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International Arbitration 2023

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Luxembourg: Law & Practice and Trends & Developments

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LUXEMBOURG

Law and Practice

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Contents

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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 Hong Kong, London, 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 has 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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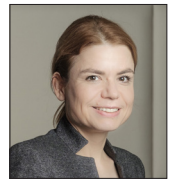

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1. General

1.1 Prevalence of Arbitration

Whilst arbitration is a recognised form of dispute resolution in Luxembourg, domestic parties mostly use litigation. In light of the recent modernisation of the Luxembourg arbitration law, more frequent use of arbitration by parties to domestic commercial disputes is expected.

Since the reform of the law on mediation in 2012, parties have increasingly used mediation as a method of dispute settlement, or as a mandatory step before constituting an arbitral tribunal.

Due to its open economy, Luxembourg is more often the place of enforcement of foreign arbitral awards rather than the seat of an arbitration.

However, as ever more contracts under Luxembourg law include arbitration clauses with Luxembourg as the seat of arbitration, the use of arbitration is expected to 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 events to share expertise and information on arbitration-related matters. The Association also provides a comprehensive database of Luxembourg and international qualified arbitrators and practitioners.

1.2 Key Industries

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

For example, in the period 2015–2019, 20% of the disputes handled by the Arbitration Centre of the Luxembourg Chamber of Commerce were banking and finance-related disputes.

1.3 Arbitral Institutions

International Chamber of Commerce (ICC), Belgian Centre for Arbitration and Mediation (CEPANI) and German Arbitration Institute (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 2015–2019, the Arbitration Centre has seen a 33% increase in the number of cases compared to the period 2010–2014.

1.4 National Courts

Luxembourg does not have a specialised court that has jurisdiction over all arbitration-related disputes. However, there are only some judicial bodies that regularly deal with arbitration-related matters.

The President of the District Court (usually of Luxembourg City), in their capacity as the judge acting in support of the arbitration (*juge d'appui*), has jurisdiction over disputes relating to arbitration proceedings and has exclusive jurisdiction to recognise and enforce arbitral awards.

The Luxembourg Court of Appeal has exclusive jurisdiction over actions to annul awards rendered in Luxembourg as well as appeals against decisions granting or rejecting the recognition (*exequatur*) of foreign arbitral awards rendered outside of Luxembourg.

2. Governing Legislation

2.1 Governing Legislation

The main source of legislation on arbitration can be found in Articles 1224 to 1249 of the New Code of Civil Procedure (NCCP), and is essentially based on French arbitration law and the UNCITRAL Model Law. Unlike French law, Luxembourg law does not distinguish between domestic and international arbitration but establishes a single regime for both types of arbitration. Luxembourg law does not limit the possibility of parties to resort to arbitration in international commercial matters but, subject to certain exceptions, includes all civil and commercial matters in which the parties may freely dispose of their rights.

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 ICSID Convention, the Energy Charter Treaty and more than 100 bilateral investment treaties.

2.2 Changes to National Law

As of 25 April 2023, a new Luxembourg arbitration law is in force. Based essentially on French law and the UNCITRAL Model Law, the new law has modernised the provisions regarding arbitration in the NCCP but does not apply to arbitration agreements concluded, arbitral tribunals constituted, and awards rendered prior to the entry into force of the new law.

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 (*clause compromissoire*) or a submission agreement (*compromis*). Neither is subject to any formal requirements and both can be concluded at any moment notwithstanding any commenced court procedure.

Case law rendered under the previous legal regime also considered the voluntary appear-

ance of the parties before the arbitral tribunal to constitute a valid submission agreement.

In practice, the parties must be very precise in drafting the submission agreement to avoid additional discussions on the seat, applicable law, and language of the arbitration

3.2 Arbitrability

Disputes involving rights that are at the full disposal of a person can be submitted to arbitration (Article 1224 of the NCCP). The mere fact that the subject matter of a dispute may be a matter of Luxembourg public policy does not per se render the dispute non-arbitrable.

Luxembourg law provides that, save for disputes regarding the status of persons and disputes involving a weaker party, most civil and commercial matters can be referred to arbitration. Thus, disputes arising out of, but not limited to, matters regarding status and capacity of persons, 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 1224 of the NCCP). Furthermore, disputes between professionals and consumers, employers and employees, or landlords and tenants in non-professional leases cannot be submitted to arbitration, even after the relevant and underlying contractual relationship has ended (Article 1225, NCCP).

