Luxembourg

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of Luxembourg?

Since 1806 the legislation governing arbitration proceedings in Luxembourg has been included in the procedural code, presently in articles 1224 to 1251 of the *Nouveau Code de Procédure Civile* ("NCPC"). These provisions apply without distinction between the commercial or civil, or the domestic or international nature of the case.

The parties may either enter into an arbitration agreement in connection with a specific dispute, or they may promise to submit any dispute connected with defined matters to arbitration.

The arbitration agreement must be made in writing. The requirement of a written form does, however, not apply to a promise to enter into arbitration proceedings, or an arbitration clause. The written form is then a mere matter of evidence, and for instance the voluntary appearance before the arbitrators has been considered as evidence of the existence of a valid arbitration clause.

However, in principle an arbitration clause must be subject to the specific acceptance by a party, if the agreement is a printed form prepared by the one party for mere adherence by the other. This requirement, however, does not apply to international contracts, which are not governed by Luxembourg law.

The arbitration agreement sets out the object of the litigation and the names of the arbitrators. In practice, it is often entered into after the commencement of the procedure, if the arbitral tribunal is appointed pursuant to a promise or arbitration clause. It then defines the scope of the arbitration and the powers of the arbitrators and is then executed by all parties and the arbitrators.

1.2 What other elements ought to be incorporated in an arbitration agreement?

The parties ought to include the procedural rules to the extent that they deviate from the normal rules of court proceedings, define the institutional or other rules that may apply to arbitration and name eventually the arbitral institution, which supervises the arbitration, designate the seat of the arbitration, the language of the arbitration procedure and the choice of law (including the right of the arbitrators to act as *amiable compositeur*).

Except for the precise object of the dispute and the names of the arbitrators, it is advisable that the arbitration clause contains the same provisions, number of arbitrator(s) to be appointed and the method of appointment of the arbitrator(s).

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

If parties have agreed to submit to arbitration, the lack of jurisdiction may be raised before court by any of the parties. In such case, Luxembourg courts will deny jurisdiction on the matter.

If the lack of jurisdiction is not raised at the beginning of the court proceedings, the parties will be deemed to have waived the right to submit the case to arbitration.

If subsequently a party fails to appoint an arbitrator, national courts may be involved in the appointment. Luxembourg courts will also be involved to enforce the arbitral award within Luxembourg.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in Luxembourg?

Enforcement of arbitral awards is governed by articles ii to v of the New York Convention of 1958 and articles 1241, 1242, 1250 and 1251 of the NCPC. An arbitral award can only be enforced upon an order of the president of the district court.

The New York Convention on the Recognition and Enforcement of arbitral awards has been applicable in Luxembourg law since a law of 20 May 1983.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do the laws differ?

The NCPC does not distinguish between domestic or international arbitration proceedings.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the governing law and the Model Law?

There is no specific Luxembourg law, which governs international arbitration. The provisions of the NCPC are compatible with the requirements of international arbitration and the NCPC allows for enforcement of arbitration awards rendered by arbitration tribunals outside of Luxembourg.

As to the procedure, which would be applied in Luxembourg, failing specific agreement of the parties on procedure, it is not materially different from that described by the UNCITRAL Modal Law. There are some differences:

- a Luxembourg court cannot refer a matter to arbitration, but will only deny jurisdiction upon request of a party; and
- a arbitral tribunal would not directly require the assistance of the court.

The recourse should in principle be exercised against the decision of the president of the district court which enforces the arbitral award.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in Luxembourg?

Apart from fundamental principles such as those following from the requirement of due process of law, there are no mandatory rules governing international arbitration proceedings sited in Luxembourg.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of Luxembourg? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Art. 1224 NCPC limits the scope of arbitration to subject matters in respect of which the parties have the right to enter into a settlement.

Article 1225 NCPC defines the cases that the parties are not capable of settling by arbitration. This includes mainly any issue relating to marital status and capacity of individuals, relationship between spouses, divorce or ancillary proceedings, representation of minors of age. Further it is not possible to submit to arbitration disputes related to consumer protection laws or labour law, as well as leases.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

An arbitral tribunal is required to rule on the question of its own jurisdiction, if such matters are raised before the arbitrator.

