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International Arbitration

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Law and Practice

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1. General

1.1 Prevalence of Arbitration

Whilst arbitration is a recognised form of dispute resolution in Luxembourg, litigation is mostly used by domestic parties.

At this stage, it seems that domestic parties tend to choose ad hoc arbitration proceedings rather than institutional arbitration proceedings.

Since the reform of the law on mediation in 2012, parties have increasingly used mediation as a method of dispute settlement.

Due to its open economy, Luxembourg is often the place of enforcement of foreign arbitral awards.

1.2 Trends

As more and more contracts now include arbitration clauses with Luxembourg as governing law and seat, the use of arbitration will continue to grow. In that respect, the Luxembourg Arbitration Association (the Association), which was founded in 1996 and is dedicated to the promotion and development of arbitration practice in Luxembourg, continues to organise a series of event to share expertise and information on arbitration-related matters. The Association also provides a comprehensive database of Luxembourg and international qualified arbitrators and practitioners.

Considering the suspension of all procedural deadlines in litigation proceedings in Luxembourg from mid-March to mid-June 2020 due to the COVID-19 pandemic, parties entering into new contracts might consider inserting arbitration clause so as to benefit from the flexibility offered by arbitration proceedings (electronic production of submissions and exhibits, virtual hearings, etc).

1.3 Key Industries

Due to the positioning of Luxembourg as a finance and investment funds hub, arbitration in these industries are experiencing more international arbitration activity than others.

For example, in the period 2015-19, 20% of the disputes handled by the Arbitration Centre of the Luxembourg Chamber of Commerce were banking and finance-related disputes.

1.4 Arbitral Institutions

ICC, CEPANI and DIS arbitrations are widely used for international arbitration in Luxembourg.

The Arbitration Centre of the Chamber of Commerce of the Grand Duchy of Luxembourg (the Arbitration Centre) is also used for domestic and international arbitrations. The Arbitration Centre was launched in 1987 and has an institutional system of dispute resolution with Rules of Arbitration inspired by the International Chamber of Commerce (ICC). The Arbitration Centre issued a new set of rules on 1 January 2020. These new rules are available in English and French on the website of the Chamber of Commerce, in the Arbitration Centre section.

Over the period 2015-19, the Arbitration Centre has seen a 33% increase in the number of cases compared to the period 2010-14.

2. Governing Legislation

2.1 Governing Law

The main source of legislation on arbitration can be found in articles 1224 to 1251 of the New Civil Code of Procedure (NCCP). Under Luxembourg law, there is no distinction between domestic and international arbitration.

Luxembourg law on arbitration is not based on the UNCITRAL Model Law.

The main differences between the UNCITRAL Model Law and the Luxembourg NCCP dispositions are that arbitration in Luxembourg is not limited to commercial relationships and that the NCCP refers, for arbitration proceedings, to the common judicial procedure (Article 1230 NCCP) whereas the UNCITRAL Model Law is tailored to arbitral proceedings. Nevertheless, Article 1225 NCCP sets out certain restrictions regarding the material scope of arbitration and parties are free to determine the different steps of their arbitral proceeding.

Luxembourg is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the European Convention on International Commercial Arbitration of 1961, the Energy Treaty Charter and more than 100 bilateral investment treaties.

2.2 Changes to National Law

It should be noted that since October 2013 a group of practitioners and academics interested in arbitration, the Think Tank for Arbitration, have worked on a comprehensive reform of the law on arbitration and organised seminars on arbitration. The completion of these works led the Think Thank for Arbitration to propose a draft Model Law – which combines elements from the UNCITRAL Model Law, the Belgian as well as the French arbitration laws – to the Ministry of Justice.

As at 1 July 2020, no draft bill has been presented to the Luxembourg Parliament.

3. The Arbitration Agreement

3.1 Enforceability

For an arbitration agreement to be enforceable under the laws of Luxembourg, such agreement can either take the form of an arbitration clause (*promesse d'arbitrage*) or a submission agreement (*compromis*).

