Luxembourg: Reform of the Arbitration Law

On 22 April 2023, the Arbitration Law amending Title I of Book III of the New Code of Civil Procedure, which governs arbitration in Luxembourg, came into force (the "Arbitration Law").[1] The new provisions effectuate a large-scale reform of Luxembourg's legal framework for arbitration and international arbitration, thereby enhancing the attractiveness of Luxembourg as a seat of international arbitration. This alert highlights noteworthy features of the arbitration reform.

The Arbitration Law, adopted on 23 March 2023 by the Luxembourg House of Representatives, came into effect on 22 April 2023 as a result of a major reform of the arbitration legal framework. This reform aims to further enhance the Luxembourg's appeal as a trusted arbitral seat and to bring Luxembourg closer to meeting international standards in relation to the arbitration procedure.

Inspired by the 2006 UNCITRAL model law, Belgium arbitration law and French arbitration law, the new provisions reshape arbitration from the arbitration agreement to the enforcement of an arbitral award.

1. A lightened approach to the validity of the arbitration agreement

Under the prior Luxembourg arbitration regime, the validity of the arbitration agreement suffered from the outdated arbitration provisions and the uncertainty of case law, particularly with respect to the separability doctrine. The approach adopted by Luxembourg in its amended arbitration provisions mirror its endeavors to strengthen its pro-arbitration stance. In particular, the Arbitration Law provides the following amendments:

- **No form requirement**: The New Code of Civil Procedure made a distinction between the arbitration clause and the submission agreement ("compromis") with respect to the form requirements. While both agreements had to be in writing, the submission agreement had to include the subject matter of the disputes and the name of the arbitrators to be valid.

[1] Law of 19 April 2023 amending the second part, book III, title I, of the New Code of Civil Procedure to reform arbitration.

The Arbitration Law adopted a lightened approach.

First, the Arbitration Law removes the distinction between arbitration clause and submission agreement with respect to the form requirement.

Second, as under French arbitration law, there is no longer an in-writing requirement. In this regard, the new Article 1227 of the New Code of Civil Procedure states that an arbitration agreement "is not subjected to any requirement form."[2] This implies that the arbitration agreement may be entered into any form as long as the content of the agreement can be recorded.

Third, the new definition only includes a substantive requirement for an arbitration agreement to be valid. The parties shall only express their intent to arbitrate their dispute.[3]

- **Enshrining the separability doctrine**: Prior to the Arbitration Law, the application of the separability doctrine by the Luxembourg courts might confuse arbitration practitioners. On the one hand, the Luxembourg Court of Appeal held that as the arbitration clause is an accessory contract to the main contract, the nullity of that main contract entails the nullity of the arbitration clause.[4] On the other hand, that same court considered that the law governing the arbitration agreement is not necessarily the same since the arbitration agreement is a "separate part" of the main contract.[5] Happily, the Arbitration Law brings this inconsistency to an end.

  Under the new Article 1227-2 of the New Code of Civil Procedure, an arbitration agreement shall be treated as an agreement independent from the other terms of the contract. This concept is more in line with the international commercial arbitration practice,[6] for the better. As specified under Article 1227-2, the separability doctrine has some crucial consequences for the arbitration process: (i) the arbitration agreement is not subject to invalidity or non-existence when the main contract is itself invalid or non-existent; and conversely;[7] (ii) the law governing the arbitration agreement is not necessarily the law governing the main contract, and conversely.

[2] Article 1227 of the New Code of Civil Procedure as amended by the Arbitration Law dated 19 April 2023.
[3] Article 1227 of the New Code of Civil Procedure as amended by the Arbitration Law dated 19 April 2023.
[4] Court of Appeal, 12 March 2003, Pas. Lux. No. 32, p. 399.
[5] Court of Appeal, 26 July 2005, Pas. Lux. No. 33, p. 117.
[6] Cass., Civ. 1, 7 May 1963, *Ets Raymond Gosset v. Carapelli*, JCP G 1963, II, 13: "In matters of international arbitration, the arbitration agreement, concluded separately or included in the legal act to which it is related, always has, except in exceptional circumstances, a complete juridical autonomy excluding it from being affected by an eventual invalidity of that act."
[7] Article 1227-2 of the New Code of Civil Procedure as amended by the Arbitration Law dated 19 April 2023.

- **Confirming the doctrine of Kompetenz-Kompetenz**: The new Article 1227-3 of the New Code of Civil Procedure confirms the doctrine Kompetenz-Kompetenz, recognized by settled case law.[8] The Kompetenz-Kompetenz doctrine empowers the arbitral tribunal to rule on its own jurisdiction and to decide on issues including the existence and the validity of the arbitration agreement.