However, the tribunal will not make a final decision on these issues. Article 1244 NCPC contemplates the possibility of challenging the arbitration award, which may be declared null and void inter alia if there was no valid arbitration agreement, if the tribunal was not properly constituted, if the matters submitted to arbitration in accordance with the arbitration agreement could not be settled by arbitration or if the arbitrator has exceeded his or her competence and powers. Thus, any decision of the arbitrator(s) on these subjects may be subject to verification by courts.

3.3 What is the approach of the national courts in Luxembourg towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The lack of jurisdiction of the Luxembourg court, which results from an arbitration agreement, is not a matter, which may be raised *ex officio* by the judge. The issue of the lack of jurisdiction must be raised by a party in *limine litis*, since otherwise such party is deemed to have waived the right to settle the dispute by arbitration. If the argument is raised, the court will enforce the arbitration agreement by declaring that it has no jurisdiction on the matter.

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal?

The issue of the jurisdiction and competence of a national arbitral tribunal can only be addressed by a court prior to the initiation of the arbitration proceedings, if the matter is first brought before the court.

If one party has designated an arbitrator, the issue might be raised by the president of the district court if an application is made to him to appoint an arbitrator following the failure by the other party to appoint an arbitrator. In such case, the president of the district court could refuse to appoint an arbitrator if it is obvious that the arbitrator has no jurisdiction. There is no possibility of appeal against any such order, whether it appoints an arbitrator or refuses to appoint an arbitrator.

Once the arbitrators are appointed, the only procedure, which allows a court to address this issue, is in the context of proceedings initiated to seek the annulment of the arbitration award. The award could be declared null and void by the court, if the issue to be resolved could not be settled by arbitration or if there was no valid arbitration agreement or if the arbitrators have exceeded their powers and competence.

If the matter is concurrently brought up before the arbitral tribunal and the court, the latter would have to stay the proceedings and to wait for the outcome of the arbitration proceedings. If the arbitral tribunal decides that it has jurisdiction on the matter, this decision would be final unless the arbitration award is declared null and void following the specific procedure referred to above.

3.5 Under what, if any, circumstances does the national law of Luxembourg allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Since the arbitration agreement or an arbitration clause can only be binding upon the parties thereto, an arbitral tribunal cannot assume jurisdiction over persons that are not themselves party to such agreement. However, a third party may become bound by an agreement in the event it accepts an assignment of the rights under the agreement or the benefit of a stipulation contained therein, provided that in such event it is deemed to have accepted the benefit of the entire contract, including the arbitration clause.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in Luxembourg and what is the typical length of such periods? Do the national courts of Luxembourg consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

There are no Luxembourg law provisions providing for specific limitation periods for the commencement of arbitration proceedings. The same limitation periods apply as before the ordinary courts and limitation rules would normally be considered to be substantive rules.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

In the vast majority of the cases where the parties have agreed to

arbitration, they will also have agreed on the law governing the substance of their agreement, in which case the law so chosen will in principle apply. Absent any choice of law, the provisions of the Rome Convention of 19 June 1980 and, as from December 2009, the Brussels Regulation n° 593/2008 of 17 June 2008, will apply where the matter falls within the territorial scope of those international instruments. But even where those international instruments do not apply, national conflict rules lead to solutions very similar to those set out in the Convention/Regulation.

However, to which extent arbitrators are bound or lead by national conflict of law rules, is a matter of argument.

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Where there is an intimate link between the (performance of an) agreement and the territory/interests of a certain country, certain mandatory rules of law of that country can apply even if they would not otherwise be applicable as per the ordinary conflict of law rules.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The choice of law rules governing the formation, validity, and legality of contracts apply similarly to the formation, validity, and legality of arbitration agreements.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

There are no specific requirements for the choice of an arbitrator except for the independence from the parties. Parties are free to choose their arbitrators regardless of any specific qualification or experience, and the method of their appointment. Lawyers or notaries may be appointed, provided they are independent. The participation of a judge in an arbitral tribunal is not prohibited. Civil servants need to be authorised by the government to be able to accept the appointment as an arbitrator and, in any case, they cannot take part in arbitration involving the administration in which they serve. The parties are free to designate an even or uneven number of arbitrators.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

In case the parties fail to agree on a procedure for the appointment of arbitrators (including the umpire), article 1227 NCPC provides for a default procedure. In the latter case, the arbitration will be carried out by a tribunal of three arbitrators whereby each party (if there are two parties only) has the right to appoint one arbitrator and the two arbitrators so appointed select the umpire. If a party fails to appoint an arbitrator or if the arbitrators selected by the parties fail to appoint an umpire, the appointment will be carried out by the president of the district court.

