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 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.

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?

The Luxembourg Arbitration Law is provided for in articles 1224–1251 of the New Code of Civil Procedure (NCPC). These provisions, applicable in domestic arbitrations, are also applicable in international arbitrations subject to the applicability of international conventions. This section was extended by the Law of 24 February 2012 with new provisions regarding mediation.

The Luxembourg Arbitration Law is based neither on the UNCITRAL Model Law nor on French Arbitration Law. Certain noticeable differences and particular provisions are addressed at question 50.

Since 2013, the Think Tank for Arbitration, led by arbitration practitioners and university professors, has been working on reforming the Luxembourg Arbitration Law and produced a draft law partially inspired by French arbitration law and the UNCITRAL Model Law. On 15 September 2020, the Luxembourg government published its draft bill No. 7671, which seeks to streamline the Luxembourg arbitration regime and render it quicker and more flexible. Like the current Luxembourg Arbitration Law, the draft bill does not distinguish between national and international arbitration. Between December 2020 and October 2021, several bodies and government authorities shared their comments with the Luxembourg parliament on the Draft Bill No. 7671, including in particularthe Luxembourg judicial authorities (the District Courts of Luxembourg and Diekirch, the Superior Court and the Magistrate's Court of Esch-sur-Alzette), the Chamber of Commerce, the Luxembourg Arbitration Association and the Luxembourg Bar Council).

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 at: https://www.cc.lu/fileadmin/user_upload/cc.lu/Rules_of_arbitration.pdf

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

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?

The District Court has jurisdiction in relation to arbitration-related matters. It is particularly well versed and has extensive experience in this field, thus providing the parties with the certainty expected when choosing Luxembourg as the place of the arbitration.

The District Court has jurisdiction over matters concerning the appointment of the arbitral tribunal (article 1227 NCPC), the enforcement of a foreign award (article 1241 NCPC), actions to set aside international awards rendered in Luxembourg (article 1244 NCPC), the opposition of a party's request to complete the award (article 1248), etc.

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.

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 (promesse d'arbitrage or arbitration clause) or may concern an existing dispute (compromis or submission agreement) in accordance with article 1227 NCPC.

Article 1226 NCPC provides that submission agreements may be drawn up in minutes before the selected arbitrators, by deed before a notary public, or by written private deed (which may be drawn up by electronic means pursuant to article 1322 et seq of the Luxembourg civil Code and the law of 14 August 2000 on electronic commerce).

A submission agreement is subject to certain requirements of form and content. Article 1227 NCPC provides that it shall be in written form and specify, in sufficient details, the subject matter of the dispute and state the name of the arbitrators. It will be void if it does not meet these requirements.

An arbitration clause, however, is not subject to any requirement of form.

Recording it in writing is a merely a matter of evidencing its existence and content.

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

Articles 1224 and 1225 NCPC determine the scope of what parties may submit to arbitration.

Article 1224 NCPC allows parties to submit to arbitration matters in which they have the right to enter into a settlement, whether civil or commercial. This reflects a broad concept of arbitrability.

Certain matters are specifically excluded pursuant to article 1225 NCPC. These include the status and legal capacity of natural persons, conjugal relations, applications for divorce or legal separation and the representation of incapacitated persons or missing persons.

A dispute may not be deemed non-arbitrable solely on the ground that the arbitral tribunal shall decide on matters of public order.

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 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 or misuse of corporate assets).

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 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?

Unlike French law, Luxembourg law does not recognise the "group of companies doctrine".

12 Are arbitration clauses considered separable from the main contract?

The Luxembourg Arbitration Law does not contain specific provisions relating to the separability of arbitration agreements. In 2003, the Court of Appeal ruled that an arbitration clause is ancillary to the principal contract and must thus be declared void where the principal contract is declared void. However, in 2005, the Court of Appeal ruled that an arbitration clause is 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 tribunals jurisdiction and competence?

The principle of competence-competence is recognised in Luxembourg, although Luxembourg arbitration law does not specifically address it. Thus, an arbitral tribunal may rule on its own competence if the issue is brought to it.

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

Should a party to an arbitration ask a Luxembourg court to determine an issue relating to the tribunal's jurisdiction and competence, the court will decline jurisdiction if an objection is raised limine litis, even if the arbitral tribunal has not yet been constituted.