  Pursuant to the new provision, a Luxembourg court must refer a dispute to arbitration if the dispute is subject of an arbitration agreement. While this referral may be made at the request of a party, the wording of Article 1227-3 may suggest that domestic courts, on their own initiative, may refer the dispute to arbitration. In any event, the arbitral tribunal has exclusive jurisdiction on its own jurisdiction.

  However, under Article 1227-3, the Luxembourg court retains jurisdiction to conduct a review of the arbitration agreement (i) if the subject matter of the dispute may not be arbitrable; or (ii) if the arbitration agreement is manifestly void or manifestly not applicable. In other words, the domestic courts have only jurisdiction to conduct a prima facie review of the arbitration agreement.

2. Enhancing the efficiency of arbitral proceedings in Luxembourg-seated arbitrations: the support judge

The Arbitration Law enshrines the role of the support judge to support arbitration proceedings in Luxembourg. Inspired by French arbitration law, the Luxembourg support judge's role is to facilitate domestic and international arbitration proceedings and settle possible difficulties during these proceedings. Prior to the 2023 reform, no judge was specifically dedicated to assist parties in their arbitration proceedings.

- **Territorial competence of the support judge**: The new Article 1229 makes the Luxembourg support judge competent to support any arbitration proceedings, provided that one of the following requirements is met: (i) the arbitration takes place in Luxembourg; (ii) the parties agree that the Luxembourg Code of Civil Procedure will apply to the arbitration; (iii) the parties have expressly granted jurisdiction to Luxembourg courts over disputes relating to the arbitral proceedings; (iv) there is a

[8] District Court of Luxembourg, 22 January 2019, No. 176.980 of the docket; District Court of Luxembourg, 27 February 1987, No. 35962 and 36358 of the docket.

close connection between the dispute and Luxembourg; or (v) one of the parties risks suffering a "denial of justice."

- **Limited material competence to increase the speed of the arbitration proceedings:** The support judge has jurisdiction for any claims arising out of, or related to arbitral proceedings, including arbitrator appointments,[9] arbitrator challenge,[10] interim relief,[11] evidence disclosure,[12] extension of time for the arbitral tribunal missions,[13] and denial of justice.[14]

- **The president of the District Court of Luxembourg as default authority**: The new Article 1230 designates the president of the District Court of Luxembourg as the default authority to assist the parties in arbitration proceedings, unless otherwise agreed by the parties. Prior to the Arbitration Law, when parties requested assistance of a judge for the arbitration proceedings, only the president of the competent district court had jurisdiction. This judge was unacquainted with the arbitration proceedings. By designating the President of the District Court of Luxembourg as default authority, the 2023 reform establishes a dedicated judge to arbitration to ensure the speed and the efficiency of the arbitration proceedings in Luxembourg-seated arbitrations.

- **No appeal against the support judge's decision**: With the same aims to increase the speed and the efficiency of arbitral procedure in Luxembourg, the new Article 1230 provides that the decision of the support judge cannot be subject to appeal, unless otherwise specified.

- **The special jurisdiction of the support judge in case of denial of justice:** In the event that a party faces a risk of "denial of justice," even in cases having no connection with Luxembourg, the support judge may have jurisdiction. The use of "always competent" in Article 1229 in case of denial of justice, suggests this broader jurisdiction. Additionally, the French support judge, which inspired the Luxembourg support judge, has such competence to prevent a risk of denial of justice. It finds its roots in the NIOC case.[15]

[9] Article 1228-4 of the New Code of Civil Procedure as amended by the Arbitration Law dated 19 April 2023.
[10] Article 1228-3, Article 1228-7, Article 1228-8, and Article 1228-9 of the New Code of Civil Procedure as amended by the Arbitration Law dated 19 April 2023.
[11] Article 1231-9 of the New Code of Civil Procedure as amended by the Arbitration Law dated 19 April 2023.
[12] Article 1231-8(2) of the New Code of Civil Procedure as amended by the Arbitration Law dated 19 April 2023.
[13] Article 1231-6 of the New Code of Civil Procedure as amended by the Arbitration Law dated 19 April 2023.
[14] Article 1229 of the New Code of Civil Procedure as amended by the Arbitration Law dated 19 April 2023.
[15] Cass. civ. 1, 1 February 2005, *NIOC v. State of Israel*, No. 01-13.742, 02-15.237.

