GAR KNOW HOW COMMERCIAL ARBITRATION

Luxembourg

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Infrastructure

1. Is your state a party to the New York Convention? Are there any noteworthy declarations or reservations?

Luxembourg is party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, approved by the Law of 20 May 1983 (the New York Convention). The New York Convention entered into force subject to a reciprocity reservation allowing Luxembourg to apply the Convention to the recognition and enforcement of arbitration awards only when these are made in the territory of another contracting state. The Law of 1983 does not include a commercial reservation. Luxembourg courts have clarified on numerous occasions the functioning of the New York Convention of 1958.

2. Is your state a party to any other bilateral or multilateral treaties regarding the recognition and enforcement of arbitral awards?

Luxembourg is also party to the European Convention on International Commercial Arbitration of 1961, the Convention on Conciliation and Arbitration within the OSCE of 1992, the Energy Charter Treaty of 1994 and over 100 bilateral investment treaties. Luxembourg has expressed its intention to withdraw from the Energy Charter Treaty but has not yet taken any steps to leave.

Luxembourg is also a party to the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), ratified by the Luxembourg parliament on 8 April 1970.

Pursuant to article 54(1), ICSID awards shall be enforced as if they were final court judgments in the country where enforcement is sought. In a judgment dated 11 February 2021, the Court of Appeal confirmed the recognition and enforcement of an award issued by an ICSID panel. The Court of Appeal gave full effect to articles 53 and 54 of the ICSID Convention, which provide that the parties are bound by the award and that it shall not be subject to appeal or any other remedy except those provided for in the ICSID Convention, and that contracting states (such as Luxembourg) shall recognise an ICSID award as binding and enforce the pecuniary obligations imposed by such an award as if it were a final judgment of a court of that state. The only condition for the refusal of the recognition relates to the existence of the award.

3. Is there an arbitration act or equivalent and, if so, is it based on the UNCITRAL Model Law? Does it apply to all arbitral proceedings with their seat in your jurisdiction?

As of 25 April 2023, a new Luxembourg Arbitration Law is in force. This reform is in line with a worldwide trend of reforms to increase recourse to arbitration as an alternative means of resolving disputes. It also secures Luxembourg's position as a place of enforcement of foreign awards. The new arbitration law is provided for in articles 1224–1249 of the New Code of Civil Procedure (NCPC).

Areas of focus on the new Arbitration Law include party autonomy, protection of weaker parties, equality of awards and judicial decisions and efficiency of arbitration and arbitral awards.

The new Arbitration Law only applies to arbitration agreements concluded, arbitral tribunals constituted, and arbitral awards rendered, after the entry into force of the new law.

The Luxembourg Arbitration Law is essentially based on the UNCITRAL Model Law and on French Arbitration Law. However, unlike French law, the new Luxembourg Arbitration Law does not distinguish between international and domestic arbitrations, but rather establishes a common regime.

4. What arbitration bodies relevant to international arbitration are based within your jurisdiction? Do such bodies also act as appointing authorities?

The main arbitration institution in Luxembourg is the Arbitration Centre set up by the Chamber of Commerce of Luxembourg in 1987 (the Luxembourg Arbitration Centre). The Luxembourg Arbitration Center is managed by its Council, which is assisted in its work by the Secretariat.

The Luxembourg Arbitration Centre makes available model arbitration clauses in German, English and French to be inserted in the parties' agreement in the event of future disputes, but also to be agreed upon after a dispute arises if the parties have not provided for arbitration as a dispute resolution mechanism. The arbitration would be conducted under the Rules of the Arbitration Centre, which are inspired by the Rules of Arbitration of the International Chamber of Commerce (ICC).

The Rules of the Luxembourg Arbitration Centre have recently been amended and updated, and the new Rules came into effect on 1 January 2020. The new Rules are applicable to all proceedings submitted to the Arbitration Centre from that date, unless the parties agreed that the previous version of the Rules applies. Changes made as part of this revision are intended to increase the efficiency of the arbitration process and meet the expectations of the parties. In particular, an emergency procedure has been introduced allowing parties to request urgent provisional or protective measures that cannot wait for the constitution of an arbitration tribunal, as well as a simplified procedure allowing parties to settle disputes that do not exceed €1 million, or disputes for which parties have agreed to use this simplified procedure, more quickly and less expensively.

The Rules are available here.

If the parties elect to arbitrate in Luxembourg pursuant to the ICC Rules, the Secretariat of the Arbitration Centre may administer the case pursuant to these Rules rather than its own Rules, given the similarities between the ICC and the Rules of the Luxembourg Arbitration Centre. The Secretariat of the Arbitration Centre is, however, unlikely to administer disputes pursuant to another set of arbitration rules.

Ex officiomembers of the Council include the President of the Luxembourg National Committee of the ICC, the Luxembourg member of the Arbitration Court of the ICC, the President of the Luxembourg Bar, the General Director of the Chamber of Commerce and the president of the Auditors Institute.

Statistics made available by the Luxembourg Arbitration Centre show that, during the period 2015–2019, the number of cases filed before the Centre increased by 60 per cent compared to the period 2010–2014. Eight-five per cent of the arbitration proceedings include at least one non-Luxembourg-based party and 70 per cent of the arbitration proceedings are sole arbitrator proceedings. In terms of industries concerned, one-third of the cases submitted relate to banking/finance matters and one-third relate to company law and shareholders' disputes.

The contact details of the Luxembourg Arbitration Centre are as follows:
7, Rue Alcide de Gasperi
L-2981 Luxembourg
Telephone: +352 42 39 39 300
Email: arbitrage@cc.lu
Website: www.cc.lu

Other widely chosen institutions include the ICC, the Belgian Center for Arbitration and Mediation (CEPANI) and the German Arbitration Institute (DIS).

In 2019, Luxembourg arbitration practitioners have relaunched the Luxembourg Arbitration Association (the LAA), a non-profit organisation founded in 1996 dedicated to the promotion and development of the arbitration practice in Luxembourg.