Luxembourg law specifically provides that the opening of insolvency proceedings does not affect arbitration agreements, regardless of whether they were concluded before or after the opening of insolvency. However, parties cannot submit to arbitration disputes regarding or arising out of the conduct of the insolvency proceedings themselves (Article 1226, NCCP).

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 from entering into arbitration agreements.

3.3 National Courts' Approach

Luxembourg national courts generally enforce arbitration agreements.

If one of the parties to an arbitration agreement seizes the courts of a matter falling within the scope of the arbitration agreement and the other party contests the jurisdiction of the court seized, that court will decline jurisdiction and refer the parties to arbitration, unless the arbitration agreement is null and void due to the non-arbitrable character of the matter, or unless the arbitration agreement is manifestly null and void or inapplicable for any other reason (Article 1227-3 NCCP).

This principle has been confirmed by case law rendered under the previous legal regime, 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 jurisdiction of the state courts will not be raised ex officio but must be raised in limine litis by a party. A defendant that fails to do so is deemed to have waived the objection.

Under the previous legal regime, it was held that arbitration agreements could be governed by a law other than the law governing the contract.

The interim relief judge may, under certain circumstances and upon request of the parties, order provisional and conservatory measures, provided the tribunal has not yet been constituted or the remedy is not one that the arbitral tribunal may grant.

3.4 Validity

Although, under the previous regime it could be debated to what extent arbitration agreements are severable, severability is a recognised principle of Luxembourg arbitration law (Article 1227-3, NCCP). Their validity is not affected by the contract being null and void. Furthermore, the nullity of the arbitration agreement does not affect the validity of the contract.

Article 5(4) of the 2020 rules of the Arbitration Centre also endorses the principle of severability 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

Only a natural person who is not deprived of their civil rights, can be designated as arbitrator. If a legal person is designated, it must designate a natural person as arbitrator (Article 1228-1, NCCP).

4.2 Default Procedures

In the absence of party agreement regarding the appointment of arbitrators, the relevant appointments are made by the appointing authority pursuant to the applicable arbitration rules or, in the absence of such an authority, by the judge acting in support of the arbitration (Article 1228-4, NCCP) (the "*juge d'appui*" – see **4.3 Court Intervention**).

Thus, if the dispute is to be submitted to a sole arbitrator and the parties cannot agree on the person to be appointed, the appointment will be made by the appointing authority or, in its absence, by the judge acting in support of the arbitration.

Similarly, where the dispute should be submitted to a panel of three arbitrators and (i) a party fails to appoint its arbitrator within a month or (ii) the two co-arbitrators fails to reach an agreement on the person that will serve as president, the necessary appointment is made by the appointing authority or, failing that, by the judge acting in support of the arbitration.

Where there are multiple parties to an arbitration and they cannot agree on the manner in which to appoint the arbitrators, the appointments are made by the appointing authority or, failing that, the judge acting in support of 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 of the 2020 rules of the Arbitration Centre).

4.3 Court Intervention

The new law introduces the function of the judge acting in support of the arbitration (*juge d'appui)*. The judge acting in support of the arbitration has jurisdiction where the seat of the arbitration is in Luxembourg or, failing that, where one of the following conditions is met:

- Luxembourg law is the chosen procedural law;

- the parties have expressly granted jurisdiction to the Luxembourg courts to resolve disputes regarding the arbitral process; or
- the dispute has a significant connection with Luxembourg.

Finally, the Luxembourg judge acting in support of the arbitration is competent where either party would be exposed to a risk of denial of justice.

Pursuant to Article 1230 of the NCCP, the President of the District Court of Luxembourg is, by default, the judge acting in support of the arbitration, unless the parties have designated another president of a district court in the arbitration agreement. The judge may be seized by either party, the tribunal or any of its members. Unless otherwise provided by law, the judge acting in support of the arbitration renders his or her decisions in the form of an order that is not subject to appeal.

The judge acting in support of the arbitration may intervene in various circumstances and in the absence of an authority whose task is to administer the arbitration (normally an arbitration centre), notably with respect to the appointment of arbitrators.