Whilst in the arbitration clause the parties agree to submit all future disputes arising out of or under their contract to arbitration, the parties to a *compromis* agree to refer an existing dispute between them to arbitration.

While the arbitration clause has no special formal requirements, the submission agreement has some requirements in terms of form and content (Article 1227 NCCP). In terms of form, it can be drawn up:

- in minutes before the appointed arbitrators;
- by act of a Luxembourg notary; or
- by private deed.

Case law has also considered the voluntary appearance of the parties before the arbitral tribunal to constitute a valid submission agreement. It is also required for the submission agreement to list the subject matter of the dispute as well as the name of the arbitrators, otherwise it is deemed to be null and void.

3.2 Arbitrability

Disputes involving rights that are at the full disposal of a person can be submitted to arbitration (Article 1224 NCCP).

Disputes concerning issues of status and capacity of persons, conjugal relationships, divorce and legal separation applications, representation or causes of incapacitated persons or the rights of an absent person or one who is presumed absent cannot be submitted to arbitration (Article 1225 NCCP).

While a clause inserted in a contract between a professional supplier of goods or services and a consumer, which would deprive the consumer of his or her right to bring his or her claim before a court (*promesse d'arbitrage*) is void (Consumer Code, Article L211-3(13)), the law does not prohibit the conclusion of a submission agreement by a consumer. It should be noted that submission agreements can be inserted into insurance contracts with a consumer (Law of 27 July 1997 on insurance contracts as modified, Article 46).

Although we are not aware of any case law in Luxembourg, it might be argued that once an employment contract has been terminated, the employer and the employee might enter into a submission agreement to solve the dispute.

Save for public establishments placed under the surveillance of municipalities (communes), which have to request a specific authorisation to enter into any arbitration agreement in relation to contracts of (and thus an exposure to disputes in) a value higher than EUR100,000, no specific text under Luxembourg law prohibits public entities to enter into arbitration agreements.

3.3 National Courts' Approach

Luxembourg national courts usually enforce arbitration agreements. If one of the parties to an arbitration agreement refers a dispute to a court and the other party to the arbitration agreement invokes the arbitration clause, the court will refer the parties to arbitration.

This principle has been confirmed by case law, even in situations in which the arbitral tribunal had not yet been constituted at the time of the filing of a court action. It should be noted that the lack of competence of the courts should be raised in limine litis in order for such argument to be taken into consideration.

It is accordingly possible for parties to jointly waive their right to arbitration. This waiver can be explicit but also implicit in the event a defendant in a court action fails to raise any objection before his or her arguments on merits of the case.

In that respect, the District Court has recently considered that a third party to an arbitration agreement could not, in litigation proceedings in which none of the parties to the arbitration agreement raised the existence of the arbitration clause, invoke the lack of competence of the courts (District Court of Luxembourg, 22 January 2019, No 176.980).

3.4 Validity

There is no special provision relating to the separability of the arbitration clause from the underlying agreement. Whilst Luxembourg case law has recognised some autonomy to the arbitration clause, it has also made clear that this autonomy is of relative effect. In the event an arbitration clause was contained in an invalid agreement, the arbitration clause would not stand.

Article 5(4) of the 2020 rules of the Arbitration Centre, however, endorses the separability principle and indicates that "unless otherwise agreed, the arbitrator shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitrator upholds the validity of the arbitration agreement".

4. The Arbitral Tribunal

4.1 Limits on Selection

There are no limits to the parties' autonomy to select arbitrators in Luxembourg. As there are no restrictions to certain professions, parties are allowed to select any person of their choice, including an active Luxembourg judge or a Luxembourg civil servant (in case of the latter, his or her department should not be involved in the arbitration).

In respect of the numbers of arbitrators, pursuant to the arbitration agreement, there can be an even or an uneven number of arbitrators.

4.2 Default Procedures

By default, an arbitral tribunal will be constituted of three arbitrators with each party appointing its own arbitrator and the two party-appointed arbitrators appointing the third arbitrator (Article 1227 NCCP).

See **4.3 Court Intervention** for the default procedure which applies for the selection of arbitrators where there are more than two parties to the arbitration.