In the first case, the appointment will be made by an *ex parte* order, against which there is no possibility of appeal. In the second case, the decision is taken by the president of the district court after a hearing where all parties have to be summoned to appear.

If there are more than two parties, that have a distinct interest in the case, all parties need to agree on the names of the three arbitrators, failing which the appointment will be made by the president of the court following a hearing, where all parties will be summoned to appear.

If an arbitrator namely appointed in the arbitration agreement declines its mission, parties should proceed to a new appointment, either by common agreement or, if it is not possible, by following the procedure of article 1227 NCPC.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The president of the district court may intervene in the selection of arbitrators in the event that a party fails to appoint the arbitrator, in the event that there are more than two parties that are required to point arbitrators and they fail to agree on the names of the arbitrators, if the arbitrators appointed by the parties cannot agree on the name of an umpire or, if the arbitration is made by a tribunal composed of an uneven number of arbitrators, the arbitrators fail to agree on the award. In such cases, the appointment of an arbitrator or an umpire will be made by the president of the district court.

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within Luxembourg?

Although the law contains no express statement with respect to the arbitrators' independence, neutrality and/or impartiality, this requirement is part of fundamental principles of Luxembourg law which are applied by courts. Lack of impartiality and independence of arbitrators would lead to the annulment of the award as constituting a violation of the rights of defence.

Neither the law nor the rules issued by an arbitration institution provide for any express rules on disclosure of potential conflicts of interest. But arbitrators are clearly obliged to declare such conflicts of interest.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in Luxembourg? If so, do those laws or rules apply to all arbitral proceedings sited in Luxembourg?

To the extent that they are not set out in articles 1224 to 1251 NCPC, the procedural rules applicable to arbitration are, except if otherwise agreed by the parties, the normal rules applicable to court proceedings.

The parties are free to agree on derogations thereto, which can be done in the arbitration agreement or in the course of the arbitration by mutual agreement of the parties and the arbitrators.

Luxembourg procedural rules apply to arbitration carried out in Luxembourg under Luxembourg law or deemed to be carried out in Luxembourg, because of the express or implied choice of the seat of arbitration. This would be the case if the agreement has been established under Luxembourg law without a specific designation of a seat of the arbitral tribunal outside of Luxembourg or any reference to a foreign arbitration procedure.

The provisions, which relate to the stay of proceedings and the enforcement of the arbitral award within Luxembourg will apply regardless of the law, which is applicable to the procedure.

6.2 In arbitration proceedings conducted in Luxembourg, are there any particular procedural steps that are required by law?

The fundamental requirement is the obligation to ensure the fairness of the proceedings and the respect of the rights of the parties: each party must have the opportunity to present its case and to reply to the statements of the other side; each party must also have the right to submit evidence and to receive access to the evidence and documents submitted by the other party.

The document and minutes produced by the arbitral tribunal need to be signed by all arbitrators unless the arbitration agreement authorises the arbitrators to empower one of them to sign alone.

Arbitration proceedings will be stayed if there are concurrent criminal proceedings, which may influence the outcome of the arbitration proceedings, or if a document is produced in respect of which the other party initiates proceedings, whether civil or criminal, in order to have it declared as being forged.

If the arbitration agreement between the parties does not fix a time limit to the arbitration, the arbitration will have been carried out during a three-month period following the execution of the agreement, unless this time limit is extended by the parties.

6.3 Are there any rules that govern the conduct of an arbitration hearing?

To the extent that the rules governing the conduct of an arbitration hearing have not been defined in the arbitration agreement or by the mutual consent of the parties and the arbitrators during a preliminary hearing or in writing, the normal rules of court procedure are applicable (article 1230 NCPC). These are contained in part in the NCPC, but also in the Decree of 29th June 1990, which contains the internal regulations of the court of appeal, the district court and the justice of peace.