Articles 1228-3 and 1228-4 NCCP provide four scenarios in which the judge acting in support of the arbitration may intervene in all disputes relating to the appointment of arbitrators, including the following:

- in the event parties do not agree on the choice of the sole arbitrator (where the dispute must be referred to an arbitral tribunal composed of a sole arbitrator);
- in the event a party fails to choose an arbitrator within one month of receipt of the request made by the other party, or if the two arbitrators do not agree on the third arbitrator (where the tribunal should be composed of three arbitrators); and
- in the event the dispute is between more than two parties, and they do not agree on the manner in which to appoint the arbitrators.

The judge acting in support of the arbitration may also intervene to resolve disputes regarding the recusal of arbitrators (Article 1228-7 to 1228-9, NCCP), to extend the deadline of the arbitration (Article 1231-6, NCCP), to order a third party to produce documents (Article 1231-8, NCCP).

4.4 Challenge and Removal of Arbitrators

Article 1228-7 of the NCCP provides that arbitrators can only be challenged if there are legitimate grounds to believe that the arbitrator is not independent and impartial or lacks the qualifications required by the parties. The appointing authority or, in its absence, the judge acting in support of the arbitration may be seized of a dispute regarding the recusal of arbitrators within a month following the discovery of the relevant fact(s).

The specific grounds for challenging arbitrators are not set out in the law on arbitration. However, case law rendered under the previous legal regime confirms that the grounds and procedure for challenging an arbitrator are the same as those used to challenge a judge (Article 521, NCCP). Pursuant to this provision, arbitrators may be challenged if:

- they are a relative of one party;
- they (or a relative) are having a dispute on the same subject or having a dispute with one of the parties;
- they have in the past advised one of the parties on the same subject;

- they have been invited by one of the parties to their home since the beginning of the proceeding; or
- they have received a present from one of the parties since then.

During arbitral proceedings, parties can unanimously decide to dismiss one or several arbitrators (Article 1228-8 of the 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 those used to challenge a judge, it is considered that the disclosure requirements of a judge also apply to an arbitrator (Article 523, NCCP). On that basis, an arbitrator is obliged to disclose facts that may raise doubts as to their impartiality and independence.

The Arbitration Centre 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

Luxembourg law explicitly recognises the principle of competence-competence. The positive aspect of competence-competence is addressed in Article 1227-2 of the NCCP which provides that the tribunal has the power to decide on its own jurisdiction, including any arguments raised regarding the validity of the arbitration agreement itself.

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**, Luxembourg law recognises, to a lesser extent, the negative aspect of competence-competence in Article 1227-3 of the NCCP, regardless of whether an arbitral tribunal had been already constituted or not.

Therefore, at the request of one of the parties, the courts must decline jurisdiction with respect to a dispute falling within the scope of an arbitration agreement, unless the matter is not arbitrable, or if the arbitration agreement is manifestly void or inapplicable.

Article 1227-3 of the NCCP provides that if the arbitral tribunal declares that it does not have jurisdiction, or if the arbitral award is set aside for reasons that preclude a new referral to an arbitral tribunal, the case must be heard by the state court initially seized as soon as the parties or one of them has notified the court's registry and the other parties of the relevant event.

5.4 Timing of Challenge

Luxembourg law does not provide for a specific action that could be brought before the courts to prevent an arbitral tribunal from asserting jurisdiction. However, as mentioned in **5.3 Circumstances for Court Intervention**, a court's decision on its own jurisdiction (ie, whether an arbitration agreement should be given effect) is not subject to any timing related to the arbitration procedure.

A partial award on jurisdiction (or a final award for the same reasons) can be challenged for the lack of jurisdiction of the arbitral tribunal, as those are considered final decisions which can no longer be challenged before the arbitrators. More generally, the award can be challenged as soon as it has been rendered and within a month after the notification of the award to the party.

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 **5.3 Circumstances for Court Intervention**.

5.7 Jurisdiction Over Third Parties

In the absence of an arbitration agreement, third parties cannot be forced to participate in arbitration proceedings. However, pursuant to Article 1231-12 of the NCCP, an interested third party may apply to the arbitral tribunal for leave to intervene in the proceedings. The tribunal must communicate the application to the parties. A party to the arbitration may also apply for a third party to intervene.

However, intervention requires the existence of an arbitration agreement between the parties and the third party as well as the tribunal's approval.

Several decisions of the Luxembourg courts have confirmed that the arbitration clause may be enforceable against a third party in the event of assignment of rights under 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 of the 2020 rules of the Arbitration Centre).