It should be noted that the 2020 rules of the Arbitration Centre include provisions in respect of multiple contracts and multiple parties (articles 7 and 8).

4.3 Court Intervention

Pursuant to Article 1227 NCCP, the President of the District Court (*Tribunal d'Arrondissement)* can intervene in the following three scenarios in respect of the selection of arbitrators:

- in the event a party fails to appoint an arbitrator and within eight days from the receipt of formal notice from the other party to do so, the President of the District Court shall, upon the request of the other party, appoint an arbitrator – such appointment cannot be subject to appeal;
- if a third arbitrator cannot be jointly appointed by the two party-appointed arbitrators, the President of the District Court shall, upon the first request of one of the parties, appoint the third arbitrator;
- if there are more than two parties to the arbitration, these parties will have to agree on the names of the three arbitrators – failing agreement and upon the first request of one of the parties, the President of the District Court shall appoint the three arbitrators.

4.4 Challenge and Removal of Arbitrators

Article 1235 NCCP provides that arbitrators can only be challenged for reasons arising after the conclusion of the submission agreement designating them.

As far as the grounds for a challenge are concerned, these are not set out in the Luxembourg law on arbitration. However, case law confirms that the grounds and procedure for challenging an arbitrator are the same as those used to challenge a judge (Article 521 of the NCCP). Among the nine grounds listed in this article, an arbitrator could be challenged if:

- he or she is a relative of one party;
- he or she (or a relative of such) is having a dispute on the same subject or having a dispute with one of the parties;
- he or she has in the past advised one of the parties on the same subject;
- he or she has been invited by one of the parties to their house since the beginning of the proceeding; or
- he or she has received a present from one of the parties since then.

It should be noted that only the party filing the challenge has the capacity to be party to such procedure. From the day of the judgment on the challenge, the challenging party has 15 days to lodge an appeal (Article 535 NCCP).

During arbitral proceedings, parties can unanimously decide to dismiss one or several arbitrators (Article 1229 NCCP). As there are not specific provisions in respect of the procedure for the designation of substitute arbitrators, the latter should be designated in the same manner as the original arbitrators.

4.5 Arbitrator Requirements

Under Luxembourg law, there are no specific requirements as to arbitrator independence, impartiality and/or disclosure of potential conflicts of interest. As seen in **4.4 Challenge and Removal of Arbitrators**, since Luxembourg case law confirms that the grounds for challenging an arbitrator are limited to the ones used to challenge a judge, it is considered that the disclosure requirements of a judge also apply to an arbitrator (Article 523 of NCCP). On that basis, an arbitrator is obliged to disclose facts that may raise doubts as to his or her impartiality and independence.

The Arbitration Centre on the other hand has clear requirements in respect of arbitrator independence, impartiality and disclosure (see Article 10 of the 2020 rules of the Arbitration Centre).

Firstly, every arbitrator must be, and remain, impartial and independent of the parties involved in the arbitral proceedings.

Secondly, before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat of the Arbitration Centre

any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and set a time limit for any comments from them.

Thirdly, an arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in the precedent paragraph concerning the arbitrator's impartiality or independence which may arise during the arbitration.

In the context of arbitrations conducted under the rules of the Arbitration Centre, a challenge, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by submission of a written statement specifying the facts and circumstances on which the challenge is based to the Secretariat of the Arbitration Centre (see Article 11 of the 2020 rules of the Arbitration Centre).

5. Jurisdiction

5.1 Matters Excluded from Arbitration

See **3.2 Arbitrability**.

5.2 Challenges to Jurisdiction

The principle of competence-competence which allows an arbitral tribunal to rule on a party's challenge to the tribunal's own jurisdiction, despite not being enshrined in the NCCP, is recognised in Luxembourg.

Save for the matters excluded from arbitration, it is generally accepted that the argument that the arbitral tribunal lacks competence must be raised in the first written submissions of the relevant party.