The aim of the LAA is to provide support on the subject matter to authorities, parties and institutions, by sharing expertise and information on arbitration-related matters, as well as providing a comprehensive database of Luxembourg and international qualified arbitrators and practitioners.

The LAA endeavours to strengthen both the legal and institutional framework surrounding this field of dispute resolution to bring forward Luxembourg's position as an arbitration seat. The LAA held its first Luxembourg Arbitration Day on 26 April 2019.

5. Can foreign arbitral providers operate in your jurisdiction?

Foreign providers of alternative dispute resolution services can operate in Luxembourg without restrictions. Luxembourg is a frequent seat in ICC, DIS and CEPANI arbitrations, and is seen as a convenient, central and neutral location to hold meetings and hearings between European parties.

6. Is there a specialist arbitration court? Is the judiciary in your jurisdiction generally familiar with, and supportive of, the law and practice of international arbitration?

There is no specialist arbitration court in Luxembourg, but the judicial bodies that have jurisdiction over arbitration related matters are familiar with, and supportive of, the practice of international arbitration.

These include, for example, the President of the District Court in its capacity as supporting judge (juge d'appui). The President of the District Court also has jurisdiction in proceedings concerning the recognition and enforcement of domestic awards (article 1233 NCPC) and foreign awards (article 1245 NCPC).

These also include the Court of Appeal, which has exclusive jurisdiction to rule on annulment proceedings of domestic awards (article 1236 NCPC) and appeals against decisions granting or rejecting the exequatur of foreign awards (article 1246 NCPC).

These jurisdictions are well versed and have extensive experience in international arbitration, thus providing the parties with the certainty expected when choosing Luxembourg as the place of the arbitration.

Luxembourg is an arbitration-friendly jurisdiction and domestic courts generally enforce arbitration agreements. Unless a defendant raises the issue of an arbitral tribunal's lack of jurisdiction in limine litis, the court will not raise the matter ex officio.

The new Arbitration Law crystalises the role of the state courts in support of the arbitration process by formally introducing the supporting judge (juge d'appui), inspired by French law. The supporting judge is the President of the District Court, who is seized by one of the parties or by the arbitral tribunal or one of its members. The supporting judge will sit as in summary matters and – unless provided otherwise – the supporting judge's orders are not subject to appeal or oppositions (article 1230 NCPC).

The supporting judge will have jurisdiction if (i) the seat of arbitration is Luxembourg, (ii) the parties have agreed to submit the arbitration to Luxembourg procedural rules, (iii) the parties have expressly given jurisdiction to the Luxembourg courts with respect to arbitration related matters, (iv) there is a significant link between the dispute and the Grand-Duchy. The supporting judge will always be competent to prevent a denial of justice (article 1229 NCPC).

Numerous provisions of the new law provide that its jurisdiction remains subsidiary in the event that the parties cannot themselves solve a difficulty and that the appointed institution (if any) is not able to assist.

Agreement to arbitrate

7. What, if any, requirements must be met if an arbitration agreement is to be valid and enforceable under the law of your jurisdiction? Can an arbitration agreement cover future disputes?

Arbitration agreements may be contractually agreed upon in anticipation of a future dispute (clause compromissoire or arbitration clause) or may concern an existing dispute (compromis or submission agreement) in accordance with article 1227 to 1227-4 NCPC.

There is no longer any requirement of form for either the arbitration clause or the submission agreement. These can be concluded at any moment, including when court proceedings are already pending. Recording it in writing is merely a matter of evidencing its existence and content.

If a dispute is brought before state courts while the parties had agreed to submit it to arbitration, the state court will – upon a party's motion but not sua sponte – declare that it lacks jurisdiction to rule on the case, unless the arbitration agreement is invalid by reason of the non-arbitrability of the subject matter or if the clause is otherwise null or not applicable (article 1227-3 NCPC).

Granting effective and efficient relief is a priority of the new law. Should an arbitral tribunal declare that it lacks jurisdiction, or if an award is set aside for a ground preventing the constitution of a new arbitral tribunal, the initiated proceedings before state courts will resume upon one party informing the court clerk of the arbitral tribunal's decision (article 1227-3 NCPC).

8. Are any types of dispute non-arbitrable? If so, which?

Articles 1224 to 1226 NCPC determine the scope of what parties may submit to arbitration.

Article 1224 NCPC allows parties to submit to arbitration matters that are at their full disposal, whether civil or commercial. This reflects a broad concept of arbitrability.

Certain matters are specifically excluded pursuant to articles 1224, 1225 and 1226 NCPC. These include the status and legal capacity of natural persons, the representation of incapacitated persons or missing persons, disputes between (i) a professional and a consumer, (ii) an employer and an employee and (iii) residential leases.

The opening of insolvency proceedings does not impact arbitration agreements, whether these were concluded before or after the opening of the insolvency proceedings. However, article 1226 NCPC does not allow parties to submit to arbitration disputes arising out of these insolvency proceedings.

The applicability of public policy rules (ordre public) has no influence on the arbitrability of the dispute. The arbitrator's power to apply rules of public policy is long-established in French and Luxembourg case law.

9. Can a third party be bound by an arbitration clause and, if so, in what circumstances? Can third parties participate in the arbitration process through joinder or a third-party notice?

In principle, the arbitration agreement only binds its signatories.

Luxembourg case law, however, admitted the extension of the arbitration agreement to third parties in the event of an assignment of contracts or rights, and of stipulation for the benefit of a third party.

Under Luxembourg law, a non-signatory may also be joined to the proceedings if circumstances exist allowing the piercing of the corporate veil (eg, fraud, co-mingling of assets, where the subsidiary has a fictional existence, extension of the bankruptcy to the master of bankruptcy, misuse of corporate assets, etc).

A party that is the beneficiary of a right, such as a contractual payment, may rely on an arbitration clause contained in a contract, although this party is not a signatory to the contract.

Additionally, a third-party can request to intervene in the proceedings by written application to the arbitral tribunal, and a party to the arbitration proceedings can request the joinder of an additional party (article 1231-12 NCPC). Such joinder must be done by a submission agreement signed between the parties to the arbitral proceedings and the additional party, and is subject to the approval of the arbitral tribunal.