6.4 What powers and duties does the national law of Luxembourg impose upon arbitrators?

Arbitrators have all the powers conferred to them by the parties' agreement as well as all non coercive powers that judges generally have, such as the right to appoint experts.

Arbitrators cannot have coercive powers against third parties, namely to order them to appear and witness, or to provide documents. Further, arbitrators have only a limited power against a party to the arbitration. If a party has been given notice, but does not appear or does not provide documents requested by the arbitral tribunal, the latter can only decide to combine the proceeding despite the failure to answer his invitation. However, an award could order payment of a penalty (*astreinte*), if the party fails to submit documents requested by the tribunal.

Verifications and statements as to material facts made in person by arbitrators are deemed to be final evidence unless they are recognised by a court to constitute a forgery.

Arbitrators have to comply with the principle of due process, of impartiality and of respect of the rights of the defence. However, the law imposes some additional duties upon them: arbitrators shall accomplish their mission themselves and shall jointly sign any act of procedure, unless one of parties has authorised the delegation of power to sign on behalf of both (article 1232 NCPC).

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in Luxembourg and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in Luxembourg?

For certain types of matters, there are, before the national courts, rules restricting the appearance of lawyers from foreign jurisdictions. It is clear that no such restrictions apply to arbitration proceedings sited in Luxembourg.

6.6 To what extent are there laws or rules in Luxembourg providing for arbitrator immunity?

There are no laws or rules providing for arbitrator immunity in Luxembourg.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

National courts have no jurisdiction on issues that are within the scope of the arbitration once the arbitral tribunal has validly been set up.

National courts may intervene during an arbitration proceeding in connection with the enforcement of preparatory acts (article 1242 NCPC) in that the president of the court will issue an enforcement order. They may upon application of a party assist in the gathering of evidence.

6.8 What is the approach of the national courts in Luxembourg towards *ex parte* procedures in the context of international arbitration?

Under Luxembourg law, each party to a dispute shall be present or at least duly called to appear before the arbitral tribunal. Except for the appointment of an arbitrator following the failure to do so by a party, *ex parte* procedures are not valid, if a party has not been called to appear.

7 Preliminary Relief and Interim Measures

7.1 Under the governing law, is an arbitrator permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Unless the parties have agreed otherwise, the tribunal is authorised to issue preliminary orders and to make orders for provisional relief. Such orders are current practice and are part of the normal procedure of Luxembourg courts, the rules of which are applicable unless otherwise agreed by the parties. The arbitral tribunal is thus empowered to grant preliminary awards as it may deem necessary. The enforcement thereof against one of the parties may, if necessary, require an enforcement order by the president of the district court (article 1242 NCPC).

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Despite the existence of concurrent arbitration proceedings, preliminary or interim relief may be granted by the referee judge in

the course of summary proceedings. This may be the case if preliminary measures are required to be ordered because of the urgency of the case or, because the opinion of the referee judge, a claim cannot be seriously challenged. The referee judge also has the power to order any measure that is necessary for the preservation of evidence, which includes the hearing of witnesses. The intervention of the referee judge may therefore result in effective measures, which an arbitral tribunal would not be able to enforce. It has however been decided that a judge could only interfere in arbitration procedures if the arbitral tribunal is not able to order the measures or if it has no power to impose the measure. If the measure is directed against the party, the arbitral tribunal will often be able to deal with it, since the provisional or interim award will be made enforceable by an order of the president of the district court.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Courts intervene within the limits as described here above (see question 6.2).

7.4 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

Unless otherwise agreed by the parties, the arbitral tribunal can order security for cost if this is considered necessary.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in Luxembourg?

The parties are free to agree upon a procedure with respect to gathering evidence, otherwise the matters will be governed by the general provisions on evidence set out in the NCPC, which are applicable to proceedings before national courts. However, contrary to national courts, the arbitrators could not issue an injunction, which as such is enforceable, except for ordering payment of a penalty failing compliance by a party with the injunction. In such case, the parties may have to apply to the referee judge to issue such an injunction. Witnesses, who refuse to appear when summoned by a court, may be fined.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure of discovery (including third party disclosure)?