5.3 Circumstances for Court Intervention

Generally, the courts of Luxembourg are reluctant to intervene in issues of jurisdiction. As mentioned in **3.3 National Courts' Approach**, if one of the parties to an arbitration agreement refers a dispute to a court despite the existence of a valid arbitration clause, the court will stay the action and refer the parties to arbitration and this even though the arbitral tribunal is not yet constituted at the time of the filing of the court action.

There are no specific legal provisions preventing the courts to review negative rulings on jurisdiction by arbitral tribunals.

5.4 Timing of Challenge

In the event a partial award on jurisdiction is rendered, as this is considered a final decision which can no longer be challenged before the arbitrators, there are no restrictions under Luxembourg law for a party to challenge the jurisdiction of the arbitral tribunal before the courts as soon as this partial award is rendered.

When a final award on merits is rendered, the party will be entitled to challenge the jurisdiction of the arbitral tribunal before the courts at the stage of annulment proceedings.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

The standard of judicial review for questions of jurisdiction is de novo.

5.6 Breach of Arbitration Agreement

See **5.4 Timing of Challenge**.

It should be noted that foreign anti-suit injunctions are unlikely to be enforced in Luxembourg.

5.7 Third Parties

In the absence of an arbitration agreement, third parties cannot be forced to participate to arbitration proceedings. Article 1243 NCCP provides that arbitral decisions may not be invoked against third parties.

A bankruptcy receiver will be bound by a submission agreement concluded by the bankrupt person before he or she entered bankruptcy. The position is not so clear in respect of arbitration clauses. Even though we are not aware of any judicial decision which has ruled on this aspect so far, some authors contend that if the contract including the arbitration clause is executed by the receiver, he or she shall be bound by the arbitration clause.

No provisions under the Luxembourg law on arbitration prevent, in theory, an interested third party from making an application to join arbitral proceedings.

Several decisions of the Luxembourg courts have confirmed that the arbitration clause may be enforceable against a third party in the event of the assignment of a contract.

The 2020 rules of the Arbitration Centre now include a provision dealing with the intervention and joinder of third parties to the arbitration proceedings (see Article 6).

6. Preliminary and Interim Relief

6.1 Types of Relief

Despite Luxembourg law not having an equivalent of the Chapter IV (A) on "Interim measures and preliminary orders" of the UNCITRAL Model Law in its law on arbitration, an arbitral tribunal in Luxembourg is still permitted to award such conservatory measures or interim relief that it deems appropriate.

To do so, an arbitral tribunal will, after a careful assessment of the requested measure, order the appointment of an expert, impose measures to secure evidence, impose a prohibition to dispose of certain goods, etc.

There are no specific procedural requirements for an arbitral tribunal to deal with a request for conservatory measures or interim relief, except for the usual requirements of equal treatment of the parties and due process.

The 2020 rules of the Arbitration Centre now provide for emergency arbitrator provisions (see Article 20 and Appendix III).

6.2 Role of Courts

The judge sitting in summary proceedings (*juge des référés*) may order instruction measures, as well as provisional and conservatory measures. He or she can accordingly (i) grant instruction measures, such as measures aimed at obtaining evidence or preventing the disappearance or destruction of evidence (instruction measures in futurum), or (ii) issue a payment order upon request (*référé-provision*).

Depending on the type of orders requested, the judge sitting in the summary proceedings will take into account the status of the arbitral proceedings and the level of urgency of the requested measures. In the context of a *référé-provision*, it has been ruled that in the event an arbitral tribunal would already be constituted, the request for interim measures would be inadmissible (Court of Appeal, 25 June 1991, No 13074).

It should be noted that parties can exclude the possibility to request interim measures from the judge sitting in summary proceedings. It has been ruled that, without an express renunciation, it cannot be inferred from an arbitration clause that the parties have waived their right to request such interim measures (Court of Appeal, 3 June 2009, No 34203; District Court of Luxembourg, 21 June 2019, No 00209).

Contrary to the arbitral tribunal which cannot issue interim measures against third parties, the judge sitting in summary proceedings can authorise an attachment or a garnishment.

At this stage, Luxembourg law on arbitration does not refer to emergency arbitrators.

