



Arbitration Guide  
IBA Arbitration Committee

# **LUXEMBOURG**

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## I. Background

(i) **How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

While the majority of disputes in Luxembourg are decided by state courts, arbitration is a popular method of dispute resolution, especially in international business relationships.

Generally, the perceived advantages to arbitration are speed, confidentiality and flexibility of the proceedings and the specialization of the arbitrators. At the same time, especially among smaller and middle sized enterprises, costs are sometimes perceived as a concern and hence arbitration is sometimes seen as a dispute resolution method more suitable for larger companies.

(ii) **Is most arbitration institutional or ad hoc? Domestic or international? Which institutions and/or rules are most commonly used?**

One possible body for arbitration in Luxembourg is the Arbitration Centre of the Chamber of Commerce of Luxembourg ('the Arbitration Centre'), which offers facilities and may handle numerous institutional arbitration cases each year. The Arbitration Centre applies its own arbitration rules that are similar to the International Chamber of Commerce ('ICC') rules and is governed by an Arbitration Council, which comprises the following members: the president of the National Luxembourg Committee of the ICC, the national member of the Arbitration Court of the ICC, the president of the Luxembourg Bar Association, the director of the Chamber of Commerce and the president of the Auditors Institute (*Institut des Réviseurs d'Entreprise* – IRE). This Arbitration Council does not itself decide on disputes or act as an arbitrator. It is rather an administrative body that acts in a supervisory capacity, in accordance with its arbitration rules. Every arbitration done at the Arbitration Centre will be governed by the arbitration rules of the Centre.

Some arbitration proceedings in Luxembourg take place under the rules of CEPANI, the oldest and largest Belgian arbitration and mediation centre, located in Brussels.

Numerous arbitrations are *ad hoc* arbitrations, referring to different institutional rules, on a case by case basis.

**(iii) What types of disputes are typically arbitrated?**

Most disputes relate to cooperation/services agreements, transfers of shares, post-acquisition problems, commercial contracts (distribution, agency, franchising), construction contracts and shareholder agreements.

**(iv) How long do arbitral proceedings usually last in your country?**

Articles 1228 and 1233 of the Luxembourg New Code of Civil Procedure ('NCPC') provide for a maximum of three months for the duration of arbitral proceedings, unless otherwise agreed by the parties. Should this duration be exceeded, the arbitration award will be declared void by the courts. However, the parties have a possibility to adapt and extend the deadline in regard to their needs.

**(v) Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?**

No statutory restrictions limit whether foreign nationals may act as arbitrators in Luxembourg, and often Luxembourg is regarded as a good location for the administration of foreign international arbitration. Moreover, the conditions imposed on attorneys to act before Luxembourg courts are not applicable to arbitration. Parties are therefore free to select the counsel of their choice, regardless of his nationality and admission to a bar association or law society.

## **II. Arbitration Laws**

**(i) What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

The Luxembourg law on arbitration was included in the NCPC, in the specific section dedicated to arbitration (title I, Book III, Part II), and ranges from Article 1224 to Article 1251 NCPC. This section was extended by the Law of 24 February 2012 with new provisions regarding mediation.

The NCPC does not contain any provision concerning its scope of application. It applies indistinctively to both domestic and international arbitrations governed by Luxembourg law.

The recognition and enforcement of awards are governed by articles 1241, 1242 and 1250 of the NCPC, articles 678 to 685-1 relating to the enforcement of foreign awards in Luxembourg, and articles II to IV of the New York Convention of 1958.

Luxembourg has not adopted the UNCITRAL Model Law.

A think tank drafting committee is currently working on a bill requested by the Ministry of Justice to reform the national arbitration law and the NCPC provisions related thereto.

**(ii) Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

Except for enforcement of foreign awards, the NCPC does not draw a distinction between domestic and international arbitration and applies to all arbitrations with seat in Luxembourg alike.

**(iii) What international treaties relating to arbitration have been adopted (eg New York Convention, Geneva Convention, Washington Convention, Panama Convention)?**

Luxembourg is party to the New York Convention. The Convention was approved by the Law of 20 May 1983. The Law specifies that the Convention will apply on the basis of reciprocity for the recognition and enforcement of arbitration awards made in the territory of another contracting state.

Luxembourg is also party to the European Convention on International Commercial Arbitration of 1961, the Washington Convention of 1965 and the Convention on Conciliation and Arbitration within the OSCE of 1992.

**(iv) Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?**

There are no rules in the articles of the NCPC relating to arbitration as to which law the Arbitral Tribunal should apply to the merits of the case if no such agreement between the parties exists. In practice, the arbitral tribunal will determine the applicable law applying the principles of private international law.

The parties to an arbitration may freely decide on the law applicable to the merits of the case, if they agree to deviate from the Luxembourg rules, or authorise the arbitral tribunal to decide as *amiable compositeur* (i.e. in fairness).

### III. Arbitration Agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

Pursuant to Article 1226 NCPC, arbitration agreements can be made before the arbitrators, by deed before a notary or by written agreement. Arbitration agreements concluded *ex ante* are not required by law to be in writing, as long as evidence in writing can be provided showing that parties have agreed on a settlement by arbitration.