6. Preliminary and Interim Relief

6.1 Types of Relief

Luxembourg law explicitly allows a tribunal to grant, adapt, and modify provisional and conservatory relief measures under the conditions that it deems appropriate, except for attachments that may only be granted by the courts. The party that has requested the interim relief will be held liable for any fees and loss arising out of the attachment if it turns out that the attachment has been wrongfully granted. A tribunal may also order the party requesting interim relief to provide appropriate security (Article 1231-9, NCCP).

Recognition of interim relief measures ordered by a tribunal may only be refused for one of the grounds of annulment of awards rendered in Luxembourg listed in Article 1238 of the NCCP (referred to by Article 1231-9, NCCP). Pursuant to Article 1231-13 of the NCCP, the tribunal may order a penalty payment (*astreinte*) to ensure that the parties comply with its decision.

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

6.2 Role of Courts

As long as the arbitral tribunal has not yet been constituted or when it appears that an arbitral tribunal cannot grant the measure sought, the existence of an arbitration agreement does not prevent a party from seeking interim relief from the competent courts.

Such an application does not imply a waiver of the arbitration agreement.

It should be noted that, unlike the arbitral tribunal, the interim relief judge can issue interim measures against third parties, and the judge acting in support of the arbitration can order a third party to produce documents (Article 1231-8, NCCP).

Luxembourg case law has not ruled on matters involving emergency arbitrators and has not had the opportunity to qualify such a procedure in the scope of jurisdiction.

6.3 Security for Costs

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

In the context of court proceedings and pursuant to the provision oncautio 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 under certain conditions 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 1249 of the NCCP. Most rules regarding arbitration procedure are indicated in that section.

7.2 Procedural Steps

The arbitration law does set specific procedural steps that must be followed in order to initiate an arbitration. More generally, all the procedural steps of the arbitration proceedings will need to comply with certain 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.

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 proceedings.

According to Article 1228-6 of the NCCP, arbitrators must disclose every circumstance likely to affect their independence and impartiality in the eyes of the parties, including circumstances that may arise after acceptance of their appointment.

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

Pursuant to Article 1231-2 of the NCCP, unless the arbitration agreement provides otherwise, the arbitral tribunals applies the procedural rules, including with respect to evidence, that it deems appropriate without being bound to apply the rules of evidence contained in the NCCP.

Article 1231-8(1) of the NCCP provides that the arbitral tribunal may hear the parties and any other party, including witnesses. Unless a foreign law is applicable and that law provides otherwise, oral testimony is not provided under oath.

The same provision enables arbitral tribunals to order parties to produce documents in their possession. In an international dispute, tribunals

will normally be guided by the IBA Rules on the Taking of Evidence in International Arbitration.

According to Article 1231-8(3) of the NCCP, arbitral tribunals may rule on the authenticity of documents, unless these are public or official documents (*actes authentiques*). In such a case, the arbitral tribunal invites the parties to seize the competent judicial authorities.

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

8.3 Powers of Compulsion

The arbitral tribunal does not have direct powers of compulsion in respect of production of documents or the attendance of witnesses at the hearing No provisions prevent the arbitrators from drawing 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

Luxembourg law provides for the confidentiality of arbitral proceedings, except if the parties have provided otherwise (Article 1231-5, NCCP).

Furthermore, enforcement proceedings before Luxembourg state courts for an 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

Although this is not explicitly provided for by the law of arbitration, the award must be handed down in writing.

The tribunal's deliberations must remain secret. The parties may allow, through the arbitration agreement or the applicable rules, separate or dissenting opinions to be appended to the award (Article 1232, NCCP).

The award is adopted by the majority of arbitrators, but must be signed by all arbitrators. In the event an arbitrator(s) refuse(s) to sign the arbitral award, a reference to this refusal should be included in the arbitral award (Article 1232-1, NCCP).

Awards must be reasoned, unless the parties have agreed otherwise (Article 1232-2, 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 Luxembourg law on arbitration, but it is strongly recommended.

Parties may agree on a time limit for the delivery of the award, but usually rely implicitly on a time limit included in the applicable arbitration rules. If no time limit has been agreed, Luxembourg law provides a default time limit of six months from the arbitrator's acceptance of their mandate (Article 1231-6, NCCP). The parties, the person charged with administrating the arbitration procedure (provided the rules allow it), and the judge acting in support of the arbitration may extend the deadline (Article 1231-6 Section 2, NCCP).