6.3 Security for Costs

There are no specific provisions expressly empowering arbitral tribunals to order security for costs.

In the context of courts proceedings and pursuant to the provision on cautio judicatum solvi (Article 257 NCCP), a Luxembourg defendant could request the court, in limine litis – ie, before the debate on the merits of the case – to order a plaintiff (not based in the European Union) to deposit the amount in respect of costs and damages to which the plaintiff could be condemned into an escrow account/provide a guarantee. In the event such judicial bond is granted, the debate on the merits cannot start without the plaintiff remitting the monies.

As decided by case law, general principles relating to judicial proceedings have to be adapted to the specific nature of arbitration (Court of Appeal, 22 July 1904, No 517).

7. Procedure

7.1 Governing Rules

As mentioned in **2.1 Governing Law**, the main source of legislation on arbitration can be found in articles 1224 to 1251 of the NCCP. All rules in respect of the procedure of arbitration are indicated in that section.

7.2 Procedural Steps

Pursuant to its Article 1230, the NCCP provides supplementary rules as to the conduct of arbitral proceedings. As such, the general provisions applicable to national courts must be observed unless the parties explicitly or tacitly agree otherwise. More generally, all the procedural steps of the arbitration proceedings will need to comply with the general principles of civil procedure (eg, ensuring the rights of the defence). The latter principle is essential, as a violation of the rights of the defence constitutes grounds for annulment of the arbitral award.

Due to the initial three-month provision on the duration of arbitral proceedings, Article 1237 NCCP provides that parties should have exchanged their written submissions and exhibits at least 15 days before the end of the arbitral procedure. Nonetheless, the parties and the arbitral tribunal will usually agree at the beginning of the arbitral proceedings on a procedural calendar in respect of written submissions and exhibits. In any event, as long as the adversarial principle has been complied with, the arbitral award cannot be annulled on the grounds that parties have exchanged documents after that 15-day deadline.

7.3 Powers and Duties of Arbitrators

Arbitrators have the same duties as judges and, in that respect, they must handle evidence submitted by the parties in a diligent manner, uphold essential principles of procedural fairness, as well as be and remain impartial and independent of the parties involved in the arbitral tribunal.

7.4 Legal Representatives

There are no particular qualifications or other requirements for legal representatives appearing in international arbitration proceedings in Luxembourg. In practice, the arbitral tribunal can require the parties to provide it with powers of attorney authorising the legal counsel to represent parties during the arbitral proceedings.

8. Evidence

8.1 Collection and Submission of Evidence

In terms of the general approach to the collection and submission of evidence at the pleading stage and at the hearing, the parties are free to organise the arbitral proceedings including the collection and submission of evidence as they want.

As per the usual practice, the evidence rules regarding the production of documents or witness statements are determined at the beginning of the arbitral proceedings by parties and together with the arbitral tribunal or through a reference to institutional rules of procedure. Parties usually take guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

Even though the Luxembourg law on arbitration remains fairly silent with regards to evidentiary proceedings, arbitral tribunals are to ensure that the rules of due process are complied with. If the parties did not provide for this in their arbitration agreement, then the relevant supplementary rules of the NCCP apply (see **8.2 Rules of Evidence**).

8.2 Rules of Evidence

Save for the rule that parties have to exchange their written submissions and documents at least 15 days before the end of the arbitral procedure, Luxembourg law on arbitration does not say much about rules of evidence.

Parties will decide on the rules of evidence either directly by providing for rules of evidence in their arbitration agreement or through reference to institutional rules of procedure.

In March 2018, the Rules of Procedure of the Luxembourg Bar have been amended to allow Luxembourg lawyers to assist witnesses in the redaction of their witness statements and prepare their cross-examination.

In the event parties have not made derogations to the general provisions for the ordinary courts either in their arbitration agreement or in the terms of reference, the relevant supplementary rules of the NCCP will apply. The relevant rules are as follows.