Article 1227 of the NCPC provides that the arbitration agreement must specify the intention of the parties to submit their dispute to arbitration, the subject matter of the dispute and the arbitrators' names in order to be valid.

Arbitration agreements can be contained in general terms and conditions. However, in principle, pursuant to Luxembourg civil law, the general conditions pre-established by one of the parties are binding against the other party only if it has been able to see them before signing the contract and if it can be considered that it has accepted them depending on the circumstances.

- (ii) **What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?**

Luxembourgish courts generally have a pro-enforcement approach as soon as the intention of the parties to arbitrate is apparent.

If court proceedings are initiated despite an existing arbitration agreement, the opposing party must object and raise the defence *in limine litis*, i.e. at the outset of the proceedings. Should the opposing party fail to object to the introduction of the court proceedings, the court will not raise the matter *ex officio*, and the opposing party will be deemed to have waived the right to raise such defence. If the opposing party objects *in limine litis*, the court will declare that it is not competent to hear the case.

The situation is slightly different in interim proceedings. Old decisions have held that the judge sitting in interim proceedings is competent to order *in futurum* investigation measures, if an arbitral court has not yet been appointed and if the parties have not expressly decided that interim proceedings cannot be referred to.

In a more recent decision, it was held that an arbitration clause that provides that the parties will submit to arbitration any dispute in relation with the contract,

includes disputes for which the judge sitting in interim measures is competent. Therefore, all disputes were to be referred to arbitration, even those relating to anticipated reliefs, which are usually referred to in interim proceedings. It seems therefore that, when it comes to interim proceedings, arbitration agreements are enforced on a case by case basis and the drafting of the arbitration clause clearly seems the main criteria determining competence.

An arbitration agreement is no longer enforceable in the following circumstances, pursuant to article 1233 of the NCPC:

- a. death, refusal, or impediment of one of the arbitrators unless there is a clause providing that the arbitration agreement will be enforceable anyway or providing for the replacement of the arbitrator which will be chosen by the parties or by the remaining arbitrators;
- b. expiration of the time limit stipulated in the arbitral agreement, or expiration of three months if not otherwise stipulated; or
- c. deadlock, where there is an even number of arbitrators who are not empowered to choose an additional arbitrator.

**(iii) Are multi-tier clauses (eg arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

Multi-tier clauses are valid under Luxembourg law and do occur occasionally in practice.

If a clause containing an unequivocal obligation for the parties to refer to mediation prior to starting arbitration proceedings is raised *in limine litis* before an arbitral tribunal, the latter should suspend the review of the case and declare itself incompetent to hear the case until this obligation is fulfilled. The parties must start the arbitral proceedings anew when the mediation is over.

**(iv) What are the requirements for a valid multi-party arbitration agreement?**

There are no specific provisions in the NCPC relating to multiparty arbitration agreements. The requirements are the same as for a bilateral arbitration agreement.

In the case of a multi-party dispute, where more than two parties have different interests, article 1227 of the NCPC provides that they will have to reach an

agreement to appoint three arbitrators, with the defendant(s) and claimant(s) each appointing one arbitrator and the two nominated arbitrators selecting the tribunal chairman.

Should they fail to do so, the president of the District Court will appoint all the arbitrators on request of one of the parties.

**(v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

There are no specific provisions in the NCPC or case law related to this matter.

**(vi) May arbitration agreements bind non-signatories? If so, under what circumstances?**

In principle, the arbitration agreement only binds the parties (article 1243 of the NCPC) but Luxembourg case law has confirmed that in the event of the assignment of a contract or the stipulation in favour of a third party, the arbitration clause may be enforceable against a third party. Courts have also extended arbitration agreements to non-signatories in cases of group contracts where the parties would (i) have implicitly agreed to adhere to the arbitration agreement; (ii) would be linked to the master agreement<sup>1</sup>.

In principle, parties which have an interest in the arbitral proceedings may join or intervene, unless otherwise provided in the arbitration rules agreed between the parties.

#### **IV. Arbitrability and Jurisdiction**

**(i) Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

Anyone can compromise on rights freely disposable (Article 1224 NCPC). However, some matters are excluded from arbitration, for instance disputes in relation with the (i) status and legal capacity of natural persons, (ii) marital relationship, (iii) application for divorce or legal separation, (iv) representation of incapacitated persons or missing persons (Article 1225 NCPC). Furthermore,

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<sup>1</sup> *Tribunal d'arrondissement, Xème chambre*, civil judgment n°115/2012, 1 June 2012.



disputes that are subject to a mandatory attribution of jurisdiction cannot be submitted to arbitration.

Any arbitration clause inserted in a pre-established contract concluded between professional traders and consumers is considered as an abusive clause, if it is not proven that such clause was specifically accepted by the consumer.

The issue of arbitrability is generally considered an issue of jurisdiction and will therefore in principle be assessed by arbitral tribunals as part of the *competence-competence* principle.