Article 6 of The Rules of the Luxembourg Arbitration Centre provides for the joinder of additional parties. A third party may request to intervene, or a party to the proceedings may seek to have a third party join the proceedings, by submitting a request for joinder. No additional party may be joined after the confirmation of any arbitrator unless all parties agree otherwise.

10. Would an arbitral tribunal with its seat in your jurisdiction be able to consolidate separate arbitral proceedings under one or more contracts and, if so, in what circumstances?

Nothing in the new Luxembourg Arbitration Law prevents an arbitral tribunal from consolidation separate arbitration proceedings. Typically, consolidation may occur if all parties involved consent to it. Parties' consent may be recorded in their choice of arbitration rules or separately.

For example, article 9 of the Rules of the Luxembourg Arbitration Centre provides that the Council may, at the request of a party, consolidate two or more arbitration proceedings (i) where the parties have agreed to the consolidation, (ii) where all of the claims are made under the same arbitration agreement or (iii) where the claims are made under more than one arbitration agreement, the arbitration proceedings are between the same parties, the disputes in the arbitration proceedings arise in connection with the same legal relationship and the Council finds the arbitration agreements to be compatible.

11. Is the "group of companies doctrine" recognised in your jurisdiction?

There is no Luxembourg case law expressly referring to the "group of companies doctrine", but the Luxembourg courts have accepted the extension of an arbitration agreement to non-signatories on a number of occasions on several grounds.

12. Are arbitration clauses considered separable from the main contract?

The Luxembourg Arbitration Law provides under article 1227-2 NCPC that the arbitration clause is separable from the other contractual provisions. The nullity of the arbitration clause does not imply the nullity of the contract, and vice-versa. This was already confirmed by case law, for example, in 2005 when the Court of Appeal ruled that an arbitration clause was a "distinct part" of the contract that may be submitted to a different law.

Article 5(4) of The Rules of the Luxembourg Arbitration Centre provides that an arbitrator may uphold the validity of an arbitration agreement despite any allegation that the underlying contract is non-existent or null and void.

13. Is the principle of competence-competence recognised in your jurisdiction? Can a party to an arbitration ask the courts to determine an issue relating to the tribunal's jurisdiction and competence?

The principle of competence-competence is recognised in Luxembourg under article 1227-2 NCPC. Thus, an arbitral tribunal may rule on its own jurisdiction and any questions relating to the existence or validity of the arbitration agreement.

Luxembourg courts will decline jurisdiction where one of the parties shows the existence of a valid arbitration clause.

Should a party to arbitration proceedings ask a Luxembourg court to determine an issue relating to the tribunal's jurisdiction, the court will decline jurisdiction unless the arbitration clause is null or not applicable (article 1227-3 NCPC). The state court cannot sua sponte raise its own lack of jurisdiction.

Case law further confirms that the non-jurisdiction of a state jurisdiction "necessarily implies" the jurisdiction of the arbitral tribunal.

Domestic courts may, however, provide an ex-post control of the arbitral tribunal's jurisdiction when the District Court proceeds with the exequatur of awards (domestic awards pursuant to articles 1233 and 1238 NCPC, and foreign awards pursuant to articles 1245 and 1246 NCPC), or in the case of annulment proceedings against domestic awards before the Court of Appeal (articles 1236 and 1238 NCPC). Courts will review whether the arbitral tribunal wrongly assessed its jurisdiction, whether it was properly constituted, etc.

14. Are there particular issues to note when drafting an arbitration clause where your jurisdiction will be the seat of arbitration or the place where enforcement of an award will be sought?

There is no requirement of form for either the arbitration clause or the submission agreement. It is, however, preferred to record the parties' agreement in writing to demonstrate their consent when a dispute arises.

It is also advisable for parties to address the scope of the dispute, the procedural rules pursuant to which an arbitral institution shall administer the dispute (eg, the Luxembourg Arbitration Centre or the ICC), the seat of the arbitration (eg, Luxembourg), the law applicable to the contract (eg, Luxembourg law) including the arbitral tribunal's rights to act as amiable compositeur pursuant to article 1240 of the NCPC, the number of arbitrators as well as the method of appointment.

The model arbitration clause made available by the Luxembourg Arbitration Centre provides as follows:

> *All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of arbitration of the Arbitration Center of the Luxembourg Chamber of commerce by one or more arbitrators appointed in accordance with said rules.*

The arbitral tribunal shall be composed of one/three arbitrator(s).
The law governing the contract shall be the law of (__)

Model clauses are also available in French and German.

15. Is institutional international arbitration more or less common than ad hoc international arbitration? Are the UNCITRAL Rules commonly used in ad hoc international arbitrations in your jurisdiction?

For international cases, institutional arbitrations, in particular under the aegis of the Luxembourg Arbitration Center, the ICC and CEPANI, are more frequent than ad hoc arbitrations in Luxembourg.

That being said, parties sometimes provide for the UNCITRAL Rules in their arbitration agreements, and seek the support of the Permanent Court of Arbitration as appointing authority, in accordance with article 6 of the UNCITRAL Rules.

For domestic cases, ad hoc arbitration proceedings seem to be most favoured.

16. What, if any, are the particular points to note when drafting a multi-party arbitration agreement with your jurisdiction in mind? In relation to, for example, the appointment of arbitrators.

Article 1228-4 NCPC sets out the applicable rules to appoint the tribunal when there are more than two parties to the proceedings and that they do not agree on the details of the appointment procedure. The arbitral institution or the supporting judge will designate the arbitrators.

The Rules of the Luxembourg Arbitration Centre also provide for the possibility of multiple claimants or multiple respondents, pursuant to article 6 of the Rules.

Commencing the arbitration

17. How are arbitral proceedings commenced in your jurisdiction? Are there any key provisions under the arbitration laws of your jurisdiction relating to limitation periods of which the parties should be aware?

Arbitration proceedings are usually commenced by the filing of a request for arbitration, within the limitation period (prescription), which would otherwise be applicable under judicial proceedings, in accordance with the substantive law governing the agreement.