- Each party must prove the facts its claims are based on. Nevertheless, in the absence of a dispute, the facts advanced by a party can be considered as established (Article 58 NCCP). The judge is allowed to order the parties ex officio to procure all evidence admissible by law (Article 59 NCCP): the parties should help in the taking of evidence. If they fail to do so, the judge shall draw the necessary conclusions from a party's lack of co-operation or refusal (Article 60 NCCP).
- When there are no provisions relating to witnesses in the arbitration agreement, witnesses will need to testify under oath (Article 411 NCCP). As a matter of clarification, the law on arbitration is silent as to the hearing of witnesses and does not distinguish between the various types of witnesses which the arbitral tribunal could hear (factual or expert witnesses).
- The arbitral tribunal may not refuse to hear a witness presented by a party on a relevant fact. The same principle also applies to documentary evidence.

As pointed out above, parties are free to derogate to these general provisions of the courts.

On a separate note, arbitrators cannot rule on whether a document is false or forged or even examine documents with such aim (Article 1236 NCCP).

8.3 Powers of Compulsion

The arbitral tribunal does not have powers of compulsion in respect of production of documents or the attendance of witnesses either before or at the hearing. There is no difference in that respect between parties to the arbitration and non-parties. No provisions prevent the arbitrators to draw adverse inference from a failure by a party to comply with a request of evidence production – ie, the arbitrators may interpret this behaviour to the advantage of the other party.

The only coercive power which could potentially be used by an arbitrator, even though the question has yet to be submitted to the courts, is the possibility to order a party to produce accounting records (Article 19 of the Luxembourg Commercial Code).

9. Confidentiality

9.1 Extent of Confidentiality

The confidentiality of arbitration is not anchored in Luxembourg law.

It should nonetheless be noted that in enforcement proceedings before Luxembourg courts, the arbitral award and the arbitration agreement are not part of the public record. However, once a party files an application for annulment of an arbitral award or an appeal against the ex parte decision granting recognition of the arbitral award, the existence of the proceedings becomes part of the public record.

10. The Award

10.1 Legal Requirements

The arbitral award shall be signed by the sole arbitrator or the majority of the arbitrators (in the event there is more than one arbitrator). In the event the arbitrator(s) refuse(s) to sign the arbitral award, a reference to this refusal should be included in the arbitral award (Article 1237 NCCP). There is no formal requirement to indicate the reasons of dissent.

The arbitral award must describe the reasons leading to the arbitral tribunal's decision. It is possible for parties to exempt the arbitral tribunal from rendering a reasoned award (Article 1244(8) NCCP).

The inclusion of certain information in the arbitral award such as the date, the place of arbitration, the names of the parties and their addresses, the names of the legal counsels and of the arbitrator is not prescribed by the law on arbitration.

The law expressly states that an arbitral award cannot be subject to "opposition" – ie, a non-participating respondent to the arbitral proceedings cannot seek to have the arbitral award revoked on the basis that it was neither a party to nor represented in the proceedings (Article 1237 NCCP).

In terms of time limits on the delivery of the arbitral award: while the inclusion of a maximal duration of the arbitral proceedings is not a compulsory requirement, if no indication is made in the arbitration agreement, the duration of arbitral proceedings may not exceed three months. The extension of such duration shall be provided by common agreement of parties (see articles 1228 and 1233 NCCP). The courts have ruled that the oral agreement at a procedural hearing that the arbitrator "could take the time needed to render his [or her] arbitral award" does not constitute an agreement as to a specific deadline (District Court of Luxembourg, 25 January 2011, No 104723).

10.2 Types of Remedies

The law is silent as to the types of remedies an arbitral tribunal can award.

In respect of the possibility for the arbitral tribunal to award punitive damages, it should be noted that under Luxembourg law, damages can only be compensatory and cannot exceed the amount of the loss sustained by the injured party. In that respect, it should be noted that an arbitral award granting punitive damages might face annulment on that basis of violation of Luxembourg public order (Article 1244(1) NCCP).

10.3 Recovering Interest and Legal Costs

The recovery of interest is a matter of applicable law.

Under Luxembourg law, arbitral tribunals are able to award compensatory interest at either the statutory or the contractually agreed rate.