Luxembourg procedural law does not know the concept of discovery as it is known in the United Kingdom or the United States of America. The parties to the litigation are under no obligation to make documents available to the court or to disclose documents. However, if the existence of documents is known to the court, the court may order that the documents be produced and the refusal by a party to produce such documents will lead to certain conclusions, or courts may make the payment of a penalty (*astreinte*) at a rate determined by them for each day during which a party was not complied with the order. Courts also have the power to order disclosure by documents held by third parties, but in such event cannot order payment of a penalty.

If the arbitration procedure is carried out in Luxembourg, the arbitrators have the power to order disclosure of documents held by the parties, but cannot order disclosure of documents held by third parties, nor can they force third parties to appear as a witness. If such steps are required to be taken, the parties may have to initiate proceedings before the referee judge. However, there is no reason why arbitrators could not in an interim award order the payment of a penalty in case of non-compliance by a party. Such order could then be enforced following an enforcement order of the president of the district court.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

Since there is no procedure of discovery or disclosure other than that which has been stated above, courts may only in limited circumstances intervene in ordering the disclosure of documents, which may be relevant for the proceedings. It should however be emphasised that courts are normally reluctant to order the disclosure of documents held by third parties that are not party to the litigation.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal? Is cross-examination allowed?

Unless the parties have specifically agreed about the rules, which apply to written and/or oral witness testimony, the normal rule of examination of witnesses before a court, are applicable. However, arbitrators have no power to require that witnesses be sworn and a false statement before the arbitral tribunal may not be prosecuted as perjury. If witnesses sign their statements, a false statement may be prosecuted as forgery. The parties will normally file written witness statements in the form required by article 402 NCPC, unless another form has been agreed by the parties, and propose a hearing of witnesses to the arbitral tribunal. In practice, the hearing of witnesses will result in a cross-examination by the parties and questions may also be raised by the arbitral tribunal. The tribunal does not have the power to force the attendance of a witness and if a witness fails to appear, the parties may have to apply to the referee judge to obtain an order, which requires the witness to give an oral testimony under penalty of a fine.

Unless it has been otherwise agreed in the arbitration agreement, arbitrators are also permitted to appoint experts or advisers to assist on specific matters.

8.5 Under what circumstances does the law of Luxembourg treat documents in an arbitral proceeding as being subject to privilege? In what circumstances is privilege deemed to have been waived?

Luxembourg law treats certain documents as being subject to privilege. This will normally be those documents that are kept by persons that are committed to an obligation of secrecy. The documents held by such persons could only be disclosed in connection with criminal proceedings by order of an investigating magistrate. The production of these documents could not be ordered by a civil court. These privileged documents would include the advice given by lawyers to their client. The privilege could be waived by the person that benefits from the obligation of secrecy. However in certain circumstances the obligation of secrecy is considered to be in the public interest and a waiver could not be contemplated.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award?

Arbitral award shall be in writing as it must be signed by each arbitrator, either approving or disapproving the award (article 1237 NCPC). Refusal of a minority of arbitrators to sign should be mentioned in the arbitral award. The award shall be motivated unless parties have exempt by an express agreement the arbitrators from the duty to motivate the award (article 1244 8 NCPC).

The tribunal should render its arbitral award within the time limit fixed by the parties or within a 3-month period if the parties have not agreed otherwise (article 1233 NCPC and 1228 NCPC). The award shall be in writing.

10 Appeal of an Award

10.1 On what bases, if any, are parties entitled to appeal an arbitral award?

Although certain provisions of the NCPC contain a reference to an appeal against an arbitral award, these references are contained in the law by mistake since the possibility of an appeal has been abrogated since 1981. The only possibility to challenge an arbitral award is the procedure to have it declared null and void by way of opposition to the enforcement order of the president of the district court. This is only possible for Luxembourg awards and not with foreign awards.