**(ii) What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

If court proceedings are initiated despite an existing arbitration agreement, an objection to jurisdiction must be raised *in limine litis*. Should the opposing party fail to object to court proceedings, the court will not raise the matter *ex officio*, and the opposing party will be deemed to have waived the right to settle the dispute by arbitration. If the opposing party objects *in limine litis*, the court will declare itself without jurisdiction to hear the case.

Provided that such denial of jurisdiction is timely raised, the participation of a party in court proceedings is not considered a waiver of a right to arbitrate.

**(iii) Can arbitrators decide on their own jurisdiction? Is the principle of competence-competence applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

The principle of *competence-competence* is recognised in Luxembourg, although no specific rule directly addresses the allocation of competence between courts and arbitrators. The arbitral tribunal may rule on its own jurisdiction and may, for this purpose, examine the validity of the arbitration agreement.

State courts will decline jurisdiction where one of the parties shows *in limine litis* the existence of a valid arbitration clause. State courts must decline jurisdiction even if the arbitral tribunal has not yet been appointed. Case law further confirms that the non-jurisdiction of a state court 'necessarily implies' the jurisdiction of the arbitral tribunal.

As to domestic awards, an *ex post* control by state courts is also available by way of the grounds for annulment provided in article 1244 NCPC. Among other

possibilities, the arbitral award may be declared null and void based on the incompetence of the arbitral court or the lack of a valid arbitral agreement.

## V. Selection of Arbitrators

### (i) How are arbitrators selected? Do courts play a role?

The parties may freely choose the arbitrators, provided that the arbitrators chosen are impartial, independent and that the parties have reached an agreement regarding the appointed arbitrators.

If the parties have signed an arbitration clause without having agreed on a procedure to appoint the arbitrators or where they encounter difficulties in choosing their arbitrators, the NCPC sets out rules to appoint three arbitrators. In such a situation, each party shall appoint one arbitrator and the two appointed arbitrators will then choose a third arbitrator (Article 1227 of the NCPC).

Where a party fails to appoint an arbitrator or if the two appointed arbitrators fail to designate the third one, the president of the District Court will appoint, on request of either party, the third arbitrator.

### (ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

Arbitrators must be impartial and independent. The NCPC does not include any guidelines or requirements as to the disclosure of conflicts.

The procedure regarding the challenge of an arbitrator is not described in the NCPC, but pursuant to case law and the position of some scholars, the procedure is the same as for the challenge of a judge. Challenges to arbitrators must be brought before the District Court. It is not permitted for the opposing party to object to the procedure initiated for challenge of the arbitrator. The grounds on which an arbitrator can be challenged and replaced are the following:

- a. if the arbitrator is director of a company which is a party in the dispute;
- b. if the arbitrator or their spouse is related to a party or to the spouse of a party in dispute up to the degree of first cousin. If the spouse is separated or dead, this provision is applicable if there are children, and in the absence of children, the father-in-law, son-in-law and brothers-in-law cannot be appointed as arbitrator;

- c. if the arbitrator, his/her spouse, their ancestors and descendants are party to another issue with the same object as the one subject to arbitration, or if they are creditors or debtors of one of the parties, or if within five years prior to the challenge, there has been a criminal prosecution between them and one of the parties or its direct relatives;
- d. if there is an issue between the arbitrator, his/her spouse, ancestors, descendants and one of the parties which has begun before the arbitration proceedings, or has ended less than six months before;
- e. if the arbitrator is guardian, heir apparent or the recipient of a gift of one of the parties;
- f. if the arbitrator has already advised or written on the issue, been a witness to the dispute, or if the arbitrator has entertained the parties in his or her house or received presents; or
- g. if there is hostility between the arbitrator and one of the parties (insult, attack or threat as of the beginning of the arbitration proceedings or less than six months before the beginning).

According to case law, arbitrators may be challenged on the additional ground of lack of independence and impartiality<sup>2</sup>.

**(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?**

Any person above the age of eighteen who is capable of entering into an agreement, is not under the supervision of a legal administrator and has full voting rights may act as an arbitrator. The Law does not contain any requirements or limitations with regard to education, nationality, experience or residence.

However, there might be contractual limitations, imposed by the parties. Indeed, parties are free to agree on such requirements and may furthermore agree to exclude certain categories of persons.

Arbitrators must also comply with the ethical duties of the professional association to which they belong (if any). Luxembourg law does not include any provisions in this respect specifically applicable to arbitration.

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<sup>2</sup> Court of Appeal, 24 November 1993, No. 14983.

- (iv) **Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

The NCPC requires arbitrators to be impartial and independent, but does not contain any specific rules or codes of conduct regarding conflicts of interest.

Article 1235 of the NCPC states that an arbitrator can be challenged only on grounds that have arisen after acceptance of the arbitration agreement (which has to mention the names of the arbitrators in order to be valid). These grounds for challenging an arbitrator are the same as those relating to the state court judges set forth in article 521 of the NCPC (family relationship with parties or having written about or advised on the dispute).

The International Bar Association Guidelines on Conflicts of Interest are also commonly used as a reference.

