# THE INTERNATIONAL ARBITRATION REVIEW

Twelfth Edition

**Editor**
**James H Carter**

THE LAWREVIEWS

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TWELFTH EDITION

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# CONTENTS

# PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

**James H Carter**
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2021

Chapter 25

# LUXEMBOURG

*François Kremer and Séverine Hamm*[1]

## I INTRODUCTION

Located in the centre of Europe, Luxembourg is a multicultural jurisdiction with a strong economy. As a leading financial place in Europe, Luxembourg is an appropriate jurisdiction for international arbitration and is regularly the place for the enforcement of foreign arbitral awards. The choice of Luxembourg as an arbitration centre is also justified by the numerous advantages of the country, including its neutrality as well as its political and social stability.

### i Structure of the law

The legislation on arbitration proceedings in Luxembourg can be found in Articles 1224 to 1251 of the New Code of Civil Procedure (NCPC). These provisions apply for domestic or international arbitration in commercial or civil matters.

Under Luxembourg law, the parties are free to choose the rules applicable to their arbitration. They may decide to settle disputes through arbitration by using the rules of the Arbitration Centre of the Luxembourg Chamber of Commerce or of any another institution such as the International Chamber of Commerce (ICC), the Belgian Centre for Arbitration and Mediation or the German Arbitration Institute.

Luxembourg is also a party to the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards (New York Convention), the Energy Treaty Charter, the European Convention on International Commercial Arbitration of 1961, the Washington Convention of 1965 and many bilateral treaties.

### ii Domestic and international arbitration law

Under Luxembourg law, the same provisions apply to both domestic and international arbitration.

#### *Arbitrability*

The parties can in principle agree to arbitration on rights freely disposable. However, certain matters cannot be submitted to arbitration. Cases regarding the status or capacity of persons, conjugal relationships, divorces, legal separation applications, representations of incapacitated persons or rights of an absent person or one who is presumed absent (Article 1225 NCPC) are excluded from arbitration.

1 François Kremer is a partner and Séverine Hamm is counsel at Arendt & Medernach.

***Enforceability***

To be enforceable, the consent to arbitration shall either take the form of an arbitration clause or a submission agreement. In the first scenario, the parties agree in advance to submit to arbitration all future disputes arising between them, while in the second scenario they decide to submit an existing dispute to arbitration.

The arbitration clause does not require any formal conditions to be valid, contrary to the submission agreement, for which formal requirements are necessary (Article 1227 NCPC). As a matter of fact, the latter may only be drawn up in the form of minutes before the appointed arbitrators, by an act of a Luxembourg notary or by private deed. The submission agreement shall also indicate the subject matter of the dispute and the names of the arbitrators to be valid.

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.

***Arbitral tribunal***

The parties are free to select arbitrators in Luxembourg, and there are no restrictions as to certain professionals.

By default, the tribunal will be composed of three arbitrators, both parties choosing one each, who will then appoint the third arbitrator (Article 1227 NCPC).

The President of the Luxembourg District Court can intervene if any difficulties arise regarding the nomination of the arbitrators, for example if a party fails to appoint an arbitrator or if the third arbitrator cannot be jointly appointed by the two appointed arbitrators, or if there are more than two parties that cannot agree on the nomination of the three arbitrators.

According to Article 1235 NCPC, arbitrators can only be challenged for reasons arising after the conclusion of the submission agreement designating them. Although there are no specific provisions, it is admitted that the grounds and procedure to challenge an arbitrator are the same as those to challenge a judge, for instance if there is a family relationship between the arbitrator and a party, or if he or she has advised one of the parties in the past on the same subject.

During the course of the arbitration proceedings, the parties can decide to dismiss one or several arbitrators by common consent.

Like judges, arbitrators shall at all times remain impartial and independent.

In terms of procedure, the NCPC provides supplementary rules regarding the arbitration proceedings (Article 1230 NCCP).

Arbitrators must respect the general principles of civil procedure, such as the rights of defence and due process of law, whose violation may constitute a ground for annulment of an award.