Article 1244 NCPC draws up an exhaustive list of 12 basis for annulment of proceedings:

- causes relating to the substance of the arbitration: the arbitral award is contrary to the public interest; the dispute cannot be settled by way of arbitration; or there is no valid arbitration agreement between the parties;
- causes relating to the arbitral proceedings: the tribunal has exceeded its power or jurisdiction; omission to decide upon one or more issues, which are indivisibly linked to the settled issues; the tribunal has not been regularly set up; violation of the rights of the defence; or lack of motivation, unless there was a exemption to motivate contradictions in the provision of the arbitral award; and
- causes relating to the grounds of the award: the award has been obtained by fraud; the award has been found on the basis of evidence which has been declared false by virtue of an irrevocable court decision or on the basis of evidence that has been recognised to be false; or it is discovered that the one party has concealed evidence which would have had a decisive influence on the award.

10.2 Can parties agree to exclude any basis of appeal or challenge against an arbitral award that would otherwise apply as a matter of law?

Articles 1244 and 1246 NCPC are mandatory provisions and parties cannot agree to waive the right to challenge the arbitral award. Parties cannot alter the list by excluding or adding causes to it. The only indirect waiver is the possibility for the parties to exempt the tribunal from the obligation to motivate its award (article 1244 8 NCPC).

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The parties cannot expand the scope of the proceedings for annulment of an award before national courts.

10.4 What is the procedure for appealing an arbitral award in Luxembourg?

In principle, the proceedings for annulment are not directed against the arbitral award, but against the enforcement order. However, it is accepted by some authors that a party seeking an appeal may also apply for annulment in the absence of an enforcement order, but there is no case law on that issue up to this date.

Proceedings for annulment are possible only if the jurisdiction of the final award has been rendered and the arbitral tribunal has no further jurisdiction. Such is not the case where the tribunal has omitted to decide on one or more points which can be dissociated from the issues already decided by the tribunal. In that case a party can apply to the tribunal to complete the award even though the time limit of the arbitration has expired (article 1248 NCPC), unless the other party disputes that the issues could be dissociated. In that case, an action may be brought before the district court which will decide on the possibility to dissociate the issues and eventually refers the matter to the arbitral tribunal in order to complete the award.

The proceedings shall be initiated within one month from the date of the notification of the enforcement order or from the day of disclosure as to causes of nullity relating to the grounds of the award (article 1246 NCPC) by way of opposition to the enforcement order before the district court, the president of which has rendered the order (article 1246 NCPC). The opposition shall be notified by writ of summons.

Any causes of annulment of the arbitral award shall be pleaded in the same proceedings except the causes relating to the grounds of the award having appeared later.

The arbitral award is several. When the provisions of an arbitral award are subject to annulment but can be dissociated from the other provisions, only the defective provisions will be annulled and the award will remain valid as to the other provisions (article 1247 NCPC).

The enforcement of the arbitral award is stayed during the proceedings for annulment unless the arbitral tribunal has ordered the provisional enforcement of the award (article 1249).

In case of a foreign arbitral award, it is possible to challenge the enforcement order before the court of appeal. The effect of these proceedings is not to annul the foreign arbitral award, but to prevent its enforcement in Luxembourg.

11 Enforcement of an Award

11.1 Has Luxembourg signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Luxembourg has signed the New York Convention of 10th June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and has ratified it by a law of 20 May 1983 without reservation. The provisions of the New York Convention apply by virtue of the law of implementation to any

award granted by a tribunal whose seat is situated in a country that has also signed the convention.

Otherwise, the NCPC deals with the recognition and the enforcement of arbitral awards in general. Foreign arbitral awards will be rendered enforceable as domestic ones. Application for an enforcement order shall be filed with the district court of the domicile of the person against whom the enforcement is sought or of the place where the award should be enforced. The application shall be accompanied by the original or a certified copy of the arbitral award (article 1250 NCPC).

Subject to the conventional provisions, the recognition and enforcement of a foreign award can be refused only if one of the causes for annulment as set out by article 1244 NCPC exists or if the validity of the arbitral award can still be challenged before the arbitral tribunal and the tribunal has not ordered the provisional enforcement (article 1251 NCPC).

11.2 Has Luxembourg signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

In addition to the New York Convention, Luxembourg has signed and ratified the European Convention on International Commercial Arbitration dated 21st April 1961.