## **VI. Interim Measures**

- (i) **Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

Arbitrators can grant interim relief if it is clear that the parties have agreed that interim measures are covered by the arbitration clause or the arbitration agreement. Arbitrators are entitled to order provisional or protective measures, such as conservatory measures to preserve evidence or prevent irreparable harm.

The arbitral tribunal may order, upon request of one of the parties, interim measures which must be enforced by an order of the president of the District Court. Unless otherwise agreed by the parties, the arbitral tribunal can request a security for costs. Interim measures issued by arbitrators are enforceable by the District Court.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court ordered provisional relief remain in force following the constitution of the arbitral tribunal?**

If not otherwise agreed by the parties, arbitrators have the power, upon application of a party, to order any provisional measures they deem necessary.

According to some scholars, however, Courts have the power to grant provisional relief or interim measures only before the constitution of an arbitral tribunal.

Interim relief is typically granted in the form of an order rather than an award. An arbitral tribunal may make the granting of interim relief dependent on the provision of appropriate security.

Luxembourg courts are empowered to enforce interim measures issued in arbitrations seated in Luxembourg and abroad. A court may recast an arbitral tribunal's order regarding interim relief into a form fulfilling the requirements for enforcement under Luxembourg civil procedure law.

**(iii) To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

Subject to the arbitration agreement and prior to the constitution of the arbitral tribunal, parties may apply to state courts for urgent relief or to preserve evidence.

## **VII. Disclosure/Discovery**

**(i) What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

The concept of "discovery" does not exist in Luxembourg law. There are a few provisions, such as article 350 NCP, allowing parties to request the production of precisely targeted documents. The court has full discretion whether or not to grant these applications.

Similarly, Luxembourg law does not provide for specific rules of evidence or discovery for arbitration proceedings and consequently the general provisions of the NCPC will be applicable unless otherwise provided by the parties.

Thus, article 60 of the NCPC is applicable unless otherwise agreed by the parties. It provides that as a general principle, each party must provide the evidence of the facts and cooperate in the investigation process conducted by the courts. Each party is free to provide all documents it considers necessary to its defence. However, disclosure of the document must be made at least 15 days before the end of the arbitration period (Article 1237 NCPC).

An arbitral tribunal may order the parties to disclose certain documents, order interim measures, issue preventive evidentiary injunctions (article 350 NCPC) or emergency evidentiary measures (article 933 NCPC), but no arbitration decision may bind a third party. In commercial matters, private documents, accepted invoices, correspondence, balance sheets or witness statements are often submitted as evidence (article 109 of the Commercial Code).

- (ii) **What, if any, limits are there on the permissible scope of disclosure or discovery?**

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).

Also, parties may only apply for the production of precisely targeted documents.

- (iii) **Are there special rules for handling electronically stored information?**

The NCPC does not contain any special rules or guidance for handling electronically stored information. Parties – and, absent any agreement between them, arbitrators – have full discretion to decide how to deal with electronically stored information.

## **VIII. Confidentiality**

- (i) **Are arbitrations confidential? What are the rules regarding confidentiality?**

There are no specific provisions relating to confidentiality of arbitration proceedings in Luxembourg law. It is recommended that parties agree on the confidential nature of the arbitration proceedings, and on the potential remedies attached to the breach of such confidentiality.

Enforcement proceedings are public.

- (ii) **Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?**

The NCPC does not contain any specific provisions on this issue. Absent any specific agreement between the parties, the arbitral tribunal may decide on issues relating to trade secrets and confidentiality of information as part of its general power to govern the proceedings.

Arbitration agreements generally require arbitrators to return to the parties the documents delivered during the proceedings.

**(iii) Are there any provisions in your arbitration law as to rules of privilege?**

While the NCPC itself does not contain any specific provisions on privilege of information, certain information may be privileged under the applicable law pursuant to rules of professional secrecy: for example, under Luxembourg law members of certain professions (such as doctors, physicians, pharmacists and attorneys) may not disclose information obtained through their profession.

**(iv) Are there any provisions in your arbitration law as to rules of privilege?**

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**IX. Evidence and Hearings**

**(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? If so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?**

The IBA Rules on the Taking of Evidence in International Commercial Arbitration are not usually taken into account.

**(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?**

Article 1230 NCPC confers the discretion to the arbitral tribunal to set the procedural rules and place of arbitration when no agreement between the parties exists. Failing such an agreement within the time limits fixed by the tribunal, the procedure and the place of arbitration are therefore determined by the arbitrators. The parties and the arbitral tribunal are free to organise the arbitral as they see fit, within the limits imposed by the general principles of equality between the parties, the right of defence and the right to a fair trial.

**(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?**

The NCPC does not contain any rules on witness testimony and, more generally, allows parties and arbitrators flexibility in the organization of the taking of evidence in arbitral proceedings (Article 1230 NCPC).

If the witness is easily ‘approachable’, parties can freely file witness statements. However, such statements may not be prepared with the help of the parties’ counsels.