An agreement to extend the deadline to render the award should be explicit. The courts have ruled that an 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. Tribunals may grant the remedies provided under the laws that they are called upon to apply. They may also grant interim relief (Article 1231-9, NCCP).

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 may be annulled for being contrary to Luxembourg's public policy (Article 1238 4°, NCCP).

At the request of a party, tribunals may interpret the award, rectify any material errors or omissions in the award or supplement the award where the tribunal has omitted to rule on a claim (Article 1232-4, NCCP).

10.3 Recovering Interest and Legal Costs

The recovery of interest is a matter of applicable law. Under Luxembourg law, arbitral tribunals may 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 may 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 on 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 punish the abusive behaviour of a party through the allocation of costs.

11. Review of an Award

11.1 Grounds for Appeal

Awards rendered in Luxembourg are not subject to any form of appeal before the Luxembourg courts but to an action for annulment before the Court of Appeal (Article 1236, NCCP). Any agreement waiving the action for annulment is ineffective. The action for annulment must be lodged within a month from the award's notification to the parties (Article 1239, NCCP). The

action for annulment does not suspend the award's enforceability (Article 1241, NCCP).

The grounds to annul an award are exhaustively enumerated in Article 1238 of the NCCP:

- the arbitral tribunal has wrongly asserted its jurisdiction;
- the arbitral tribunal was improperly constituted;
- the arbitral tribunal exceeded its mandate;
- the award is contrary to public policy;
- the award is not reasoned, unless the parties have dispensed the arbitrators from giving reasons; and
- there has been a violation of the rights of defence.

As of the 2023 reform, awards rendered in Luxembourg are also subject to the additional, extraordinary remedy of revision aiming at the award's revocation so that a new decision can be made in fact and in law. Revision is possible in four exhaustively enumerated cases all of which pertain to instances where the award was procured through fraud (Article 1243(1), NCCP).

The deadline to seek revision of an award is two months starting from the date on which the victim of the fraud discovered the relevant event (Article 1243(2), NCCP).

Finally, awards rendered in Luxembourg may also be opposed by third parties so that they do not produce an effect against them. This opposition must be made to the court that would have been competent in the absence of the arbitration (Article 1244, NCCP).

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.

11.3 Standard of Judicial Review

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

12. Enforcement of an Award

12.1 New York Convention

Luxembourg ratified the New York Convention by the 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 a foreign arbitral award in Luxembourg, the requesting party must obtain an exequatur order from the president of the district court that is territorially competent in respect of the other party (Article 1245, NCCP). There is no specific time limit to request enforcement.

The president of the district court is seized ex parte. Exequatur may be refused only if the award is tainted by one of the grounds listed in

Article 1246 of the NCCP (Article 1245, Section 3, NCCP).

If the president of the district court refuses exequatur, the requesting party may lodge an appeal before the Court of Appeal within one month the notification of the order refusing to recognise the award. The appeal is governed by the rules applicable in respect of awards rendered within Luxembourg (Article 1245, NCCP referring to Article 1235, NCCP).

If the president of the district court grants exequatur, the party against which recognition was obtained may lodge an appeal against the exequatur order within a month from the service of the order before the Court of Appeal.

If the award brought for recognition and enforcement in Luxembourg falls within the scope of an international treaty, the terms of that treaty displace the grounds to resist recognition and enforcement listed in Article 1246 of the NCCP. Thus, ICSID awards are recognised and enforced pursuant to Articles 53–55 of the ICSID Convention. Similarly, the recognition and enforcement of New York Convention awards may only be resisted on the basis of the grounds listed in Article V of the said Convention.

Pursuant to Article 1246 of the NCCP, the recognition and enforcement of awards that do not fall under an international treaty may be resisted for one of ten grounds including the six grounds for the annulment of awards rendered in Luxembourg (Article 1238, NCCP – see **11.1 Grounds for Appeal**), plus the following:

- after the award has been rendered, it transpires that it was obtained through fraud;
- if decisive documents withheld by another party have surfaced;
- if the award was made based on documents that a court has found to be forgeries; and
- if the award was based on testimony that a court found to be false.