11.3 What is the approach of the national courts in Luxembourg towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

Luxembourg courts recognise and enforce arbitral awards whether domestic or foreign. Annulment of a foreign award in the home jurisdiction is not a ground to refuse enforcement in Luxembourg.

A party which intends to enforce a Luxembourg arbitral award shall file the minutes of the arbitral award with the chancery of the district court, or the chancery of the court of appeal if the award is rendered following an arbitration, which has settled a dispute where an appeal was lodged against a judgment of a court of first instance (article 1241 NCPC). In the latter case, the enforcement order is made by the president of the relevant section of the court of appeal.

11.4 What is the effect of an arbitration award in terms of *res judicata* in Luxembourg? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Although there are no precedents, which confirm this, it is accepted by treatises that an arbitral award which qualifies for being rendered enforceable by order of the president of the district court has the authority of the *res judicata* and parties are precluded from any further arbitration or court proceedings on the arbitrated issues as if it was a judgment of a national court.

12 Confidentiality

12.1 Are arbitral proceedings sited in Luxembourg confidential? What, if any, law governs confidentiality?

The law does not specifically provide for the confidentiality of arbitration proceedings. However, it is commonly accepted that such proceedings are deemed confidential by their nature, since confidentiality is often an important criterion for the choice of arbitration. The parties are free to agree on the confidentiality of the proceedings and the award and to determine the modalities of disclosure to third parties. Arbitrators are subject to a general duty of confidentiality.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Information disclosed in arbitral proceedings cannot be referred to and/or relied on subsequent proceedings before national court unless the information is set out by the arbitrators in the award and the proceedings are among the same parties. It is a consequence of the confidentiality of the proceedings that the information cannot be disclosed to third parties. In certain circumstances, the information may however be used by the same parties in subsequent proceedings in court or before arbitrators, notably if the subsequent proceedings are a consequence of the arbitral proceedings.

Further, the parties may have agreed or may be deemed to have agreed with that information disclosed during the arbitral proceedings could be made available if this is necessary for the protection of the legitimate interests of the parties.

12.3 In what circumstances, if any, are proceedings not protected by confidentiality?

Confidentiality of the proceedings is not protected if the parties have agreed otherwise or deemed to have agreed otherwise. This includes any procedure, which is related to the arbitration, such as any application for enforcement or any procedure for annulment. It is generally accepted that disclosure is also possible if this is reasonably necessary for the protection of the legitimate interest of an arbitrating party. The confidentiality of arbitral proceedings could not be protected in the event that the disclosure becomes necessary in the context of the prosecution of criminal offense.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The arbitrators have full power to grant remedies to the extent that such remedies are compatible with Luxembourg law. To the extent that Luxembourg law is applicable to the case, the arbitrators could order under sanction of penalty that certain steps be undertaken by an arbitrating party or they could order the payment of a sum of money as damages. As to punitive damages, the question is debatable. Indeed if the arbitral tribunal has to apply foreign law, which provides for special damages or punitive damages, it may be argued that the tribunal is able to award such damages even though the arbitration is sited in Luxembourg. However, one may come to the conclusion that the punitive or special damages that are often acceptable in other countries such as the United States of America, are not compatible with the Luxembourg *ordre public* and therefore are not available in arbitration proceedings that are subject to the Luxembourg *ordre public*.

If the law to be applied by the arbitrators is Luxembourg law, damages, which exceed the amount of the loss, would be excluded anyway and agreed upon damages would have to be reduced by the arbitrators. The provision, which gives power to the judge or arbitrator to reduce these amounts, is part of the internal *ordre public* and it is generally considered that the type of punitive damages, which is available elsewhere, will be considered to be

incompatible with the prevailing legal concepts regarding this matter. Thus a foreign award, which orders payment of such damages, might not be enforceable.

13.2 What, if any, interest is available, and how is the rate of interest determined?

If the arbitral tribunal applies Luxembourg law, it would be normal for the tribunal to grant an award of interest and to allow, if this was requested by parties, this interest to be compounded annually, if the matter deals with interest due for late payment under contractual obligation or even, more often, if the matter deals with interest due on an amount of damages due as a result of wrongdoing.