The parties can also request the arbitral tribunal to call a witness if the latter is not easily ‘approachable’, by proving that they could provide a first-hand testimony on a matter related to the dispute. If the arbitral tribunal accepts such request, the witness will be examined by the members of the arbitral tribunal. Counsel may not directly examine the witness and should always go through the tribunal. This is the reason why witness preparation is strictly forbidden.

Furthermore, cross-examination does not exist, as witnesses can only be examined by the arbitral tribunal rather than by the parties’ counsel.



**(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?**

The NCPC does not restrict who can appear as witnesses, as long as they report what they personally witnessed. The NCPC prohibits the following persons from appearing as witnesses:

- the parties to the dispute. The sole manager of a company or the chief executive officer are considered as being the company itself and can therefore not be heard as witnesses; and
- persons who can put forward a good reason for not testifying such as professional secrecy or protection of private life.

The NCPC allows parties and arbitrators to organize the taking of evidence – including witness evidence – in arbitral proceedings as they see fit. The arbitral tribunal will thereby decide the weight to give to the evidence brought forward.

In practice, witnesses appearing before an arbitral tribunal will rarely be required to take an oath or state an affirmation of truth but arbitral tribunals have the ability to issue an admonition or reminder of the obligation to tell the truth subject to criminal sanction and will generally do so.

**(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg legal representative) and the testimony of unrelated witnesses?**

As mentioned above, any connection to one party shall be disclosed and arbitral tribunals will take into account a given witness's interest in the outcome of the dispute and will assess the probative value of the respective testimony accordingly.

**(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?**

The NCPC does not contain any rules regarding the testimony of party-appointed experts and leaves it to the parties and arbitrators to organize whether and under which conditions expert testimony is possible. However, as part of its discretion to assess the weight of evidence brought, the tribunal will ensure that the appointed experts are independent and impartial.

- (vii) **Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

Absent any contrary agreement between the parties, the arbitral tribunal may appoint its own experts, either at its own motion or at the request of a party.

The findings and opinions of an expert appointed by an arbitral tribunal will bind both parties.

An arbitral tribunal is under no obligation to select an expert from a particular list but it is common practice to have experts selected from a particular list. As is the case for evidence brought forward by party-appointed experts, the arbitrators have the discretion to assess the weight and importance of the evidence.

- (viii) **Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?**

Witness conferencing is allowed, as parties and arbitrators have the discretion to organize expert testimony as they see fit. Witness conferencing is, however, not common, and no typical practice exists in Luxembourg.

- (ix) **Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

Luxembourg arbitration law or institutional rules do not contain any rules as to the use of arbitral secretaries.

## **X. Awards**

- (i) **Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

Article 1237 NCCP provides that the award must be signed by each arbitrator either approving or disapproving the award. The only substantial requirement is that the award must be reasoned, unless the parties have expressly exempted the arbitrators from that duty (article 1244(8) NCCP).

Unless the parties have agreed on any limitations, an arbitral tribunal can order the same relief as state courts.

**(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?**

Punitive damages are contrary to Luxembourg public order and could lead to the avoidance of the award under article 1244 NCPC. Only the damages suffered can be repaired. Generally speaking, any remedy or relief ordered by an arbitral tribunal can only be enforced through the intervention of a judicial authority (article 1242 NCPC).

Under Luxembourg law, the question which type of damages and interest can be awarded is considered to be an issue of substantive law. Hence, no specific provisions regarding this issue are included in the NCPC. However, Article 1154 of the Civil Code empowers arbitrators to award compound interests.

**(iii) Are interim or partial awards enforceable?**

An interim or partial award that contains at least one issue on the final decision on the merits is immediately enforceable.

**(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?**

The NCPC is silent on the issue of dissenting opinions. Minority arbitrators who refuse to sign the award must be mentioned in the award. Nothing prohibits the expression of dissenting opinions, although it is not common practice to set out dissenting opinions.

**(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?**

The parties may settle their dispute at any time during the arbitral proceedings and request the arbitral tribunal to record such a settlement in a consent award, which is to be signed by the arbitral tribunal as well as the parties.

**(vi) What powers, if any, do arbitrators have to correct or interpret an award?**

The law is silent on this issue of correcting and interpreting awards. However, the provisions of the NCPC apply, according to which any party may request the tribunal to correct any clerical error, error in computation, typographical error or any error of a similar nature in the award, or request the arbitral tribunal to give an interpretation of a specific point or part of the award.

## **XI. Costs**

### **(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?**

According to Luxembourg procedural law and in the absence of a party agreement, costs are awarded at the arbitral tribunal's discretion considering the circumstances of the case and, in particular, the outcome of the proceedings. In practice, however, a party can request that the unsuccessful party bears the costs of the arbitration (i.e., the fees and expenses of the arbitrators and costs of the administering authority).

### **(ii) What are the elements of costs that are typically awarded?**

The following costs can typically be awarded: arbitrators' fees and expenses; institutional and administrative fees; attorneys' fees; costs for the taking of written and oral witness evidence. Costs incurred by the parties will be awarded to the extent they were necessary for the pursuit of the parties' respective claims and defences.

### **(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?**

In principle, it is accepted that the arbitral tribunal decides on its own fees and expenses.