In addition to the above, Article 1247 of the NCCP provides that a party that discovers that the award has been obtained through fraud after the deadline to challenge the exequatur order has expired, may request the Court of Appeal to revise the order within two months from the moment when it became aware of the fraud.

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 into one of the three official languages had been provided in respect of an arbitral award written in English, the exequatur order 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 Luxembourg public policy to not enforce an award (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 grounds that the arbitral award was 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:

- the fraud in question could not be discovered during the arbitration; and
- the fraudulent manoeuvres had an influence on the arbitrators' decision (Court of Appeal 19 December 2019, No 133/19).

The Court of Appeal has, however, ruled that a court can stay exequatur proceedings in the case of a parallel criminal investigation in Luxembourg that could establish fraudulent behaviour of a party, according to the principle that criminal proceedings hold the civil proceedings in abeyance (*le criminel tient le civil en l'état*) (Court of Appeal, 2 December 2021, No 108/21-III-Exequatur).

13. Miscellaneous

13.1 Class Action or Group Arbitration

Luxembourg law does not specifically 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. Lawyers admitted to the Luxembourg Bar must comply with the Bar's ethical rules, even in the context of arbitration proceedings.

However, Article 3.6.5 of the Internal Rules of the Luxembourg Bar Association (*règlement intérieur de l'Ordre des avocats du Barreau de Luxembourg*) allows lawyers admitted to the Luxembourg Bar to adapt to foreign or arbitral procedural rules, norms, or guidelines regarding the handling of witnesses in such procedures.

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 international commercial 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 the case of dispute. Parties to separate proceedings could also appoint the same tribunal in each of the related proceedings and thereupon request consolidation.

As far as is known, separate arbitration proceedings have not been consolidated by a Luxembourg court.

Article 9 of the rules of the Arbitration Centre provide for consolidation of arbitration proceedings.

13.5 Binding of Third Parties

A third party may be bound by an arbitration agreement when a contract including an arbitration clause is assigned. A third party may apply to the courts to oppose an award (Article 1244, NCCP).

Trends and Developments

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Arendt & Medernach

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 Hong Kong, London, 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 has 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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The 2020 Reform of the Luxembourg Arbitration Centre Rules

The Chamber of Commerce has adopted new rules for arbitration, offering a simplified, quicker, and less expensive procedure. These rules entered into force on 1 January 2020 and are available in French and English on the website of the Luxembourg Chamber of Commerce.

The new rules apply to all arbitrations submitted to the Arbitration Centre from 1 January 2020 and provide for a substantial modernisation of the rules before the Arbitration Centre, although parties may agree to apply the previous rules.

Notably, the new rules implement an emergency procedure allowing parties to request urgent interim or conservatory relief that cannot wait until the constitution of the arbitral tribunal (Article 20 of the Rules of Arbitration of the Luxembourg Chamber of Commerce). Furthermore, the rules now provide for a simplified procedure allowing parties to settle disputes up to an amount of EUR1 million or a threshold agreed by the parties (Article 22 of the new rules).

The new rules also allow requests to be made for interim and conservatory relief provided by judges in state courts before and after the constitution of an arbitral tribunal. In other words, prior to the transmission of the file to the arbitrator, the parties may apply to the courts for provisional or conservatory measures and that request should not be deemed as a waiver to the right to arbitration. The latter has also been enshrined in the 2023 Luxembourg arbitration law reform. Following the constitution of the arbitral tribunal, the parties may still apply for conservatory or interim relief to state courts, unless otherwise agreed by the parties. The arbitrator has in any event the power to grant interim relief but may make the granting of such a measure conditional upon the payment of appropriate security.

A simplified procedure for lower-value disputes applies if the amount in dispute does not exceed EUR1 million (main claim and counterclaim taken together) or if the parties have reached an agreement. Unless the parties agree otherwise, cases should be referred to a sole arbitrator who may take all appropriate procedural steps.

The time limit within which the arbitrator must render a final award should be, as in ordinary procedures, six months from the date of the case management conference. However, the council may extend this period.

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New Luxembourg Arbitration law

The Luxembourg Parliament voted on 23 March 2023 to reform and modernise Luxembourg arbitration law through changes to the New Code of Civil Procedure. The new law will take effect after it is published in the *Mémorial* (Luxembourg Official Journal).