In this case, the National Iranian Oil Company (NIOC) initiated arbitration against the State of Israel due to a breach of a participation agreement. Although NIOC appointed its co-arbitrator, the State of Israel refused to do so. Considering that the arbitration clause made the President of the ICC of Paris the default appointing authority of the third arbitrator, the NIOC requested that the French court appoint the Israel's co-arbitrator. In the meantime, an Israeli court ruled that Iran was an enemy of the State of Israel. As a result, an Iranian company could not apply to an Israeli court to appoint an arbitrator. Noting that NIOC was unable to request an Israeli judge to complete the constitution of the arbitral tribunal, the Paris Court of Appeal found that French courts had jurisdiction in this case because of a denial of justice abroad. The Court of Appeal further ruled that French judges may:

> step in the event of a proven denial of justice abroad; that, in fact, the right of a party to an arbitration agreement to have its claims submitted to an arbitral tribunal is a rule of public policy that the French judge, like any other, must ensure is respected in the exercise of his powers to support the arbitration.

To circumvent a risk of infringement of public policy, the French judge has extended its jurisdiction, and it should be on the basis of this interpretation that the broader jurisdiction of the Luxembourg judge should be construed.

3. Enhancing the efficiency of arbitral proceedings in Luxembourg-seated arbitrations: the default procedure for multi-party arbitrator appointments

Prior to the Arbitration Law, the default mechanism under the New Code of Civil Procedure for the appointment of arbitrators in three-member tribunals was that each party would appoint one co-arbitrator and the co-arbitrators would jointly appoint the presiding arbitrator. In the event that a party failed to appoint its co-arbitrator or the co-arbitrators failed to appoint the presiding arbitrator, the president of the competent district court, acting as the default appointing authority, would appoint the co-arbitrator(s) or the presiding arbitrator.[16]

As no provision specified the default procedure for multi-party arbitrator appointments, it may be suggested that the above-mentioned default mechanism be applied to multi-party disputes. Multi-party arbitrations involve three or more parties. According to ex-Article 1227, all of the claimants and all of the respondents, respectively, would jointly appoint their co-arbitrator.

[16] Ex-Article 1227 of the New Code of Civil Procedure.

Failing this, the president of the competent district court would appoint a co-arbitrator for the unsuccessful side. This default mechanism implies that the claimants or the respondents agree on arbitrator appointment. However, it is not always the case in practice. Parties on the claimant side or on the respondent side may have interests that are not aligned and come into conflict. For instance, one of the respondent may refuse to be part of the arbitral proceedings. As a result, if the president of the competent district court appoints a co-arbitrator for one side that failed to agree on the appointee, there may be a breach of the principle of equality between the parties in the appointment of the arbitrators and, therefore, a breach of the parties' equal treatment. That was the reasoning in the well-known Dutco case, where the French Court of Cassation set aside an award on the ground that the arbitral tribunal was improperly constituted. This case involved three parties to a consortium agreement with an arbitration agreement that provided for ICC arbitration with a three-member arbitral tribunal. Dutco initiated arbitral proceedings against its two counterparties. On the ICC Court of Arbitration's request, the two respondents jointly appointed a co-arbitrator under protest and later filed an application to set aside the award. The Court of Cassation annulled the award, holding that "equality of the parties in the appointment of arbitrators is a matter of public policy which can be waived only after the disputes has arisen."[17] The Dutco decision has established a principle of equality of the parties in the appointment of the arbitrators, which has had an international impact and influenced major arbitration institution rules. For instance, the Luxembourg Arbitration Center Rules 2020 contain provisions aimed at resolving the multiparty arbitrator appointments while respecting the principle of equality of the parties in the appointment of the arbitrators.

However, most arbitration laws remained unchanged, which may raise concerns in ad hoc multi-party arbitrations that continue to be subject to the default appointment procedure.

The 2023 Luxembourg arbitration reform introduces a new Article 1228-4 para. 3, addressing this risk of a breach of equality of the parties in the appointment process. Under the new Article 1228-4 para. 3:

> When the dispute involves more than two parties and the parties disagree on the mechanism of the constitution of the arbitral tribunal, the administered body of the arbitration, or, by default, the support judge, appoints the arbitrators.