Article 1231-6 NCPC provides that, unless the arbitration agreement provides otherwise, the arbitral proceedings shall last six months from the acceptation of the last arbitrator's mission.

Limitation periods are generally quite long in Luxembourg for civil claims in contract and torts (30 years). Certain provisions of the NCPC, however, provide for shorter periods for certain specific actions.

Choice of law

18. How is the substantive law of the dispute determined? Where the substantive law is unclear, how will a tribunal determine what it should be?

In most cases, the parties have agreed on the substantive law governing the performance of their obligations in the underlying agreement. Arbitrators will decide in accordance with the applicable laws (article 1231 NCPC).

However, parties may provide, in the arbitration agreement, that the arbitral tribunal shall decide as an amiable compositeur (ie, ex aequo et bono),in accordance with article 1231 NCPC. This grants the arbitral tribunal the authority to set aside any governing substantive laws and the provisions of the Luxembourg Arbitration Law (insofar as the rules of natural justice and public policy requirements are complied with).

In international matters, the arbitral tribunal will apply the rules of law chosen by the parties. In the event that these are unclear, the tribunal will apply the rules that it considers appropriate.

Appointing the tribunal

19. Does the law of your jurisdiction place any limitations in respect of a party's choice of arbitrator?

The Luxembourg Arbitration Law expressly requires that the arbitrator is a physical person enjoying civil rights (article 1228-1 NCPC). Should the parties designate a moral person in their arbitration agreement, this person can only nominate the arbitrator.

There are no mandatory qualifications or expertise, and the parties may freely choose their arbitrators provided that they are impartial and independent (article 1228-6 NCPC).

Arbitrators are often chosen among lawyers, civil servants or magistrates but may also be chosen among any category of professionals relevant in a given dispute (such as engineers or experts).

20. Can non-nationals act as arbitrators where the seat is in your jurisdiction or hearings are held there? Is this subject to any immigration or other requirements?

There are no restrictions concerning non-nationals. Non-nationals may be appointed as arbitrators in arbitrations seated in Luxembourg or when hearings are held in Luxembourg.

21. How are arbitrators appointed where no nomination is made by a party or parties or the selection mechanism fails for any reason? Do the courts have any role to play?

The parties are free to provide for an appointment procedure in the arbitration agreement. In the event that the parties have not done so, or that the appointment mechanism fails, the parties shall apply the supplementary provisions provided at article 1228-4 NCPC.

In the case of an arbitration by a sole arbitrator, if the parties do not agree on the choice of arbitrator, the arbitrator shall be appointed by the arbitral institution or, failing this, by the supporting judge. In the case of an arbitration by three arbitrators, if a party fails to participate in the appointment within one month, the co-arbitrator shall be appointed by the arbitral institution or, failing this, by the supporting judge.

22. Are arbitrators afforded immunity from suit under the law of your jurisdiction and, if so, in what terms?

The Luxembourg Arbitration Law does not address the question of immunity or liability of arbitrators.

However, the Luxembourg Criminal Code provides for sanctions against corrupt judges, arbitrators and experts. In accordance with article 250 of the Luxembourg Criminal Code, arbitrators are subject to 10 to 15 years of imprisonment and a fine from €2,500 to €250,000 when having directly or indirectly requested or accepted any offer, promise, donation, present or advantage of any sort, for themselves or for a third party, in relation to accomplishing, or failing to accomplish, their duties.

Also, once the confidentiality of the proceedings has been established, arbitrators must rigorously observe it, unless they are ordered to do otherwise by a court or a law. In the event of a breach, it may be argued that arbitrators would be liable under article 458 of the Luxembourg Criminal Code and be subject to imprisonment of eight days to six months and a fine between €500 and €5,000.

23. Can arbitrators secure payment of their fees in your jurisdiction? Are there fundholding services provided by relevant institutions?

The Luxembourg Arbitration Law does not address this. In practice, when the dispute is submitted to the Luxembourg Arbitration Centre, the Council fixes the amount of the advance on costs likely to cover the fees and expenses of the arbitrator. In principle, this amount shall be paid in equal shares by each of the parties (unless one party defaults). The amount of the advance on costs may be readjusted at any time during the proceedings.

Challenges to arbitrators

24. On what grounds may a party challenge an arbitrator? How are challenges dealt with in the courts or (as applicable) the main arbitration institutions in your jurisdiction? Will the IBA Guidelines on Conflicts of Interest in International Arbitration generally be taken into account?

Arbitrators may be challenged in the event of legitimate doubts as to their impartiality or independence, or if they do not possess the qualifications required by the parties (article 1228-7 NCPC). In the event of a disagreement, this dispute is settled by the arbitral institution, failing this by the supporting judge, within one month of the discovery of the cause of the challenge.

Luxembourg courts prior to the new Arbitration Law relied on the provisions of articles 521 and 523 NCPC (applicable to judges) with respect to grounds for challenge for arbitrators. Such grounds include family relationships, if the arbitrator has advised or written about the dispute or has gained knowledge about it, etc. Case law generally refers to the lack of independence and impartiality as a ground to challenge an arbitrator (Court of Appeal, 24 November 1993, No. 14983).

Article 1228-8 NCPC allows the parties to agree on the change of arbitrators and allows a party to request it from the arbitral institution, failing this the supporting judge, seized within one month of discovery of the cause of the revocation (for example, the arbitrator's failure to pursue its mission).

The International Bar Association guidelines on conflicts of interest are also commonly used as a reference.

Interim relief

25. What main types of interim relief are available in respect of international arbitration and from whom (the tribunal or the courts)? Are anti-suit injunctions available where proceedings are brought elsewhere in breach of an arbitration agreement?

In accordance with article 1227-4 NCPC, a party may apply to the state courts for interim measures of protection in two cases: either before the arbitral tribunal is constituted, or after its constitution if it appears that the arbitral tribunal cannot grant the measure sought. However, interim measures that would de facto be final do not qualify as interim measures and thus cannot be granted by a judge (Court of Appeal, 21 January 2009). Seizing a state court, for example, the judge of summary proceedings (juge des référés), does not imply a waiver of the arbitration agreement.