Arbitration law has been codified in Luxembourg since the Napoleonic era, but this is the first significant change to the law in many years. This eagerly anticipated reform ensures that Luxembourg's arbitration law is responsive to the realities of international commerce and the growing demand for efficiency in alternative dispute resolution. Luxembourg's arbitration law provides parties with options to resolve their dispute in a discrete, efficient and timely fashion while also ensuring recourse to the support of state courts when necessary.

The new law incorporates elements of French and Belgian law as well as provisions of the UNCITRAL model law on international commercial arbitration, thus bringing the procedural framework applicable to arbitration in line with international standards. In a departure from French law, the Luxembourg law does not distinguish between domestic and international arbitration but rather creates one coherent regime. This choice makes the law well adapted to the realities of arbitration in Luxembourg, which is typically international, and follows the UNCITRAL model that has been widely adopted by other countries in this respect.

Matters excluded from arbitration

The law prioritises giving parties access to arbitration in civil and commercial matters, while expressly excluding certain types of disputes from arbitration. No arbitration agreement may be made concerning the status and capacity of persons. Furthermore, disputes between professionals and consumers, employment disputes and disputes relating to residential leases may not be subject to arbitration even after the end of contractual relations between the parties. Disputes arising from insolvency proceedings may also not be subject to an agreement to arbitrate, although the opening of insolvency proceedings does not prevent the application of existing arbitration agreements or the conclusion of such agreements during the course of the insolvency proceedings.

The arbitration agreement – validity and separability

The law broadly upholds the right of parties to have recourse to arbitration, even after proceedings before state courts have already been initiated.

Parties may enter into an arbitration agreement either by concluding an arbitration clause before any dispute arises in relation to their contract(s), or via an agreement to submit an existing dispute to arbitration (known as a *compromis*). The law formally recognises the separability and autonomy of the arbitration clause, meaning that its validity is not affected by the invalidity of the contract and vice versa. The law formally enshrines the principle of "competence-competence", meaning the arbitral tribunal is competent to rule on its own jurisdiction over a dispute.

If a dispute that falls within the scope of an arbitration agreement is brought before a state court, the court must decline jurisdiction unless it finds the subject matter of the dispute to be non-arbitrable, or the arbitration agreement to be manifestly null and void, or manifestly inapplicable. The state court may not, however, assert its lack of jurisdiction over a dispute on its own initiative.

Intervention by state courts – interim measures and the supporting judge (juge d'appui)

Several provisions of the new law give parties the option of requesting the intervention of state courts to support resolution of their dispute throughout the arbitration process. As provided by Article 1227-4, the existence of an arbitration agreement does not preclude a party from applying to a state court for interim measures before the arbitral tribunal is constituted or when the tribunal cannot grant the requested measure – eg, in the case of an attachment procedure or a constraint placed on third parties. Furthermore, an application for an interim, provisional or conservatory measure does not imply a waiver of the arbitration agreement.

To facilitate the progression of an arbitration, the law introduces the role of the supporting judge, or "*juge d'appui*". Pursuant to Article 1229, the supporting judge may be involved when:

- the designated seat of the arbitration is Luxembourg;
- in the absence of such designation, the parties have agreed to submit the arbitration to Luxembourg procedural law;
- the parties have agreed to the jurisdiction of Luxembourg courts over disputes relating to the arbitral proceedings; or
- there is a significant link between the dispute and Luxembourg.

The supporting judge is the president of the district court designated in the arbitration agreement, or the President of the District Court of Luxembourg in the absence of a designation. The supporting judge plays an important role in resolving difficulties and disputes that may arise during the arbitration. According to Article 1230, their intervention may be requested by a party, the arbitral tribunal or a single member of the arbitral tribunal.

The law gives the supporting judge authority to intervene in disputes involving the tribunal, including:

- constitution of the arbitral tribunal, failing agreement by the parties or a decision by the person in charge of organisation of the arbitration (Article 1228-3);
- appointment of the arbitrator or arbitrators, failing agreement by the parties or a decision by the person in charge of organisation of the arbitration (Article 1228-4);
- settlement of any other disagreements relating to the appointment of arbitrators, failing agreement by the parties or a decision by the person in charge of organisation of the arbitration (Article 1228-4);
- settlement of disagreements concerning whether an arbitrator should be removed or recuse themselves due to legitimate doubts as to their impartiality or independence, or lack of required qualifications, if the person in charge of organising the arbitration does not settle the disagreement (Articles 1228-7 and 1228-8); and
- settlement of disagreements as to the reality of the motive for an arbitrator's decision to abstain or resign, if the person in charge of organising the arbitration does not settle the disagreement within one month following their impediment, abstention, or resignation (Article 1228-99).