In institutional arbitration, however, this power is restricted as the arbitrators' fees are generally fixed by the institution by application of cost scales or schedules whereby fees are calculated on the basis of either the amount in dispute or on the basis of time spent.

In ad hoc arbitrations, parties generally refer to an institution's schedule of costs to establish the fees of the arbitral tribunal in order to avoid conflicts.

### **(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?**

Absent any agreement between the parties, the arbitral tribunal has the discretion to apportion the costs of the arbitration between the parties, with application of the method it considers most appropriate. This discretion is part of the arbitral tribunal's adjudicating function and is expressly included in some arbitration rules (eg, CEPANI Rules Article 27(2)).

- (v) **Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?**

Legal doctrine is silent on the matter and state courts have not decided yet whether they have the power to review an arbitral tribunal's decision on the apportioning of costs.

## **XII. Challenges to Awards**

- (i) **How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

An arbitration award having its seat in Luxembourg can only be challenged on a limited list of annulment grounds, listed as follows:

- a. the arbitration award infringes public order;
- b. the dispute should not have been subject to arbitration proceedings;
- c. there was no valid arbitration agreement;
- d. the arbitration court exceeded the limits of its jurisdiction or of its powers;
- e. the arbitration court omitted to rule on one or more points of the dispute and the issues omitted cannot be separated from the issues on which the court has ruled;
- f. the arbitration award was made by an arbitration court that was established improperly;
- g. the rights of the defence have been breached;
- h. the arbitration award does not state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given;
- i. the arbitration award contains contradictory statements;
- j. the arbitration award has been obtained by fraud;
- k. the arbitration award is based on evidence that has been declared false by an irrevocable judicial decision or on evidence that was recognised to be false; and
- l. after the arbitration 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.

Specific time limits are applicable in order to file an application to set aside an arbitral award. This action must be filed within one month from the notification of the award or from the discovery of the fraud (article 1246 NCPC). The average duration of challenge proceedings is eighteen months.

According to the New York Convention, an application made at the place of arbitration to set aside or suspend the effectiveness of an award rendered outside Luxembourg provides grounds for staying recognition and enforcement of that award in Luxembourg.

The Court of Appeal recently ruled that the enforcement of an award can be adjourned if it has been set aside in the state of the seat of arbitration – even if the annulment of an award in its state of origin does not constitute grounds for refusal of enforcement pursuant to Article 1251 of the NCPC<sup>3</sup>. In its judgement, the Court referred to Articles V and VI of the New York Convention according to which, the recognition and enforcement of an award may be refused or adjourned, at the request of the party against whom it is invoked, if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the state of origin. The court granted a stay of the enforcement due to the fact that a procedure to annul the award was introduced.

In an even more recent judgment, the Luxembourg Court of Appeal has confirmed its earlier jurisprudence by refusing the enforcement of an award that was set aside at the seat of arbitration<sup>4</sup>. The Court ruled that an arbitral award that does not produce legal effects in its country of origin because it has been annulled or is not yet final, cannot produce legal effects in Luxembourg. In other words, according to the court's latest ruling, an award can only be enforceable in Luxembourg on the condition that it is also enforceable in its country of origin.

As to domestic awards, the enforcing court can stay the enforcement proceedings pending the outcome of proceedings to set aside the award at the seat of arbitration.

**(ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?**

Case law held that the right to challenge an award is a mandatory rule that the parties cannot exclude in advance<sup>5</sup>. Also, the 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).

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<sup>3</sup> Luxembourg Court of Appeal, 25 July 2015.

<sup>4</sup> Luxembourg Court of Appeal, 27 April 2017.

<sup>5</sup> District Court of Luxembourg, 3 January 1996.

- (iii) **Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?**

Article 1231 NCPC provides that an appeal on the merits is possible against an award unless the parties agree otherwise.

- (iv) **May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?**

If a court sets aside an international arbitral award, it may remand the case to the same arbitral tribunal for the rendering of a new award.

Articles 1245 and 1246 NPCP set out the procedure and the time limitations that apply to such recourse.

### **XIII. Recognition and Enforcement of Awards**

- (i) **What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?**

Awards are enforced by an order of the president of the district court upon request of one of the parties, or one of the arbitrators. The process for recognition and enforcement of arbitral awards depends on whether the arbitral award was rendered in Luxembourg or abroad, and in the latter instance, whether an international convention applies.

A claimant wishing to enforce an award must apply *ex parte* to the President of the District Court to obtain the *exequatur*. The President will grant the *exequatur* by order when the award is no longer open to appeal. The request will, however, be dismissed if the award or its enforcement is contrary to national public policy or if the dispute was not capable of settlement by arbitration. The President cannot rule again on the merits of the dispute (Article 124 NCPC).

For foreign awards, the process of enforcement depends on whether an international convention applies. Luxembourg has ratified the 1958 New York Convention with a reciprocity reservation. Moreover, it has adopted the European Convention. In addition, bilateral conventions on arbitration have been concluded with multiple countries.