The tribunal may also grant provisional and conservatory measures, in accordance with article 1231-9 NCPC, but it cannot order attachments (as it may not issue orders against third parties). Once granted, the arbitral tribunal may modify, complete, suspend or retract the measure. The party that obtained the measure from the tribunal is responsible for the costs and damages caused in the event that the tribunal later decides that the measure should not have been granted. For these measures to be efficient, the new Arbitration Law provides that these decisions are enforceable in the same way as decisions on the merits (their enforceability can only be refused for a cause of annulment of the award listed at article 1238 NCPC).

Anti-suit injunctions are not available under Luxembourg law (and are generally not available under EU law).

26. Does the law of your jurisdiction allow a court or tribunal to order a party to provide security for costs?

There are no provisions in the new Arbitration Law expressly empowering the arbitral tribunal to order security for costs.

However, article 257 NCPC provides that, upon request of the defendant in limine litis, non-Luxembourg based claimants may be ordered to advance payments of costs and damages they may be ordered to pay if they do not prevail. When the request is granted, the amount must be made available (for example, in an escrow account) for the proceedings on the merits to commence. This general principle may be applied to arbitration proceedings seated in Luxembourg.

Procedure

27. Are there any mandatory rules in your jurisdiction that govern the conduct of the arbitration (eg, general duties of the tribunal and/or the parties)?

The new Arbitration Law provides a number of mandatory rules that govern the conduct of the arbitration. This being said, the parties are given a lot of freedom to tailor the process to their needs, for example in the arbitration clause or during the proceedings. When the parties can derogate from the provisions of the Arbitration Law, the text of the provisions most often expressly provide for it.

However, the parties would normally not be able to derogate from the rules concerning, for example, arbitrability, the role of the state courts and in particular the supporting judge, enforcement of awards and recourse (annulment, third-party challenge, revision), etc.

Arbitration proceedings shall also respect all important principles of natural justice that usually govern judicial proceedings. These include observance of the adversarial nature of proceedings, equality between parties (eg, audi alteram partem), ensuring the rights of defence, etc. When applied, these general principles shall be adapted to the specific nature of arbitration (Court of Appeal, 22 July 1904, Pas.6, p. 517). Failing to respect these may lead to the annulment of the award or to obtain its exequatur.

Arbitration proceedings must also comply with the most important procedural principle stated in article 6, section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which is the impartiality and independence of the court arbitration (Court of Appeal, 5 March 2003).

28. What is the applicable law (and prevailing practice) where a respondent fails to participate in an arbitration?

In the event of a party's failure to appoint an arbitrator, article 1228-4 NCPC provides that the appointment shall be made by the arbitral institution or by order of the supporting judge (issued upon application and in principle not subject to appeal).

In application of article 1231-10 2° and 3° NCPC, unless the party has a legitimate reason, its refusal to file any submissions or appear before the arbitral tribunal, after having been given due notice, does not prevent the arbitral proceedings from going forward. The tribunal will continue its mission as a party may not benefit from its own refusal to participate. The tribunal, however, cannot accept one's unwillingness to participate as acceptance of the other party's allegations.

The tribunal may render an award by default.

29. What types of evidence are usually admitted, and how is evidence usually taken? Will the IBA Rules on the Taking of Evidence in International Arbitration generally be taken into account?

As a general principle, the party requesting the performance of an obligation carries the burden to prove it and, correspondingly, the party claiming to be freed from the performance shall evidence the event bringing its obligation to an end, in accordance with article 58 NCPC. Thus, each party must provide the evidence of the facts relied upon in support of its position. This principle is also applicable to arbitration proceedings seated in Luxembourg.

Written evidence prevails but parties may also rely, for example, on testimonial evidence and declarations. Oral testimonies are not under oath, unless the procedure is subject to a foreign law that requires it. For technical questions or proof of foreign law, the parties often produce expert evidence.

In commercial matters under Luxembourg law, private documents, accepted invoices, correspondence, balance sheets or witness statements are often submitted as evidence, in accordance with article 109 of the Luxembourg Commercial Code.

Parties to arbitration proceedings seated in Luxembourg often voluntarily choose to comply with the IBA Rules on the Taking of Evidence in International Commercial Arbitration. The Prague Rules are less frequently chosen.

30. Will the courts in your jurisdiction play any role in the obtaining of evidence?

The Luxembourg Arbitration Law allows the tribunal to request the production of any evidence in the possession of a party to the proceedings in any manner it deems appropriate, and if necessary under penalty (article 1231-8 1° NCPC). If the evidence is in the hands of a third party, the party requesting the disclosure may seize the supporting judge upon the tribunal's invitation (article 1231-8 2° NCPC).

The supporting judge is seized by application (requête) so the court clerk summons the third party by registered letter, and then informs the arbitral tribunal. The supporting judge sits as would sit the summary judge (comme en matière de référé), and the decision would be rendered within a few weeks. The order of the supporting judge can be appealed within 15 days.

31. What is the relevant law and prevailing practice relating to document production in international arbitration in your jurisdiction?

The guiding principles of the Luxembourg procedural law (articles 51 et seq NCPC) are generally applicable to arbitration proceedings pursuant to article 1231 NCPC.

The rules concerning the production of documents in arbitration proceedings would thus logically follow the rules applicable before state courts, and the same conditions and criteria would be applicable.

32. Is it mandatory to have a final hearing on the merits?

The new Arbitration Law does not provide that it is mandatory to have a final hearing on the merits.

33. If your jurisdiction is selected as the seat of arbitration, may hearings and procedural meetings be conducted elsewhere?

According to article 1228 NCPC, the tribunal may hold hearings, procedural meetings, and sign decisions in any place it deems appropriate, unless the parties have agreed otherwise. This does not affect the principle that the arbitration is deemed to be taking place at its seat, and the arbitration award will be deemed to be issued at its seat.