The maximum duration of arbitral proceedings is three months from the day of the agreement to arbitrate if nothing is indicated in the agreement. An extension of this duration is possible, by common consent, according to Articles 1228 and 1233 NCCP.

**iii Structure of the courts**

In Luxembourg, there are different types of jurisdiction depending on the amount in dispute and the subject matter of the dispute. Basically, small disputes are handled by lower courts while most disputes are referred to the District Court.

There are three levels of jurisdiction. The decisions of the District Court can be appealed before the Court of Appeal and the decisions of the Court of Appeal can be submitted to the Court of Cassation.

The Luxembourg courts are quite reluctant to intervene in issues of jurisdiction. If one of the parties to an arbitration agreement refers a dispute to a national court, that court will stay the proceedings and refer the parties to an arbitral tribunal.

The summary courts may, upon request of the parties, order provisional and conservatory measures. However, the parties can renounce this option of requesting interim measures as long as the renunciation is explicit.

Domestic arbitral awards can only be challenged before the District Court by way of annulment proceedings. Article 1244 NCPC provides for limited grounds for annulment.

During annulment proceedings, the courts will not review a case on the merits but will limit the scope of its review to the limited grounds for annulment listed in Article 1244 NCPC.

### iv Local institutions

The principal local institution is the Arbitration Centre of the Luxembourg Chamber of Commerce, which was launched in 1987 and which has built its own institutional system of dispute resolution with specific rules of arbitration.

The Arbitration Centre operates under the authority of an Arbitration Council (Council), which has five members, including the President of the National Luxembourg Committee of the International Chamber of Commerce (ICC), as President, the Luxembourg member of the Arbitration Court of the ICC, the President of the Bar of Luxembourg, the Director General of the Chamber of Commerce and the President of the Institute of Auditors. Its role is to organise and monitor the good operation of arbitration procedures before the Arbitration Centre, according to the Arbitration Rules of the Centre.

Most of the cases submitted to the Arbitration Centre relate to company law, either because they concern the functioning of companies (cooperation and services agreements, commercial contracts (distribution, agency, franchising), construction contracts and shareholder agreements), or because they relate to difficulties arising from a transfer of shares (transfer and post-acquisition problems). Arbitration is also used in the insurance sector.

The Arbitration Centre has been conducting an increasing number of cases.

### v Trends

In light of a growing desire to develop arbitration, Luxembourg practitioners have revived the Luxembourg Arbitration Association, which was originally founded in 1996. This Association aims at promoting arbitration in Luxembourg by supporting authorities, parties and institutions by providing them with information, advice and assistance on arbitration-related matters.

October 2013 saw the creation of the Think Tank for the Development of Arbitration, bringing together judges, lawyers and law professors. It aims to reflect the development of a modern and efficient national legislative framework adapted to the evolution of international trade. A proposal from the Think Tank resulted in the submission of a bill of law to Parliament in 2020 with the objective of reforming the legal provisions applicable to arbitration in Luxembourg.

## II THE YEAR IN REVIEW

### i Developments affecting international arbitration

***Legislation: an upcoming arbitration law***

On 15 September 2020, the Minister of Justice submitted a bill of law to reform the procedural framework applicable to arbitration in Luxembourg. This bill of law is currently pending with Parliament.

The bill is based on a proposal from the Think Tank for Arbitration inspired by Belgian and French arbitration law, as well as some elements from the UNCITRAL Model Law.

This reform of the law is an important step in the development of arbitration in Luxembourg as it takes into account the recent changes in French, Belgian and Luxembourg law and will definitively modernise Luxembourg's arbitration law to align it with international arbitration standards.

***Arbitration institution rules: new rules of arbitration of the Chamber of Commerce***

The Chamber of Commerce has adopted new rules of 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.

They are applicable to all arbitration proceedings filed with the Arbitration Centre from said date onwards, and provide for a thorough revision of the applicable rules before the Arbitration Centre. The parties may agree that the previous version of the Rules shall apply.