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 by way of annulment of the award. Article 1244(3), (4) and (6) provide that the award may be challenged before the District Court if there was no valid arbitration agreement, if the tribunal exceeded its jurisdiction or powers or if the award was rendered by an improperly constituted tribunal.

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?

An arbitration clause is not subject of any particular requirement of form. It is, however, preferred to record the parties' agreement in writing to demonstrate their consent when a dispute arises, if this were necessary.

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.

Multi-party arbitrations are expressly provided for at article 1227 NCPC. If there are more than two parties with distinct interests in the dispute, they will have to agree on the names of the three

arbitrators. Failing agreement, these appointments will be made by the President of the District Court at the request of the most diligent party, the other parties present or duly called.

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?

Article 1230 of the NCPC provides that, unless the parties have agreed otherwise, the parties and the arbitrators shall follow the time limits and forms as are established for the domestic courts.

Thus, 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.

Parties should take note that 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 these laws.

However, parties may also provide, in the arbitration agreement, that the arbitral tribunal shall decide as an amiable compositeur (ie, ex aequo et bono),in accordance with article 1240 of the 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 the event that the parties failed to choose a substantive governing law, or that it is unclear, the tribunal may apply the rules of law relied upon by the parties in the proceedings or determine the substantive law in accordance with the rules of private international law.

Appointing the tribunal

19 Does the law of your jurisdiction place any limitations in respect of a partys choice of arbitrator?

The Luxembourg Arbitration Law does not provide for any mandatory qualifications or expertise, and the parties may freely choose their arbitrators provided that they are impartial, independent and have legal capacity (over 18 and not under the supervision of a legal administrator).

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 1227 NCPC.

The courts would play a role where a party would refuse to participate in the appointment of a co-arbitrator. Upon one party's application, the appointment shall be made by order of the President of the District Court. Such appointment is not subject to appeal. A copy of the application and order shall, within eight days, be served on the defaulting party and the arbitrators, with an injunction to carry out their duties. Once appointed, the co-arbitrators shall then agree on the person of the President, or the President of the District Court will proceed with the appointment if they cannot agree.

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?

Article 1235 of the NCPC provides that arbitrators may not be challenged, except for reasons that have arisen since the agreement to arbitrate (compromis). Thus, in principle, if the cause of the suspicion precedes the agreement and the parties go forward with the arbitration, they may be deemed to have waived their right to raise this ground. Following this logic, it may be inferred that arbitrators may only be challenged for reasons predating the agreement if the reasons were unknown or the party did not participate in the appointment. Challenges to arbitrators are to be brought before the District Court.

In accordance with article 523 of the NCPC, judges shall disclose facts that might provide grounds for a challenge, which are provided at article 521 of the NCPC. Since case law refers to these provisions in the context of arbitration proceedings, the same grounds would apply to challenge 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).

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?

An arbitration clause does not prevent a party from applying to the Juge des Référés (judge of summary proceedings) to seek interim measures of protection, for example in the event of urgency to preserve evidence or establish facts essential to the outcome of the dispute (Court of Appeal, 25 June 1991).

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).

The parties may also contractually agree on the competence of the judge to order interim relief.

Anti-suit injunctions are not available under Luxembourg law.

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

Article 257 of the NCPC provides that, upon request of the defendant, 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.

Article 257 of the NCPC may be applied to arbitration proceedings seated in Luxembourg pursuant to article 1230 of the NCPC, which provides that arbitrators and parties shall follow the usual procedure (ie, time limits and forms) of domestic courts, unless the parties have agreed otherwise.

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)?

It is generally understood that articles 1224–1251 of the NCPC provide supplementary procedural rules. These complement the general provisions applicable before domestic courts (ie, time limits and forms) unless the parties agree otherwise, in accordance with article 1230 of the NCPC. Parties may agree otherwise for example in their arbitration agreement.

In any event, arbitration proceedings shall respect all important principles of natural justice which 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).

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 1227 of the NCPC provides that the appointment shall be made by order of the President of the District Court (issued upon application and not subject to appeal).

A party's refusal to appear before the arbitral tribunal, after having been given due notice, does not prevent the arbitral proceedings from going forward. The tribunal shall be entitled to render an award by default.

A duly informed defaulting party may not object to the award, in accordance with article 1237 of the NCPC.

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?