The 2020 rules of the Arbitration Centre are silent on the subject.

Parties are entitled to recover legal costs as well as any other costs related to the arbitration (ie, arbitrators' fees and expenses and administrative costs). The allocation of costs will be decided by the arbitral tribunal based on the provisions found in the arbitration clause or the arbitration rules. If no specific provisions are applicable, an arbitral tribunal enjoys broad discretion and can, on a case-by-case basis, order each party to bear its own costs or apportion costs between the parties based on the relative success of their claims.

The arbitral tribunal could also sanction the abusive behaviour of a party through the allocation of costs.

11. Review of an Award

11.1 Grounds for Appeal

The only way for an arbitral award to be challenged is by way of annulment proceedings.

Article 1244 NCCP provides for the following limited grounds of annulment:

- the arbitral award is contrary to public policy;
- the dispute could not be referred to arbitration;
- the arbitration agreement was not valid;
- the arbitral tribunal exceeded its jurisdiction or powers;
- the arbitral tribunal omitted to decide on one of the issues submitted to arbitration, if the omitted issue cannot be separated from the topics addressed in the arbitral award;

- the arbitral tribunal was improperly constituted;
- there has been a violation of the rights of the defence;
- the arbitral award is not reasoned, unless the parties have expressly exempted the arbitrators from any reasoning;
- the arbitral award contains conflicting provisions;
- the arbitral award has been obtained by fraud;
- the arbitral award is based on evidence that has been declared false by an irrevocable court decision, or that has been recognised to be false; or
- if, since the arbitral award was made, a document or a piece of evidence was discovered that would have had a decisive influence on the arbitral award and that had been withheld by the opposing party.

11.2 Excluding/Expanding the Scope of Appeal

Parties cannot agree to expand the scope of challenge before the courts or reserve their rights as to the lodging of an appeal against the arbitral award before the courts.

No provisions prevent parties from including in their arbitration agreement the possibility of arbitral appeal to a second arbitral instance.

11.3 Standard of Judicial Review

In annulment proceedings, the courts will not review the merits of the case unless the invoked grounds require a limited review thereof, such as a violation of public policy.

12. Enforcement of an Award

12.1 New York Convention

Luxembourg ratified the New York Convention by law of 20 May 1983 and issued a declaration of reciprocity in this respect.

Luxembourg is also a party to the European Convention on International Commercial Arbitration of 21 April 1961, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and more than 100 bilateral investment treaties.

12.2 Enforcement Procedure

In order to enforce an arbitral award in Luxembourg, the requesting party shall seek enforcement by a request addressed to the President of the District Court. There is no specific time limit to request enforcement.

The President of the District Court will on an ex parte basis review the arbitral award. At this stage of the proceedings, he or she can refuse to grant leave for enforcement on the basis of very few limited grounds.

If the President of the District Court successfully grants leave for enforcement, then the order of the District Court can only be attacked by means of an application for annulment. In contrast, if the President refuses the enforcement of the arbitral award, then the concerned party can lodge an appeal in accordance with the ordinary rules of civil procedure.

In terms of the possibility for the courts to refuse the enforcement of an arbitral award, the procedure differs whether the award in question is subject or not to the New York Convention. When it does, the grounds for resisting enforcement are strictly limited to the grounds listed in Article V of the New York Convention. If not, the provisions of Article 1251 NCCP will apply.

Article V lists the following grounds:

- the arbitral award can still be attacked before the arbitral tribunal and the arbitral tribunal has not ordered provisional execution of the award;
- the arbitral award or its enforcement is contrary to public policy or the subject matter of the dispute could not be referred to arbitration; and/or
- if one of the ten grounds for annulment listed in Article 1244 NCCP is established.

Since annulment of an arbitral award is not one of the grounds for refusing enforcement under Article 1251 NCCP, the Luxembourg courts relying on the provisions of Article VII(I) of the New York Convention considered that they had a sufficient basis to enforce arbitral awards annulled at the seat of arbitration (Court of Appeal, 28 January 1999). The Luxembourg courts still take into account the circumstances of each case. For example, it has been ruled that the enforcement proceedings of a foreign arbitral award in Luxembourg shall be stayed until the annulment proceedings have been completed in the country where the arbitral award has been issued (Court of Appeal, 25 June 2015).