The introduction of an urgent procedure allowing parties to request urgent interim or conservatory measures that cannot wait for the constitution of an arbitral tribunal on the merits (Article 20 of Rules of Arbitration of the Luxembourg Chamber of Commerce), as well as a simplified procedure allowing parties to settle disputes not exceeding €1 million or a threshold agreed to by the parties (Article 22 of Rules of Arbitration of the Luxembourg Chamber of Commerce), are two major elements of these new rules.

Judges may order interim relief as well as provisional and conservatory measures, as provided in the new Rules of Arbitration of the Luxembourg Chamber of Commerce, either before or after the constitution of an arbitral tribunal. Before the file is transmitted to the arbitrator, the parties may apply for interim or conservatory measures to the competent courts. The application must not be considered as a waiver of the arbitration agreement and must not affect the powers reserved to the arbitrator in this respect. After the constitution of the arbitral tribunal, parties may also request conservatory or interim measures unless otherwise agreed by the parties. The arbitrator may make the granting of any such measure subject to the payment of an appropriate security.

A simplified procedure for disputes of lower value will apply in the event that a dispute amounts to no more than €1 million (principal claim and counterclaim) or if an agreement exists between the parties. Unless otherwise agreed by the parties, cases shall be referred to a sole arbitrator, who will be able to adopt all appropriate procedural measures. The time limit within which the arbitrator must render a final award is six months from the date of the case management conference. However, the Council may extend this time limit.

### ii Arbitration developments in local courts

#### *Interpretation and enforcement of arbitration clauses*

Under Luxembourg law, there is no provision on the separability of an arbitration clause from the underlying agreement. While Luxembourg case law has recognised the autonomy of the arbitration clause, this autonomy is of relative effect. If the arbitration clause was inserted in an invalid agreement, the clause would not stand. However, according to Article 5 of the new Rules of Arbitration of the Luxembourg Chamber of Commerce, unless the parties decided otherwise, the arbitrator shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void.

Luxembourg courts have always been keen to enforce arbitration agreements. If one of the parties does not comply with the arbitration agreement by filing its claim before the national courts rather than before an arbitral tribunal, the national court will stay the proceedings and refer the dispute to arbitration, in accordance with the arbitration clause. This principle of incompetence of the judicial courts before an arbitration agreement has been confirmed by case law and applies also where an arbitral tribunal has not yet been constituted at the time an action was filed before the national courts.[2] Courts have held, however, that an agreement to arbitrate may be revoked by unilateral, non-simultaneous renunciation on the part of both parties; for example, in the case that both parties decline to invoke an arbitration clause in proceedings before a national court.[3]

The Luxembourg courts have recently recalled that it is a principle of law that the existence of an arbitration agreement does not preclude judicial judges from hearing applications for interim measures, taking provisional measures or allocating a provision, unless there is an express agreement between the parties to exclude these cases from the jurisdiction of the summary proceedings.[4] A recent decision confirmed that the judge sitting in summary proceedings has jurisdiction to issue an interim payment order, but only when the requirement of urgency has been met.[5]

An arbitration clause must be interpreted restrictively and relates only to the merits. In the absence of an explicit expression of will, the waiver by the parties of their right to apply for interim measures cannot be inferred from the arbitration clause.[6]

#### *Qualifications of and challenges to arbitrators*

Luxembourg arbitration law provides a total freedom to select arbitrators, without restrictions regarding nationality, residence, profession, admission to a bar or experience. Any person above the age of 18 and capable of entering into a judgment may act as an arbitrator. The arbitrator could thus be a Luxembourg judge, a civil servant or an attorney without any need of particular qualifications. However, the parties may agree to exclude certain categories of persons.