The date as from which the interest shall be accrued, may vary depending on the specificities of the case. It is normally considered that the provisions of Luxembourg law, which limit the award of interest are not part of the international *ordre public* and consequently, if the arbitrators apply a legislation other than Luxembourg law, or act as *amiable compositeur*, they would have the power to derogate from rules of Luxembourg law relating to interest and, for instance, allow for the compounding of interest for periods, which are shorter then one year, in connection with contractual obligations.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

There is no specific provision of the NCPC, which deals with the cost of arbitral proceedings. However the NCPC deals with the cost of proceedings, which are normally recoverable by the winning party from the losing party, except as otherwise specifically decided by the court. This would normally include the fees and other costs of the arbitrators, but not the fees of the lawyers of the arbitrating parties. However, the recovery of fees (or part of the legal fees) is not excluded by Luxembourg law and to some extent contemplated by the NCPC.

Thus, the recovery of such fees and costs and a division of costs is possible, and failing any agreement of the parties with respect thereto, the tribunal may make an award allocating cost between the parties in the light of the outcome of the proceedings, including recovery of all or part of legal fees and other costs incurred by a party.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

The award as such is not subject to any tax and the need to pay registration taxes on the amount thereof has been abolished. However, if a party is domiciled in Luxembourg, the award may have some tax consequences. Indeed, payments ordered to a Luxembourg party may constitute expenses that are recognised for tax purposes and payments received by a Luxembourg party may, depending on their nature, constitute taxable income. Luxembourg tax law is not applicable to parties to an arbitration that are not resident in Luxembourg.

14 Investor State Arbitrations

14.1 Has Luxembourg signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965)?

The Convention of Washington of 18 March 1965 has been signed by the Grand-Duchy of Luxembourg and ratified by a Law of 8 April 1970.

14.2 Is Luxembourg party to a significant number of Bilateral Investment Treaties (BITs) or Multilateral Investment treaties (such as the Energy Charter Treaty) that allow for recourse to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ('ICSID')?

Luxembourg is party of a wide network of Bilateral Investment Agreements which consists of more than 90 BITs, of which 67 are in force. (http://www.unctadxi.org/templates/DocSearch.aspx?id=779). Luxembourg has also signed the Energy Charter Treaty which was ratified by a law of 24 January 1997.

14.3 Does Luxembourg have standard terms or model language that it uses in its investment treaties and, if so, what is the intended significance of that language?

There are no standard terms but generally the BITs shall ensure the protection of investors, a treatment equal to nationals, return of dividends, compensation for expropriation and access to independent settlement of disputes.

14.4 What is the approach of the national courts in Luxembourg towards the defence of state immunity regarding jurisdiction and execution?

Immunity of jurisdiction and execution of a state is recognised as a universal principle of international public law. But courts distinguish between the acts of a state which are jure imperi and the acts jure gestionis. Immunity of jurisdiction of a state does not apply if a state acts as private person. However, a judgment against a state cannot be enforced by a Luxembourg court unless the state has specifically waived immunity of execution.

Luxembourg signed and ratified the European Convention on State Immunity in Basel on the 16 May 1972. According to this convention each party waives its immunity of jurisdiction in case it is subject to proceedings involving a series of civil and commercial matters.

15 General

15.1 Are there noteworthy trends in the use of arbitration or arbitration institutions in Luxembourg? Are certain disputes commonly being referred to arbitration?

There is an obvious willingness of Luxembourg public authorities to present arbitration as attractive dispute resolution method in Luxembourg. In 1987 the Luxembourg Chamber of Commerce set up an Arbitration Center which rules are inspired by the rules of the ICC Court of Arbitration.

15.2 Are there any other noteworthy current issues affecting the use of arbitration in Luxembourg, such as pending or proposed legislation that may substantially change the law applicable to arbitration?

It is generally recognised by practitioners that the latest reform of the provisions of NCPC that deals with arbitration was not adequate and that more specific legislation would be helpful to promote arbitration in Luxembourg.

This promotion of arbitration and other alternative dispute resolution might prove to be particularly helpful to support the development of Luxembourg based investment vehicles used by private equity investors and by collective investment schemes. Practice shows that in numerous cases arbitration is the procedure, which best suits these investment activities where Luxembourg incorporated entities are major players.

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