The Luxembourg Arbitration Law does not provide for specific rules of evidence for arbitration proceedings. Thus, in accordance with article 1230 of the NCPC, the rules applicable before the domestic courts will apply, unless otherwise provided by the parties.

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 of the NCPC.

Thus, each party must provide the evidence of the facts relied upon and cooperate with any investigation process conducted by the tribunal, pursuant to article 60 of the NCPC.

Written evidence prevails but parties may also rely, for example, on testimonial evidence and declarations under oath. For technical questions or proof of foreign law, the parties often produce expert evidence.

Pursuant to article 1237 of the NCPC, each party must produce the documents it believes necessary to bring its case forward (eg, submissions and documents) at least 15 days before the end of the arbitration procedure. Even if a party fails to do so, the tribunal may render the award on the basis of the documents provided insofar as the rules of natural justice were complied with.

In commercial matters, 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 courts could intervene in an arbitration process in relation to evidentiary matters by ordering interim measures, for instance, by issuing preventive evidentiary injunctions (article 350 of the NCPC) or emergency evidentiary measures (article 933 of the NCPC).

In practice, these possibilities are rarely used in arbitration proceedings.

Potentially, the Luxembourg courts may be requested to decide on claims of forged evidence. If judicial proceedings are commenced, the arbitration proceedings are suspended.

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

Article 60 of the NCPC is applicable pursuant to article 1230 of the NCPC unless the parties provide otherwise. It provides that the parties have to cooperate in the investigation process conducted by the courts.

An arbitral tribunal could, for example, issue an interim judgment ordering a party to disclose relevant documents. The enforcement of this judgment could be requested from the courts.

In addition, unless otherwise provided by the arbitration agreement, any investigation must be conducted by the entire arbitral tribunal, and investigations conducted by an arbitrator without the others will be declared null and void (article 1232 NCPC).

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

Under Luxembourg law, there are no specific requirements for 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?

Nothing in the law prohibits the arbitration court from holding hearings or procedural meetings outside Luxembourg. The arbitration award must, however, be issued in Luxembourg.

Award

34 Can the tribunal decide by majority?

Unless the parties agree that unanimity is required for the award, an arbitral tribunal would decide by a majority vote. In the event that a minority arbitrator would not want to sign the arbitration award, article 1237 of the NCPC provides that the decision 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.

Should a majority among tribunal members not be reached, articles 1238 and 1239 of the NCPC provide that the members of the tribunal shall agree on a third-party arbitrator who shall render his or her award within a month of his or her appointment (unless this delay was extended by the arbitrators appointing him or her). Should the members of the tribunal not agree on the third-party arbitrator, the President of the District Court will appoint him or her.

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

Punitive damages could be considered as contrary to Luxembourg public order and could lead to the voidance of the award under article 1244 of the NCPC (see question 42).

Any remedies or relief ordered by the arbitral tribunal, can only be enforced with the intervention of a judicial authority (article 1242 of the NCPC).

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

In accordance with article 1237 of the NCPC, in the event of a dissenting opinion and where a member of the tribunal refuses to sign the award, the other arbitrators representing the majority shall record the dissent in the award. The award will have the same effect as if it had been signed by all arbitrators.

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

The arbitration award must be signed by a majority of the arbitrators to be valid.

The arbitration award is rendered enforceable by the President of the District Court. To be declared enforceable, the minutes of the award must be filed with the registrar of the District Court by an arbitrator or a party (article 1241 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?

Parties should be aware that article 1228 NCPC provides for a short three-month duration of the arbitration proceedings and would in theory require that the whole of the arbitration take place within this period. Should this duration be exceeded, the arbitration award may be declared void by the courts 1233(2) NCPC.

In practice, the parties may contractually provide (for example, in their arbitration clause) for a shorter or a longer period. They may also extend this three-month period during the proceedings or allow this matter to be determined in accordance with the rules of arbitration chosen. Thus, the extension does not necessarily have to be done by the parties directly. The rules of arbitration may for example provide that the president of the tribunal or a third-party (such as the institution) may extend it.

The duration of the extension must, however, be clear and precise. Should parties agree on the principle of an extension but not on duration, this agreement would grant them at most another three-month period. The Luxembourg courts have 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 exceeding the three-month maximum period was declared null and void (District Court of Luxembourg 25 January 2011).