The supporting judge may also intervene to:

- extend the duration of the arbitral tribunal's mission (limited to six months from the date the last of the arbitrators accepts their mandate or to a duration specified in the arbitra-

tion agreement), failing agreement by the parties or a decision by the person in charge of organising the arbitration (if authorised) (Article 1231-6);
- order the production of documents by third parties upon the request of one of the parties based on the invitation of the arbitral tribunal (Article 1231-8); and
- reconvene the arbitral tribunal after the award has been rendered, failing agreement by the parties to do so, for interpretation, correction or supplementation of the award (Article 1232-4).

Annulment and enforcement of arbitral awards

For the purposes of enforcement of an arbitral award, Luxembourg law does not distinguish between "international" and "domestic" arbitration awards but rather between arbitral awards rendered in Luxembourg and those rendered abroad. If Luxembourg is the seat of the arbitration, the award is deemed to have been rendered in Luxembourg (Article 1228).

Awards rendered in Luxembourg may be enforced using a simplified procedure:

- The party requesting enforcement will file its request for an order of exequatur before the district court of the jurisdiction in which the award was rendered. This exequatur procedure is not adversarial and an order granting exequatur is not subject to appeal.
- Under Article 1234, the court may refuse to grant exequatur only if the award is manifestly contrary to one of the grounds of annulment provided in Article 1238.
- The order granting exequatur is not subject to any appeal separate from the appeal against the award. An order refusing exequatur must state the reasons for refusal and may be appealed before the Luxembourg Court of Appeal within one month of service of the order on the applicant. In the context of this proceeding, a party opposed to enforcement may bring an action for annulment of the award before the Court of Appeal.
- Under Article 1238, actions for annulment of an award must be made within one month of notification of the award and only on one of the limited grounds enumerated in the law (eg, the tribunal wrongly asserted its jurisdiction, the award is contrary to public order or the tribunal failed to state reasons).
- Without exception, the award may not be challenged, appealed, or subject to cassation proceedings before a state court. It may only be the subject of an action for annulment before the Court of Appeal. Any provision to the contrary shall be void (Article 1236).
- Application for review in order to have the award revoked and decided again may only be made on limited grounds – eg, the award having been tainted by fraud or based on evidence declared false after the award was made.
- Third parties may oppose an award before the court that would have had jurisdiction in the absence of arbitration.

Before the reform, parties were required to request the setting aside of an award before the district court, a decision which could then be appealed to the Court of Appeal. Given that under the reformed law, requests for annulment go directly before the Court of Appeal, the reform streamlines and accelerates the enforcement process. Dismissal of the action for annulment makes the award or the provisions of the award not censured by the Court of Appeal enforceable (Article 1242).

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Awards rendered outside Luxembourg may similarly be enforced in Luxembourg only through an order of exequatur granted by the President of the District Court within the jurisdiction in which the person against whom enforcement is sought is domiciled or resides, or failing this, within the jurisdiction where the award is to be enforced.

The decision on exequatur may be appealed within one month of notification. Insofar as recognition and enforcement is not governed by a treaty (such as the 1958 New York Convention or the ICSID Convention), the Court of Appeal may only refuse enforcement on the grounds enshrined in Article 1246. The first six grounds are the same as the ones that also apply to awards rendered in Luxembourg (Article 1238). However, Article 1246 adds four additional grounds on the basis of which awards rendered abroad may be refused enforcement (fraud, discovery of decisive documents, recognition of documents as false or recognition of testimonies as false after the award).

As provided in Article 1245, the exequatur order cannot be granted if the award is manifestly affected by one of the grounds for annulment provided for in Article 1246.

Other notable provisions

The reform makes it clear that, unless the parties have agreed otherwise, the arbitral tribunal has the authority to order provisional or conservatory measures and may require parties to provide adequate security to back their requests for such measures (Article 1231-9). The arbitral tribunal may also consent to the intervention of a third party in the proceedings (Article 1231-12).

Conclusion

The reform makes Luxembourg an even more attractive choice as a seat of arbitration. Luxembourg now has a modernised arbitration framework to match its status as a sophisticated, multilingual and multicultural legal centre.

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