Award

34. Can the tribunal decide by majority?

Unless the parties agree that unanimity is required, an arbitral tribunal would decide by a majority vote (article 1232-1 NCPC). In the event that a minority arbitrator would not want to sign the arbitration award, the award will carry the same weight as if it had been signed by all members of the tribunal, and the refusal to sign shall be recorded in the award.

35. Are there any particular types of remedies or relief that an arbitral tribunal may not grant?

Punitive damages may be considered as contrary to Luxembourg public order and could lead to the annulment of the award under articles 1238. Attachments may only be granted by the state courts (article 1231-9 NCPC).

36. Are dissenting opinions permitted under the law of your jurisdiction? If so, are they common in practice?

Dissenting opinions are allowed. In accordance with article 1232 NCPC, the parties to the proceedings can provide in their arbitration clause, or by reference to rules of an arbitration institution, that a dissenting or individual opinion is annexed at the end of the award.

37. What, if any, are the legal and formal requirements for a valid and enforceable award?

The arbitration award must in principle be signed by all arbitrators. If a minority of the arbitrators refuses to sign, there must be a mention of the refusal on the award, but the award will carry the same effect as if it were signed by all members of the tribunal (1232-1 NCPC). Article 1232-2 adds that, unless agreed otherwise, the award must be reasoned. Thus, the award must be handed down in writing, although the law does not expressly provide for it.

When the award is rendered in Luxembourg, it is rendered enforceable by the President of the District Court pursuant to an exequatur order, seized by application on a unilateral basis. The party requesting the exequatur must provide the original or a copy of the award and of the arbitration agreement (article 1233 NCPC).

38. What time limits, if any, should parties be aware of in respect of an award? In particular, do any time limits govern the interpretation and correction of an award?

Unless the arbitration agreement provides for a specific duration, the duration of the tribunal's mission is six months starting from the last arbitrator's acceptance of its mission (article 1231-6 NCPC). In principle, the whole of the proceedings should take place within this period. In practice, the parties often extend this six-month period during the proceedings (by common agreement) or allow the arbitration institution to extend it, for example, if the chosen rules allow for it. Failing this, the supporting judge may grant the extension.

Case law specified that the duration of the extension must be clear and precise. Should parties agree on the principle of an extension but not on the duration, this agreement would grant them at most another six-month period. The Luxembourg courts decided that stating in the arbitration clause that "the arbitrator will have sufficient time to issue his arbitration award" does not mean that a specific term was agreed on by the parties. As a consequence, the arbitration award was rendered after the maximum period, and it was declared null and void (District Court of Luxembourg 25 January 2011).

Other delays to be aware of concerning the award include the action for annulment to be filed within one month of the notification of the award (article 1239 NCPC), the request for revision of the award to be filed within two months of the discovery of the relevant fraudulent event (article 1243(2) NCPC). The Arbitration Law does not provide for a specific timeframe to request the interpretation or the correction of errors and omissions (article 1232-4 NCPC) or with respect to third-party oppositions (article 1244 NCPC).

Costs and interest

39. Are parties able to recover fees paid and costs incurred? Does the "loser pays" rule generally apply in your jurisdiction?

The Luxembourg Arbitration Law does not provide for a "loser pays" approach for the costs and fees incurred by the parties. Similarly, in judicial proceedings, only reasonable judicial costs are normally borne by the losing party (on the basis of article 240 of the NCPC). However, court decisions followed a reasoning according to which the full reimbursement of the lawyers' fees could be requested by a party as damages resulting from a fault. In such a case, the conditions of the civil liability regime must be met (fault, damage and causation) in order for the lawyers' fees to be reimbursed.

In practice, unless otherwise agreed by the parties (for example, in their arbitration agreement), arbitration costs are often shared between the parties and each party pays its own lawyers' fees. This is subject to the aforementioned court decisions and the tribunal's discretion, which retains the power to allocate fees and costs differently depend on the circumstances of the case and the conduct of the parties, and in accordance with the chosen rules of the institution.

40. Can interest be included on the principal claim and costs? Is there any mandatory or customary rate?

Whether interest may be recovered is a matter of governing law, rather than a question of arbitration law. The interest is determined by the underlying contract or by the applicable substantive law. Where Luxembourg law applies, a legal interest rate would apply and would be calculated on the principal claim, and not on costs.

Challenging awards

41. Are there any grounds on which an award may be appealed before the courts of your jurisdiction?

The Luxembourg Arbitration Law does not allow appealing an award before the domestic courts (article 1236 NCPC), as a matter of public policy.

42. Are there any other bases on which an award may be challenged, and if so what?

An arbitration award rendered in Luxembourg may only be annulled by the Court of Appeal. The recourse seeking the annulment of the award also amounts to a recourse against the exequatur order of this award (article 1237 NCPC).

Grounds for the annulment of the award rendered in Luxembourg are listed at 1238 NCPC and include issues of jurisdiction of the tribunal, constitution of the arbitral tribunal, the tribunal exceeded its powers, the award is contrary to public policy (ordre public), the award is not reasoned (unless the parties agreed otherwise), and violation of due process.

The new Arbitration Law does not make any distinction between partial and final awards with respect to challenges. Thus, nothing would prevent a party from immediately challenging an award dealing exclusively with the tribunal's competence (and not wait until the final award).

A request seeking the annulment of an award rendered in Luxembourg does not suspend the effects of the award. However, the Court of Appeal may stop or specify the conditions for the enforcement of the award, if the enforcement is likely to damage one party's rights (article 1241 NCPC).

Although the award rendered in Luxembourg is not subject to appeal before the domestic court, it may be revised and retracted so that the tribunal rules again on the issues before it, in limited cases (fraud,

discovery of decisive evidence voluntarily withheld by a party, the award is based on evidence recognised as or declared false by a court decision after the award was rendered, or the award is based on written, oral or sworn testimony recognised as or declared false by an irrevocable court decision after the award was rendered). This recourse must be exercised within two months of the discovery of the relevant event and is filed before the arbitral tribunal, failing this before the Court of Appeal according to its procedural rules (article 1243).

