" when alleged acts of expropriation took place – an action that was deemed by the Tribunal to be abusive (¶¶ 364-365).

2.5. No protected investment for failure to meet the objective requirements of economic contribution and risk

As to jurisdiction *ratione materiae*, the Tribunal invoked the well-known "Salini criteria," (¶ 419) with two important observations:

- In line with earlier case law, the fourth criterion, e.g. economic development, was an *objective* of the investment, rather than its characteristic features (¶ 422); and
- The "economic contribution" and "risk" criteria were connected, as an investor making an economic contribution would also take a risk (¶ 423).

Key to this dispute is the Tribunal's holding that the origin of funds used for the investment may not be entirely dismissed, thereby requiring the investor itself to make a certain contribution (¶ 426). In the case at hand, the Tribunal established that the transaction resulting in the acquisition of a majority stake in CBC, a local Cameroonian bank (e.g. the putative investment) was an intra-group domestic transaction, whereby the seller and the buyer were ultimately controlled by the same Cameroonian national (¶¶ 439, 441, 447-452, 456). As such, the Tribunal held, Claimant did not make any contribution (and consequently did not undertake any risk), and could therefore not be deemed to have made an investment – either under the ICSID Convention or under the BIT (¶¶ 457, 469).

2.6. BIT does not include an investor legality clause

Under Article 2 of the BIT, Cameroon ought to "*admit to its territory in accordance with its law investments made by individuals or corporations of* [BLEU]."[4] While Cameroon argued that the Claimant's investment was made unlawfully, the Tribunal decided that the BIT did not require legality of investment, as this provision was absent from Article 1 (definitions) of the BIT.

[4] English translation of the BIT as published in United Nations – Treaty Series, Vol. 1284 (1982), p. 140. The original French text of the BIT reads: "*Chacune des Parties Contractantes admet sur son territoire, en conformité de sa législation, les investissements effectués par des personnes physiques ou morales de l'autre Partie Contractante et encourage ces investissements*."

3. Tribunal's decision on costs

In view of the Tribunal's negative finding on jurisdiction, Claimant was ordered to bear both its own and Respondent's arbitration costs (including the costs of the Tribunal and the hearing costs) (¶¶ 481-482). As to the legal costs, the Tribunal ordered each Party to bear its own costs given that Claimant nevertheless prevailed on certain points in dispute (¶ 485).

4. Dissenting opinion of Alexis Mourre

In his seven-page dissenting opinion, Mr. Alexis Mourre disagreed with the majority of the Tribunal and opined that jurisdiction over the dispute should have been upheld both as regarding *ratione personae* and *ratione materiae*.

With respect to jurisdiction *ratione personae*, Mr. Mourre agreed with the majority's finding that Luxemburg law would govern the determination of the *siège social* of Claimant (¶¶ 7, 10). Yet, Mr. Mourre argued, Claimant was a Luxemburg national under the BIT (having been incorporated in Luxemburg and having its "*siège social*" in this jurisdiction) (¶¶ 15-16). Whether or not Claimant also had its "*siège reel*" in Luxemburg was irrelevant for the purposes of jurisdiction under the BIT (¶¶ 21-23).

Ultimately, therefore, Mr. Mourre's view was that Claimant had sufficient ties to Luxemburg to be deemed an investor within the meaning of Article 1 of the BIT.

In turn, as to jurisdiction *ratione materiae*, Mr. Mourre disagreed with the majority in that Claimant's investment did not constitute a contribution and did not entail risk (¶ 37). In particular, Mr. Mourre noted that there was no evidence that the "circular" (e.g. intra-group) loan that Claimant obtained would not have to be repaid (¶¶ 40-42). Mr. Mourre further highlighted the separate legal personality of Claimant and its ultimate parent company, thereby de-emphasizing the importance of the notion of "origin of funds" (¶¶ 40-45).