In Luxembourg, the applicable law to enforcement of foreign arbitral awards is Article 1251 of the NCPC, which does not include the annulment of the awards as

a ground for refusal of the *exequatur*. Accordingly, the president of the district court may refuse the enforcement of the foreign award on the territory of the Grand-Duchy of Luxembourg:

- a) with respect to awards obtained in a jurisdiction that is not party to the New York Convention, article 1251 NCPC lists the limited cases in which annulment or non-recognition may be declared; and
- b) with respect to arbitration awards rendered in a jurisdiction that is party to the New York Convention, Luxembourg courts may only refuse their enforcement in the limited cases set forth by article V of the New York Convention.

The enforcement order or its refusal by the president of the district court may be appealed before the *Cour d'Appel*. The appeal must be lodged within two months (one month, if the defendant is a Luxembourg resident) since the day of service of the decision. After the *Cour d'Appel* has rendered a decision, the defendant can lodge a final appeal before the *Cour de Cassation*.

According to case law, standard provisions of the NCPC do not apply if the New York Convention applies<sup>6</sup>. Indeed, Luxembourg law provisions are applicable alternatively, so that the New York Convention is exclusively applicable when the award is subject to the New York Convention and a Luxembourg court is not required, or even entitled, to take into account Luxembourg law provisions. Where the award is not subject to the New York Convention, the provisions of the NCPC apply and therefore, a party may not argue that setting aside proceedings are pending in the country of origin of the arbitration award in order to object to its enforcement in another country (in this case Luxembourg)<sup>7</sup>.

**(ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?**

The decision of the president of the district court granting *exequatur* to an arbitral award (whether domestic and foreign) must be served to the other party.

The party seeking enforcement may proceed with the attachment of the other party's assets that are located anywhere in Luxembourg. The attachment will be notified by a bailiff and any attached assets will be sold to the benefit of the attaching creditor. Priority rules exist and recourses are possible against attachment measures.

The serving party has a limited period of time from the date of notification, depending on the provisions in force in the serving party's jurisdiction, to oppose

<sup>6</sup> Court of Appeal, 25 June 2015; 27 April 2017 (decision No. 40105).

<sup>7</sup> District Court of Luxembourg, (summary judgment) 5 May 2010.



the decision before the president of the district court, whose decision is subject to appeal before the court of Appeal. The court may order a stay of enforcement pending the review of the opposition or the appeal, or order that the enforcement will be conditional upon the constitution of a security.

No recourse to court is possible once the exequatur petition is filed.

**(iii) Are conservatory measures available pending enforcement of the award?**

Enforcement of the award may entail measures of attachment and judicial seizures. Conservatory measures may also be available on a provisional basis in the case of a stay of the enforcement proceedings.

**(iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?**

Traditionally, Luxembourg courts, like the French courts, have adopted a liberal regime in favour of the recognition and enforcement of foreign arbitral awards. When reviewing a request for enforcement, the judge will nonetheless ensure that the award can no longer be contested before the arbitrators, that the award was made in accordance with public policy and that the issue in dispute was arbitrable.

According to recent case law, foreign awards set aside by the court of the place of arbitration cannot be enforced in Luxembourg (New York Convention Article V(1)(e)).

**(v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?**

The time estimate varies according to the facts: enforcement of a foreign award can take approximatively two weeks. However, if the enforcement is challenged, the proceedings on the challenge to the enforcement before the Court of Appeal may take up to 18 months.

#### **XIV. Sovereign Immunity**

**(i) Do state parties enjoy immunities in your jurisdiction? Under what conditions?**

Luxembourg is party to the European Convention on State Immunity of 16 May 1972 (Basel), 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 of the Convention).

Contrary to France and Belgium, in the context of the famous *Yukos* case, Luxembourg did not enact any recent law regarding State immunity. Furthermore, Luxembourg is not a party to the United Nations Convention on Jurisdictional Immunities of States and their Property but is party to the EU Convention.

As a matter of clarity, Luxembourg courts have been recently asked to rule on this issue. A number of decisions are expected to be issued in the next months and years but as for the moment, it is safe to conclude that Luxembourg recognises the immunity of sovereign states against enforcement on their sovereign assets, i.e., used for the exercise of their sovereignty. This notion varies according to the specific circumstances and must be analysed on a case by case analysis.

**(ii) Are there any special rules that apply to the enforcement of an award against a state or state entity?**

The NCPC does not contain any specific rules on enforcement against a State or States entities. Enforcement of arbitral awards against a State or State entities are governed by the same rules as enforcement of judgments.

## **XV. Investment Treaty Arbitration**

**(i) Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

Luxembourg has ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States on 29 August 1970.

Luxembourg has also ratified the Geneva Protocol of 24 September 1923, for some commercial matters, the European Convention on International Commercial Arbitration (26 April 1961) and the Paris Agreement of 17 December 1962, relating to the implementation of the latter (both were incorporated into Luxembourg law by the law of 26 November 1981).

**(ii) Has your country entered into bilateral investment treaties with other countries?**

To date, Luxembourg has entered into 90 Bilateral Investment Treaties, 60 of which are currently in force.