2 Luxembourg District Court 28 April 2016 No. 171853, Luxembourg District Court 22 January 2019 No. 176.980.

3 Court of Appeal 29 January 2020 No. CAL-2019-00743.

4 Luxembourg District Court 21 June 2019 No. TAL-2019-00209.

5 Court of Appeal 10 February 2021 No. CAL-2020-00829.

6 Luxembourg District Court 22 May 2018 No. TAL-2017-00349, TAL-2018-01437.

Even if no deontology or ethical code is imposed for arbitrators, usual professional standards apply and the arbitrators shall be impartial and independent. The Arbitration Centre has reasserted this requirement in Article 10 of the new Rules of Arbitration of the Luxembourg Chamber of Commerce.

The President of the Luxembourg District Court may intervene in the appointment of arbitrators in three situations listed in Article 1227 NCCP:

*a* in the event a party fails to appoint an arbitrator and within eight days from the receipt of a formal notice from the other party to do so, the President of the District Court will have jurisdiction to appoint an arbitrator; this decision will not be subject to appeal;

*b* in the event the two chosen arbitrators do not agree to choose a third arbitrator, the President will, upon the request of one party, appoint this arbitrator; and

*c* in the event there would be more than two parties to the arbitration and those parties cannot agree on the nomination of the arbitrators, the President of the District Court shall appoint the three arbitrators.

According to Article 1235 NCPC, arbitrators may only be challenged for reasons arising after the signing of the arbitration clause.

According to Article 11 of the new Rules of Arbitration of the Luxembourg Chamber of Commerce, an arbitrator may be challenged for lack of impartiality or independence. The request shall be made to the Secretariat. The Council will then decide on admissibility and, if necessary, on the merits of the challenge after having heard the arbitrator or the parties, or both. When an arbitrator is replaced, the Council decides whether or not to follow the original nominating process.

***Judicial assistance in evidence gathering for arbitration proceedings***

The Luxembourg law on arbitration rules provides that the parties have to exchange their written submissions and exhibits at least 15 days before the end of the arbitral procedure. Except for this requirement, the parties are free to organise the arbitration proceedings.

All documents such as witness statements will thus be collected according to the agreement of the parties. Most of the time, parties take guidance from the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

The arbitral tribunal will have to ensure that the rules of due process are complied with during the proceedings.

Unless the parties have agreed otherwise, the relevant rules of the NCPC will apply, and among these, the obligation for each party to prove the facts upon which the claim is based. Luxembourg law does not know the concept of discovery as found in the Anglo-Saxon tradition.

The arbitral tribunal does not have the power of compulsion with respect to production of documents or the attendance of witnesses either before or at the hearing.

In March 2018, the rules of procedure of the Luxembourg Bar were amended to allow Luxembourg lawyers to assist witnesses in the drafting of their witness statements and the preparation of their cross-examination.

***Enforcement or annulment of awards***

Domestic awards can only be challenged by way of annulment proceedings. Article 1244 NCCP provides limited grounds allowing the annulment of domestic awards:

*a* the arbitral award is contrary to public policy;

*b* the dispute could not be referred to arbitration;
*c* the arbitration agreement was not valid;
*d* the arbitral tribunal exceeded its jurisdiction or powers;
*e* the arbitral tribunal omitted decisions on one of the issues submitted to arbitration, if the omitted issue could not be separated from the topics addressed in the arbitral award;
*f* the arbitral tribunal was improperly constituted;
*g* there has been a violation of the rights of the defence;
*h* the arbitral award is not reasoned, unless the parties have expressly exempted the arbitrators from any reasoning;
*i* the arbitral award contains conflicting provisions;
*j* the arbitral award has been obtained by fraud;
*k* 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
*l* 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.

The court will not review a case on the merits.

The recognition and enforcement of a foreign arbitral award are done by way of an *ex parte* application for an enforcement order to the President of the District Court. Such order is subject to appeal.

Article 1251 NCCP provides the list of limited grounds that allow a judge to refuse the exequatur of an award, except if the New York Convention applies, in which case only grounds listed in Article V of the New York Convention can be invoked.[7]

Luxembourg case law regularly states that these grounds shall be restrictively interpreted.[8]

The effect of the proceedings would not be to annul the foreign arbitral award, but to prevent its enforcement in Luxembourg.