In light of recent case law, it seems that a state or state entity raising a defence of sovereign immunity at the enforcement stage would not be successful. Indeed, the Court of Appeal ruled that a state had, by accepting that its dispute was to be resolved by an arbitral tribunal, also accepted that the arbitral award be granted leave for enforcement (Court of Appeal, 27 April 2017).

According to Article IV of the New York Convention for a party to apply for the enforcement of an arbitral award, a version of the arbitral award and of the arbitration agreement are to be translated in an official language of the country in which the award is relied upon.

Although the three official languages in Luxembourg are French, German and Luxembourgish, it seems that the requirements of Article IV of the New York Convention are interpreted with some flexibility by the courts. Indeed, it has been ruled that even though no translation in one of the three official languages had been provided in respect of an arbitral award written in English, leave for enforcement was granted on the basis that the judge was able to understand the original language of the arbitral award (Court of Appeal, 5 June 2014, No 40360).

12.3 Approach of the Courts

Luxembourg courts have a pro-arbitration approach towards recognition and enforcement of arbitral awards.

It should be noted that Luxembourg courts require a manifest, effective and concrete breach of international public order (Court of Appeal 17 May 2018, No 44420). For example, in a recent case law the Luxembourg courts considered that a party opposing enforcement on the ground that the arbitral award is contrary to public policy due to a fraud in the arbitral proceedings, must not only provide clear and convincing evidence of the alleged fraud, but demonstrate that (i) the fraud in question could not be discovered during the arbitration, and (ii) that the fraudulent manoeuvres had an influence on the arbitrators' decision (Court of Appeal 19 December 2019, No 133/19).

13. Miscellaneous

13.1 Class-Action or Group Arbitration

Luxembourg does not provide for class-action arbitration or group arbitration.

13.2 Ethical Codes

No specific ethical codes save for professional standards applicable to counsel and arbitrators conducting arbitral proceedings in Luxembourg are applicable.

13.3 Third-Party Funding

Even though Luxembourg law does not include any specific provisions regarding third-party funders, third-party funding is permitted in practice. With its very rich investment funds environment (Luxembourg is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds) and the rise of third-party funders in commercial international arbitration, Luxembourg could potentially become a niche for third-party funders.

13.4 Consolidation

Luxembourg law on arbitration is silent on the issue of consolidation.

There do not appear to be obstacles for an arbitral tribunal to pronounce the consolidation of separate arbitral proceedings into a single one under certain circumstances. In the event of related contracts with different parties, parties could, for example, at the time of drafting of the contracts, expressly record their consent to a consolidation in case of dispute. Parties to separate proceedings could also appoint the same tribunal in each of the related proceedings and thereupon request consolidation.

To our knowledge, separate arbitration proceedings have not been consolidated by a Luxembourg court.

13.5 Third Parties

A third party may be bound by an arbitration agreement when a contract including an arbitration clause is assigned.

Article 1243 NCCP provides that arbitral decisions may not be invoked against third parties.

Arendt & Medernach is Luxembourg's largest independent law firm. The firm's international team of 350 legal professionals represents clients in all areas of Luxembourg business law, with representative offices in Dubai, Hong Kong, London, Moscow, New York and Paris. The team is composed of lawyers from the following core practice areas: litigation and dispute resolution, banking and financial services, and corporate. Arendt & Medernach assists clients in complex domestic and international commercial arbitrations, and have recently advised clients in ad hoc as well as in institutional arbitrations under the rules of the Arbitration Centre of the Luxembourg Chamber of Commerce, DIS, ICC, etc. The firm has wide experience in both enforcing and opposing international awards before Luxembourg courts and has specific experience in asset tracing. Members of the team also sit as arbitrators in complex disputes, or act as expert witnesses in ICC and CEPANI proceedings.

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