As a result, Article 1228-4 para. 3 empowers the default appointing authority to appoint all arbitrators in case the various parties on the claimant's side or on the respondent's side cannot

[17] Cass. civ. 1, 7 January 1992, *Sociétés BKMI & Siemens v. société Dutco*, No. 89-18.708, 89-18.726.

agree on a joint arbitrator. By specifying the arbitration administering body or the support judge as the default appointing authority, the Arbitration Law aims to apply to either institutional multi-party arbitration or ad hoc multi-party arbitration.

4. Interim measures

The Arbitration Law gives arbitral tribunals the power to grant interim measures.[18] Prior to the 2023 reform, the New Code of Civil Procedure was a little obscure with respect to the power to grant interim measures. Ex-article 1242 provided that arbitral awards, including preliminary awards, could only be enforced after the issuance of an enforcement order by the president of the competent district court. From the expression "preliminary awards," parties might have considered that an arbitral tribunal might have the power to grant interim measures. However, such wording was unclear, and the parties' practice was to request to the competent summary judge interim measures. The Arbitration Law clarifies this mechanism by expressly granting that power to the arbitral tribunals.

- **Limits on the courts' authority to grant interim measures following the constitution of the arbitral tribunal**: Under Article 1231-9, the arbitral tribunal may grant interim measures, unless otherwise agreed by the parties. This formulation points out the leading jurisdiction of the arbitral tribunal to order interim measures. In other words, as soon as the arbitral tribunal is constituted, the court may have limited authority to grant interim relief. From our standpoint, Article 1227-4 may confirm this leading jurisdiction of the arbitral tribunal by providing that as long as the arbitral tribunal has not yet been constituted or where it appears that an arbitral tribunal cannot grant the relief sought, a party may seek such relief before a domestic court. In light of Article 1227-4 and Article 1231-9, the domestic courts may only have jurisdiction to grant interim measures: (i) prior to the constitution of the arbitral tribunal; (ii) when the arbitral tribunal cannot grant such measures; and (iii) if the parties so agree.
- **Exception to the arbitral tribunal's power to grant interim measures**: The Arbitration Law provides an exception to the arbitral tribunals' power to grant interim relief by conferring exclusive jurisdiction to domestic courts to grant attachment orders.

[18] Article 1231-9 of the New Code of Civil Procedure as amended by the Arbitration Law dated 19 April 2023.

- **Limited grounds to challenge interim measures orders**: To ensure the efficacy and the efficiency of the arbitral proceedings, and to also prevent parties from dilatory tactics, the Arbitration Law confines the grounds for challenging interim measures orders to the 6 grounds for annulling an arbitral award (see section 5). None of these grounds allows a judge to review the interim measures orders on the merits.

5. Liberal regime for enforcement of arbitral awards

The Arbitration Law aims to ease the enforcement of Luxembourg-seated arbitral awards and foreign arbitral awards by narrowing the grounds to annul arbitral awards and the grounds to refuse the enforcement of arbitral awards.

- **Limited grounds for annulling Luxembourg-seated arbitral awards**: Prior to the 2023 reform, the party seeking to annul an arbitral award might rely on 12 grounds to annul the award. The new article 1238 narrows the challenge of a Luxembourg-seated award to 6 grounds: (i) the arbitral tribunal wrongly upheld or declined jurisdiction; (ii) the tribunal was irregularly constituted; (iii) the arbitral tribunal ruled without complying with the mandate conferred on it; (iv) the award violates public policy; (v) the award failed to state the reasons on which it is based, unless the parties agree otherwise; (vi) the due process requirement was violated.
- **Limited ground for refusing enforcement of a foreign arbitral award**: Prior to the 2023 reform, a party seeking to resist enforcement of an arbitral award raised the grounds provided by Article V of the New York Convention to which Luxembourg is a contracting state. That might change with the new Article 1246 laid down by the arbitration reform. While the application of that Article 1246 is subjected to the provisions of international convention, Article VII of the New York Convention provides that an enforcement regime of a contracting state more liberal than the regime set by the convention will prevail. Under the new Luxembourg enforcement regime, an arbitral award may only be refused on the following grounds: (i) the arbitral tribunal wrongly upheld or declined jurisdiction; (ii) the arbitral tribunal was irregularly constituted; (iii) the arbitral tribunal ruled without complying with the mandate conferred on it; (iv) the award violates public policy; (v) the award failed to state the reasons on which it is based, unless the parties agree otherwise; (vi) the due process requirement was violated; (vii) if, after the award has been issued, it is showed that the

award was taken by surprise or by the fraud to the benefit of the party for whose benefit it was rendered; (viii) if decisive documents have been recovered that had been withheld by another party; (ix) if the award was based on documents that have been recognized or judicially declared false since the sentence; (x) if the award was based on affidavits, testimonies or oaths recognized or judicially declared false since the sentence.