As for the annulment proceedings, the Luxembourg judge will not review the case on the merits.

Most of the time, a violation of the public order is invoked by a party to challenge the enforcement of an award. However, Luxembourg courts require a manifest, effective and concrete breach of international public order.[9] Case law has repeatedly stated that public order cannot be used to establish new cause of invalidity (listed in Article 1244 NCPC) or a re-examination of the merits of the case (Court of Appeal 17 May 2018 No. 44420, Court of Appeal 5 November 2020 No. CAL-2019-00415).

The Luxembourg Court of Appeal has held that Article 1251 NCPC must be interpreted as meaning that in the event of the application of the New York Convention, the domestic provisions will not apply and the judge will only take into account the provisions of the New York Convention. This was a confirmation by the court of its reversal of practice as initiated by a judgment of the Court of Appeal of 25 June 2015. The court further found that the *favor*

7 See, e.g., Court of Appeal 5 November 2020 No. CAL-2019-00415.
8 Court of Appeal 17 May 2018 No. 44420.
9 Court of Appeal 17 May 2018 No. 44420.

*arbitrandum* provision – Article VII First Paragraph of the New York Convention – does not lead Article 1251 NCPC to be interpreted in a way that it would allow the enforcement in Luxembourg of annulled foreign arbitral awards.[10]

Luxembourg courts have a pro-arbitration approach towards the enforcement of foreign awards.

## III OUTLOOK AND CONCLUSIONS

Luxembourg arbitration has seen a revival in recent years, and we expect that the number of arbitration cases will continue to grow. Luxembourg continues to actively develop and promote arbitration as an alternative means of dispute resolution, including through the activities of the Luxembourg Arbitration Association, the Chamber of Commerce of Luxembourg, and legal reforms.

10 Court of appeal 27 April 2017 No. 40105.

**Appendix 1**

# ABOUT THE AUTHORS

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François Kremer is a partner in the litigation and dispute resolution practice of Arendt & Medernach. He specialises in international litigation, in particular in the fields of asset tracing, white-collar crime and corporate disputes.

He served as chair of the Luxembourg Bar Association until 2020. Prior to holding this office, he served as the vice-chair from 2016 to 2018. He has been a member of the Luxembourg Bar since 1988. As chair of the Luxembourg Bar, he is a member of the Council of Arbitration of the Luxembourg Arbitration Centre.

He is approved as a mediator at the Civil and Commercial Mediation Centre.

He also serves as Honorary Consul-General of Thailand in Luxembourg.

He previously served as a chair of the Disciplinary Council of the Luxembourg Bar and also as a member of the Luxembourg Bar Council.

François Kremer holds a Maîtrise en Droit des Affaires from the Université Paris I Panthéon-Sorbonne (France) as well as a Master of Laws degree (LLM) from the London School of Economics and Political Science (UK).

In *Chambers Europe* 2018, interviewees hold François Kremer in high regard for his litigation skills, with one source saying that he is 'one of best litigators in Luxembourg', with a 'very strong track record and reputation'. He is considered a 'superb' team head by clients in *The Legal 500* 2018 guide.

He speaks English, French, German and Luxembourgish.

**SÉVERINE HAMM**

*Arendt & Medernach*

Séverine Hamm is counsel in the dispute resolution practice of Arendt & Medernach.

She specialises in civil and commercial law, advising domestic and international clients on corporate and finance disputes. She also acts as counsel in domestic and international arbitration cases and has wide experience in both enforcing and opposing international arbitral awards before our national courts. She has been a member of the Luxembourg Bar since 2006.

Séverine Hamm holds a postgraduate degree in business law and tax (DESS droit des affaires et fiscalité; DJCE) from the Université Nancy II (France) as well as a Master of Laws degree (LLM) in international commercial and business law from the University of East Anglia (UEA, UK).

She is a board member of the Luxembourg Arbitration Association. She speaks English and French.

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