Specific time limits are applicable to file an application to challenge an award (see question 42). This application must be filed within one month of the notification of the award (or from the discovery of the fraud or of the false evidence insofar as it is filed within five years of the notification of the execution order to the parties) (article 1246 of the 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?

Luxembourg 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, recent court decisions followed a reasoning according to which the full reimbursement of the lawyer's 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 lawyer's 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.

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

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.

An arbitration award may only be challenged before the District Court on limited grounds for annulment that are listed in article 1244 of the NCPC.

No distinction shall be made 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).

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

The grounds for challenge of awards, provided at article 1244 of the NCPC, are as follows:

- if the award infringes public order;
- if the dispute was not permitted to be settled by arbitration;
- if there was no valid arbitration agreement;
- if the arbitral tribunal exceeded its jurisdiction or powers;
- if the arbitral tribunal omitted to rule on one or more points in dispute and if the points omitted cannot be separated from the points on which the tribunal has ruled;
- if the award was made by an improperly constituted arbitral tribunal;
- if there has been a violation of the rights of the defence;
- if the award is not reasoned, unless the parties have expressly exempted the arbitrators from motivating their decision;
- if the award contains conflicting provisions;
- if the award was obtained by fraud;

- if the award is based on evidence declared false by an irrevocable court decision or on evidence recognised to be false; and
- if, since the date the award was made, a document or other piece of evidence, that would have had a decisive influence on the award and that was withheld by a deliberate act of the other party, was discovered.

However, pursuant to article 1244 of the NCPC, if a party has, during the course of the arbitral proceedings, become aware that there was no valid arbitration agreement, that the tribunal exceeded its jurisdiction or powers or the tribunal was not properly constituted, and failed to invoke them at the time, this party may not rely on these grounds to challenge any subsequent award.

An arbitration award can only be challenged before the courts once it is final.

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 1231 of the NCPC provides that the parties, at the time of entering in the arbitration agreement, may exclude the possibility of an appeal on the merits.

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?

Article 1251 of the NCPC provides that, subject to the provision of international conventions, a judge may refuse to enforce an award on the following grounds:

- if the award may still be challenged before arbitrators and if the arbitrators have not ordered its provisional enforcement notwithstanding an appeal;
- if the award or its enforcement is contrary to public policy or if the dispute was not capable of being settled by arbitration;
- if it is established that there are grounds for annulment provided for in article 1244, paragraphs 3 to 12.

Parties cannot modify the list of the grounds for annulment of the award, except the one relating to the award's reasoning (article 1244(8) of the 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.

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.

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?

Neither the Luxembourg Arbitration Law nor the Rules of the Arbitration Centre provide for the confidentiality of arbitration proceedings. Thus, there is no general principle of confidentiality binding the parties and their counsel. With respect to arbitrators, we refer to question 22.

Thus, it is recommended that parties separately agree on the confidential nature of the arbitration proceedings, including of their existence – as well as the potential sanctions. Alternatively, arbitral tribunals may order confidentiality by way of procedural orders.

However, when a party seeks the annulment of an award, it does so before the District Court and the existence of the proceedings may thus become public, despite any confidentiality provision.

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 does not provide for the confidentiality of arbitration proceedings, documents do not become confidential by the mere fact that they are produced. They may, in theory, be relied upon in other proceedings. In practice, 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?

Counsel and arbitrators involved in proceedings in Luxembourg are bound by their own ethical codes and professional standards of conduct.

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.

Article 10 of the Rules of Arbitration of the Luxembourg Arbitration Center provides that arbitrators shall be and remain impartial and independent of the parties involved. See also question 24 regarding grounds for challenge in the event of a lack of impartiality or independence.

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 Luxembourg Arbitration Law contains a number of procedural specificities, and, in particular, the following:

- if the tribunal and the parties have not established a procedural timetable, article 1237 of the NCPC provides that the parties shall provide submissions and documents in support of their case at least 15 days prior to the expiration of the time limit of the arbitration agreement;
- counsel advising in arbitrations seated in Luxembourg shall be familiar with the procedure applicable before domestic courts, as it will be applicable pursuant to article 1230 unless the parties agree otherwise; and
- arbitration under Luxembourg law is not reserved for commercial matters. Civil matters are also arbitrable, subject to the exclusions of article 1225 of the NCPC.

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

There is no 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.

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

Loyens & Loeff

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.

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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