The main distinction with the grounds provided under Article V of the New York Convention is that an arbitral award that has been set aside at the seat of arbitration may be recognized or enforced in Luxembourg.

6. Other noticeable improvements

The Arbitration Law also includes a number of other interesting improvements, as follows:

- **Default time limits for the arbitral tribunal to issue a final award**: The New Code of Civil Procedure did not previously require arbitral tribunals comply with any default time limits for issuing a final award. The Arbitration Law introduced a new Article 1231-6 that requires arbitral tribunals to render final awards within six months from the date of acceptance of the mission of the last arbitrator, unless otherwise agreed by the parties. These time limits may be extended by parties' agreement, or by the administered body, or by default, by the support judge.

- **Setting-aside proceedings shall be filed with the Luxembourg Court of Appeal**: The new Article 1236 provides that a party seeking to set aside a Luxembourg-seated award should apply to the Court of Appeal. Prior to the 2023 reform, the setting-aside proceedings had to be filed with the competent district court, i.e., a first-degree jurisdiction.

  According to the new Article 1242, the Court of Appeal's decision dismissing the setting-aside application grants enforcement to the Luxembourg-seated award or to the award provisions that are not affected by this decision.

- **Challenge to a Luxembourg-seated award must be filed within one month after the notification of the award or after the service on a party**: Pursuant to the new Article 1239, the losing party in an arbitration proceeding must file an application to challenge a Luxembourg-seated award with the Court of Appeal within one month from the notification of the award or the service on a party, unless otherwise agreed by the

parties (Article 1232-3). This wording may raise some concerns regarding the starting date of the statute of limitations for challenging a Luxembourg-seated award. Does the Arbitration Law offer a choice to the party seeking to challenge the award with respect to the starting date of the statute of limitations? Does starting date begin to run on the later date between the notification of the award or the service on a party?

Similarly, if a party finds that the award has been obtained by fraud, or there is new relevant evidence or the evidence produced in the arbitration proceedings was falsified, that party may file a request for review with the arbitral tribunal within two months from the discovery of the fraud, the new relevant evidence or the falsified evidence. If the arbitral tribunal cannot be reconstituted, the request for review shall be made before the Court of Appeal in accordance with the rules of civil procedure, applicable before the Court of Appeal in civil matters.

Prior to the Arbitration Law, the challenge had to be filed within one month after an arbitral award can no longer be challenged before the arbitral tribunal or, in the event of fraud, the discovery of new relevant evidence, or falsified evidence, within one month from the discovery of the fraud, the new relevant evidence, or from the date on which the evidence was declared false or admitted to be false.

- **No separate appeal against the order granting enforcement of a Luxembourg-seated award**: Under the new Article 1234 and the new Article 1235, the order issued by a Luxembourg court granting the enforcement of a Luxembourg-seated award cannot be subject to appeal. However, in the event that an application to set aside the award is filed after the issuance of the enforcement order, parties should be advised that this application will also result in a challenge to the enforcement order (Article 1237).

- **No distinction between domestic and international arbitration**: The new provisions simultaneously apply to domestic arbitration and international arbitration. This approach eases the comprehension of the arbitration provisions. However, it is noteworthy that Article 1231 para. 2, which refers to the applicable law, makes a distinction between domestic arbitration and international arbitration.

- **Third-party proceedings ("tierce opposition")**: The new Article 1244 entitles a third party to challenge an arbitral award. To that end, the third party must show that the arbitral award affects its interests. The third-party proceedings shall be brought before the court that would have had jurisdiction, subject to the provisions of Article 613, para.

2. This Article 613, para. 2 provides that third party-proceedings related to a dispute brought before a court shall be filed by application to that court, if it has an identical degree of jurisdiction, or if it is a higher degree of jurisdiction than that which rendered the judgment.

Conclusion:

The 2023 arbitration reform reflects a positive effort to promote arbitration and to strengthen the attractiveness of the Grand Duchy of Luxembourg as seat of international arbitration. The modernization of Book III, Title I of the New Code of Civil Procedure provides a number of clarifications that are welcomed and improve the efficiency and the speed of the arbitral proceedings. However, as mentioned above, the new arbitration provisions may raise questions regarding their interpretation and application. For instance, whether the new regime for the enforcement of foreign awards will prevail over the New York Convention. Those questions will be answered in the near future and will determine whether there will be a need for further reform in Luxembourg.

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