With respect to foreign awards, the order that unilaterally grants their exequatur in Luxembourg may be appealed before the Court of Appeal within one month of the notification of the order (article 1245 NCPC). If international conventions apply, such as the New York Convention, then the Court of Appeal may refuse the exequatur for the grounds provided therein. Otherwise, the Court of Appeal may refuse the exequatur on the grounds provided at article 1246 NCPC. These include issues of jurisdiction of the tribunal, constitution of the tribunal, the tribunal exceeded its powers, the award is contrary to public policy (ordre public), the award is not reasoned (unless the parties agreed otherwise), and violation of due process, fraud, discovery of decisive evidence voluntarily withheld by a party, the award is based on evidence recognised or declared false by a court decision after the award was rendered, or the award is based on written, oral or sworn testimony known as or declared false by an irrevocable court decision after the award was rendered.

A party that becomes aware, after the expiration of the one-month deadline to appeal the exequatur order, that the foreign award rendered was based on fraud, can exercise a recourse before the Court of Appeal to revise the order, within two months of becoming award of the fraud (article 1247 NCPC).

Appealing the exequatur order or seeking the revision of the order does not suspend the effects of the award. However, the Court of Appeal may stop or specify the conditions for the enforcement of the award, if the enforcement is likely to damage one party's rights (article 1248 NCPC).

43. Is it open to the parties to exclude by agreement any right of appeal or other recourse that the law of your jurisdiction may provide?

Article 1236 of the NCPC states that a domestic award cannot be subject to appeal, as a matter of public policy.

The Luxembourg courts decided that the right to challenge the validity of an award is a mandatory rule that the parties cannot exclude in advance (District Court of Luxembourg, 3 January 1996).

Enforcement in your jurisdiction

44. Will an award that has been set aside by the courts in the seat of arbitration be enforced in your jurisdiction?

A foreign award can only be enforced in Luxembourg after being exequatured (article 1245 NCPC). The exequatur will be granted by the President of the District Court if the foreign award is not subject to one of causes of annulment provided at article 1246 NCPC).

In 1999, the Court of Appeal decided that the fact that an award could be set aside in the seat of arbitration does not prevent the Luxembourg court from enforcing the award, since article 1251 of the NCPC does not refer to the annulment of an award in the seat of arbitration as a reason for refusing its enforcement in Luxembourg (Court of Appeal, 28 January 1999, 31, 95). This approach aimed at allowing the enforcement of the award in the greatest number of cases.

This reasoning was upheld years later by the Luxembourg Supreme Court (Cour de cassation) which confirmed that the New York Convention does not impose to recognise awards set aside at their seat, on the basis of article V(1)(e), but does not prohibit it either, on the basis of article VII. In line with a liberal approach, only the conditions of article 1251 of the NCPC may be invoked to oppose the enforcement of a foreign award, which do not include the setting aside of the award at the place of the seat (Cour de cassation, 12 March 2015, n°18/15).

However, this liberal transnational approach seeking to allow enforcement in the greatest number of cases was not always followed by Luxembourg courts. For example, in a case where the application challenging the award was pending before the courts of the jurisdiction where the award was rendered, the Luxembourg Court of Appeal decided to suspend the enforcement proceedings and wait for the result of the challenge. The Court made no mention of article VII of the New York Convention (pursuant to which the provisions of the New York Convention shall not deprive any party of any right it may have to avail itself of the award in the manner and to the extent allowed by the law of the country where it is sought to be relied upon), but rather strictly held that article 1251 of the NCPC provides for grounds to refuse enforcement, "subject to international conventions", which grant it discretion to suspend the enforcement when the challenge is pending before the jurisdiction of the seat "if it considers it proper" (article VI). The Court expressed that in this case it was appropriate to suspend the proceedings because the hearings on the challenge were only a few months away.

Following a similar reasoning, in its judgment of 11 February 2021, the Court of Appeal, in the context of an award rendered by an ICISD panel, confirmed that the provisions of article 1251 of the NCPC do not apply where an international convention applies. This is the case for ICSID awards that should only be analysed in light of the ICSID Convention.

Although former article 1251 NCPC would not apply under the new regime, the Luxembourg courts may apply the same principles under articles 1238 and 1246 NCPC.

45. What trends, if any, are suggested by recent enforcement decisions? What is the prevailing approach of the courts in this regard?

Luxembourg courts interpret the conditions relating to a breach of public order restrictively as it must not lead to a review of the merits of the case (Court of Appeal, 26 July 2005). Indeed, Luxembourg courts strictly comply with the distinction between the "procedural review" of an arbitration award by the courts where the enforcement is sought and the review of the merits of the case by the courts where the arbitration award was issued.

Luxembourg has been and remains a "pro arbitration" jurisdiction. The new Arbitration Law is a very arbitration-friendly regime, which gives a lot of freedom to the parties.

46. To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

A distinction shall be made between immunity from jurisdiction and immunity from execution. Immunity from jurisdiction is a privilege allowing a state to contest a tribunal's jurisdiction to hear a claim against it. It is not absolute, and states may waive it, for example by way of an arbitration agreement. Pursuant to established case law, the waiver shall be certain and non-equivocal, and can be express or tacit (CA, 27 April 2017, CA, 11 February 2021). Immunity from execution allows a state to contest execution measures from being imposed on certain assets belonging to it, after being sentenced. Exequatur proceedings under Luxembourg law could concern a state's immunity from jurisdiction (CA, 11 February 2021)

Luxembourg is also party to the European Convention on State Immunity of 16 May 1972 (Basel) (ratified by the law of 8 June 1984), which states that "no measures of execution or preventive measures against the property of a contracting state may be taken in the territory of another contracting state except where and to the extent that the state has expressly consented thereto in writing in any particular case" (article 23).

Further considerations

47. To what extent are arbitral proceedings in your jurisdiction confidential?

The Luxembourg Arbitration Law provides that, in principle, arbitration proceedings are confidential (article 1231-5 NCPC). This is, however, subject to legal requirements and parties' agreements.

Parties may also separately agree on the confidential nature of the arbitration proceedings, including of their existence – as well as the potential sanctions.