## XVI. Resources

### (i) What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?

- *L'ordre public dans la vie des affaires* - HARLES Marianne ; SPIELMANN Dean - [Bulletin du Cercle François Laurent](#) - Bulletin IV - 1999
- *Nul ne peut être entendu comme témoin dans sa propre cause ?* - FARJAUDON Franck - [Jurisnews Arbitrage et Procédure civile](#) - vol. 2 - n°2 - 07/08/2013
- *Médiation - Clause de médiation - Demande de suspension de la procédure selon l'article 1251-5(2) du NCPC - Clause compromissoire contenue dans les statuts d'un groupement d'intérêt économique* - KAYSER Jan - [Journal des Tribunaux Luxembourg JTL](#) - n°27 - 05/06/2013
- *La théorie de l'imprévision Etude de droit luxembourgeois, de droit comparé et de jurisprudence arbitrale* - PHILIPPE Denis - [Annales du droit luxembourgeois](#) - n°25/2015 - 12/2016
- *Arbitrage - Clause compromissoire visant « tout litige en relation avec l'accord » - Exclusion de la compétence du juge des référés pour allouer une provision* - KINSCH Patrick - [Journal des Tribunaux Luxembourg JTL](#) - n°8 - 15/04/2010
- *Le rôle de la magistrature dans le développement de l'arbitrage Avant-propos* - BOLARD Vincent - [Journal des Tribunaux Luxembourg JTL](#) - n°38 - 05/04/2015
- *La législation luxembourgeoise en matière d'arbitrage* - KINSCH Patrick - [Bulletin du Cercle François Laurent](#) - Bulletin II & III - 1997
- *Le rôle de la magistrature dans le développement de l'arbitrage Le point de vue luxembourgeois* - HOSCHEIT Thierry - [Journal des Tribunaux Luxembourg JTL](#) - n°38 - 05/04/2015
- *Problèmes de l'arbitrage commercial* - ALS Georges - [Pasicrisie luxembourgeoise - Recueil trimestriel](#) - n°XVI - 1956
- *Luxembourg considers the enforcement of annulled awards* - GAICIO Laure-Hélène ; TREVISAN Fabio - [Arbitration News](#) - Vol 20 n°1 - 03/2015
- *L'arbitrage des litiges en matière de sociétés* - KINSCH Patrick - 09/2016
- *Note sous CA, 27 avril 2017, Arrêt N° 59/17 - VIII – Exequatur, Numéro 40105 du rôle et CA, 27 avril 2017, Arrêt N° 55/17 - VIII – Exequatur, Numéro 37955 du rôle* - MENETREY Severine - [Jurisnews Arbitrage et Procédure civile](#) - volume 6, n°3-4/2017 - 07/2017
- *Les voies de recours en droit de l'Arbitrage luxembourgeois* - BOLARD Georges ; NOURISSAT Cyril - [Jurisnews Arbitrage et Procédure civile](#) - Vol 4, n°1-2 - 2015

- *Rethinking international commercial arbitration Towards default arbitration*  
- CUNIBERTI Gilles - [Edward Elgar Publishing EE Cheltenham](#) - 05/2017 –  
Livre Revue JurisNews Arbitrage

**(ii) Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?**

Educational events:

- Arbitration academy ([www.arbitrationacademy.org](http://www.arbitrationacademy.org))
- ICC International Commercial Mediation Competition  
([www.iccwbo.org/court/adr/id43685/index.html](http://www.iccwbo.org/court/adr/id43685/index.html))
- CC pre-moot (arbitration): application are usually opened on early October  
([www.iccwbo.org/court/arbitration/index.html?id=46228](http://www.iccwbo.org/court/arbitration/index.html?id=46228))

## **XVII. Trends and Developments**

**(i) Do you think that arbitration has become a real alternative to court proceedings in your country?**

Most domestic disputes are referred to the courts, not to arbitral tribunals, as in principle, no court costs are incurred in the civil courts. On the other hand, arbitration is becoming more popular as an alternative to court proceedings in international commercial contracts, particularly when discretionary and celerity are needed.

**(ii) What are the trends in relation to other ADR procedures, such as mediation?**

Mediation has been used for several years in social, family, certain administrative and criminal matters. Mediation is generally used once the dispute appears, and certain special laws set out a framework for mediation in certain fields (such as the ombudsman created in 2004 for matters relating to administrative and public law).

There is now specific legislation on civil and commercial mediation introduced on 24 February 2012. The new law on Mediation in Civil and Commercial Matters has introduced mediation in both civil and commercial matters into the NCPC (articles 1251-1 to 1251-24 of the NCPC). The law transposes in Luxembourg Directive 2008/52/CE on mediation in civil and commercial matters

**(iii) Are there any noteworthy recent developments in arbitration or ADR?**

Luxembourg is currently working to implementing national measures to bring a fresh impetus to consumer ADR, to comply with the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes. The latter obliged Member States to bring into force the laws, regulations and administrative provisions necessary to comply with said Directive.

A think tank drafting committee is currently working on a bill requested by the Ministry of Justice to reform the national arbitration law.