However, the existence of the arbitral proceedings and some details of the case may become public if the matter is taken before the state courts (eg, the supporting judge if it is requested to support the arbitration process, and the Court of Appeal in the case of challenge of a domestic award or appeal against the exequatur order of a foreign award).

48. What is the position relating to evidence produced and pleadings filed in the arbitration? Are these confidential? Is there any way that they might be relied on in other proceedings (whether arbitral or court proceedings)?

Since the Luxembourg Arbitration Law provides for the confidentiality of arbitration proceedings, documents should become confidential by the mere fact that they are produced in arbitration proceedings seated in Luxembourg. In addition, parties usually address the issue separately, for example, in the arbitration agreement, or the tribunal does so in a procedural order.

49. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your jurisdiction?

The new Arbitration Law does not refer to specific ethical codes. However, counsels and arbitrators involved in proceedings in Luxembourg are bound by their own ethical codes and professional standards of conduct, such as the Luxembourg Bar's ethical rules. In 2018, the internal rules of the Luxembourg Bar (règlement intérieur de l'Ordre des avocats du Barreau de Luxembourg) were modified to include article 3.6.5, which provides that in arbitration matters, a Luxembourg lawyer may derogate from certain provisions in the handling of communications with a witness in the case.

Parties often voluntarily agree to abide by the IBA Guidelines on Conflicts of Interest in International Arbitration and the IBA Guidelines on Party Representation in International Arbitration.

50. Are there any particular procedural expectations or assumptions of which counsel or arbitrators participating in an international arbitration with its seat in your jurisdiction should be aware?

The new Luxembourg Arbitration Law contains a number of procedural specificities and introduces several new recourses before state courts. Counsel advising in arbitrations seated in Luxembourg must be familiar with the procedure applicable before each of these domestic courts (supporting judge, judge of summary proceedings, District Court, Court of Appeal, etc), also because certain procedural expectations will be applicable to arbitration proceedings pursuant to article 1231 NCPC.

51. Is third-party funding permitted in your jurisdiction? If so, are there any rules governing its use?

There is no formal legal framework regulating the third-party funding activity and no judicial guidance or notable precedents in Luxembourg. Thus, nothing prevents funders from financing arbitrations seated in Luxembourg. Funders are becoming increasingly active in Luxembourg.

When dealing with funders, Luxembourg lawyers shall be guided by their professional and ethical obligations and standards. For example, counsel shall keep in mind that they are prohibited from concluding pure contingency fee arrangements with their clients ("pacte de quota litis") and of the potential conflicts of interest that may arise out of the involvement of a third-party funder.

Certain third-party funders have set up their asset management and corporate structures in Luxembourg. We notice a growing interest from third-party funders in Luxembourg disputes (litigation and arbitration) and in the Luxembourg market generally. Loyens & Loeff has advised, from a legal and tax perspective, third-party funders seeking to establish offices in Luxembourg where they conduct their activities and generate revenues.

Véronique Hoffeld

Loyens & Loeff

Véronique has experience in advising on complex, high-value multi-jurisdictional litigation and arbitration cases, as well as in proceedings before the civil courts and arbitration tribunals. She focuses in particular on commercial disputes in financial and corporate litigation.

Together with her team, Véronique has been rewarded by various high-profile arbitration cases related to the recognition and enforcement of ICC arbitral awards. She advises on all aspects of real estate law, including the negotiation of contracts and litigation. Véronique's experience in IP law includes working on multi-jurisdictional IP and commercial disputes involving patents, trademarks, distribution and agency agreements, and infringements of copyrights and designs.

She is listed as a Dispute Resolution Expert in *Euromoney's Benchmark Litigation 2019* directory. Véronique is the former president of the National Research Fund (FNR) of Luxembourg. On 1 January 2020, she was appointed president of the board of directors of the Luxembourg Institute of Socio-Economic Research (LISER).

What others say about Véronique:

Chambers Europe: "Véronique Hoffeld (Band 2) frequently advises on cross-border disputes for clients in a range of sectors, including fashion, advertising and engineering, covering matters such as professional liability, market manipulation and distribution disputes."

Chambers Global: Véronique Hoffeld is a key contact for clients in real estate matters.

The Legal 500: "Véronique Hoffeld regularly handles IP litigation as part of her broad-ranging practice, and is a key member of the team."

@'Client-oriented' team head Véronique Hoffeld's diverse workload has recently included reviewing and updating lease agreements on behalf of a major multinational corporate with offices in Luxembourg, and representing an international bank on the sale of an office building in the centre of the country's financial district."

Olivier Marquais

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Olivier is an attorney-at-law in the litigation and risk management practice group of Loyens & Loeff Luxembourg.

Olivier's practice includes commercial contract drafting and negotiation, litigation and arbitration. He has experience in advising on a broad range of complex, high-value multi-jurisdictional technology, financial, investment management and construction disputes.

Prior to joining Loyens & Loeff in 2018, Olivier was the Legal Officer and Representative of the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center for the Asia-Pacific region based in Singapore.

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Loyens & Loeff

As a leading firm, Loyens & Loeff is the natural choice for a legal and tax partner if you do business in or from the Netherlands, Belgium, Luxembourg and Switzerland, our home markets. You can count on personal advice from any of our 900 advisers based in one of our offices in the Benelux and Switzerland or in key financial centres around the world. Thanks to our full-service practice, specific sector experience and thorough understanding of the market, our advisers comprehend exactly what you need. As a fully independent law firm, Loyens & Loeff is excellently positioned to coordinate international tax and legal matters. We have our own network of offices in major financial centres, staffed with specialists in Dutch, Belgian, Luxembourg and Swiss law. Our office network is complemented by several country desks all of which are experienced in structuring investments all over the world. Moreover, we are on excellent terms with other leading independent law firms and tax consultants. That way, we can guarantee you top-level advice in every part of the world. Each problem requires a customised solution. Our pragmatic approach and drive to devise innovative solutions allow us to effectively address the demands of our clients' domestic and international businesses. Thanks to the broad range of our legal experience, know-how and the size of our practices, we can offer you top-level advice, locally and internationally. We are committed to meeting your needs at the highest quality level in the most efficient way.

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