CHEVALIER & SCIALES
LUXEMBOURG LAW FIRM

A new legal landscape: A close look at Luxembourg's arbitration law reform

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INVESTMENT FUNDS

'Investment funds work informs much of boutique independent law firm Chevalier & Sciales' deal flow and it is this determined focus on work in the sector which ensures that clients receive 'very client focused and pragmatic' advice to fund managers on their fund structuring, regulatory and operational requirements. Although it also handles work in the retail space, the firm has gained most traction within the alternatives space, including on debt, private equity and hedge funds.'

Testimonial: 'The practice is very client focused and pragmatic. But most importantly, the partners have an extensive knowledge in their respective fields.'

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'The boutique combines creative strategies with a practical, business-centric approach, whether managing high-stakes disputes for private entities and financial institutions, advising on contentious matters or in alternative dispute resolutions. They successfully represented a financial institution in the enforcement of a €500 million arbitral award against a European State in the Grand-Duchy of Luxembourg.'

'Headed by Rémi Chevalier, the arbitration department recently handled the defense of claimants in an investment arbitration regarding the application of the $1 billion bilateral investment treaty between Switzerland and the Czech Republic. Chevalier has been appointed counsel before the European Courts of Human Rights.'

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INTRODUCTION

On March 23, 2023, the Luxembourg Parliament approved a significant reform that modernises the Luxembourg arbitration law, with changes incorporated into the New Code of Civil Procedure. This revised and long-awaited law of 19 April 2023 was published in the Luxembourg Gazette, specifically in the Memorial A n° 203 / 2023.

On September 15, 2020, the Luxembourg government addressed the modernisation of the country's arbitration law by tabling bill No. 7671 to the Chamber of Deputies. Since their incorporation in France's Napoleonic-era Code of Civil Procedure of 1806, the Luxembourg rules relating to arbitration procedures have been modified only occasionally, with a major change in 1981 that notably updated the regime for appeals against awards. The current reform comes at the right time because the Grand-Duchy has manifest advantages as a hub for arbitration, in particular the favourable attitude of judges toward international law.

The modernisation of Luxembourg arbitration has multiple goals, not only to relieve the national courts of some cross-border disputes but also to make Luxembourg more attractive as a jurisdiction by providing parties access to legal expertise. Many operating companies, and holding entities have their headquarters in Luxembourg and incur additional costs when their disputes are heard in arbitration forums abroad. Additional risks arise when the legal advisers and judges in annulment proceedings are not specialists in Luxembourg law.

The legislation is inspired by French law and the model law of the United Nations Commission on International Trade Law ("UNCITRAL" model law), and seeks to provide liberal and arbitration-friendly provisions. Within the seven new chapters that will be integrated into Luxembourg's New Code of Civil Procedure (NCPC), the law does not make a distinction between national and international arbitration.

Its principles are widely accepted in comparative law: they notably include a broad scope of whether disputes can be settled by arbitration, the absence of formalism for the arbitration agreement, the principle of autonomy of the arbitration clause, the positive and negative effect of the principle of competence-competence – whether a legal body has jurisdiction to rule on its own competence in matters before it – as well as the obligation of disclosure on the arbitrator (economic links with companies, former mandates, appointments as an arbitrator or as a lawyer of a party involved) in order to minimise the risk of conflicts of interest.

Nevertheless, the legislation innovates on certain points by comparison with French law, notably by introducing an obligation of confidentiality, sanctioned by the award of damages. It also strengthens the powers of the supporting judge and requires collaboration between the state judge and the arbitral tribunal to maximise the effectiveness of the arbitration proceedings.

The legislation also aims to extend the international jurisdiction of Luxembourg judges

by giving them a jurisdictional head in the name of denial of justice. The arbitration award has the force of *res judicata* – a settled matter that may not be relitigated – regarding the dispute it resolves and must, unless otherwise agreed by the parties to the arbitration, include its reasoning.

Regarding recourse against the award, awards handed down in Luxembourg may be subject to an action for annulment on the basis of the new article 1238 of the NCPC, which lists seven grounds for annulment. Article 1243 adopts the revision system in French law, and article 1244 deals with third-party opposition. For awards delivered abroad, no annulment proceedings can be initiated before Luxemoburg courts.

SCOPE OF ELIGIBILITY FOR ARBITRATION

Art. 1224. (1) All persons may compromise on rights which they freely dispose of.

(2) In particular, no arbitration may be entered into in respect of matters concerning the status and capacity of persons, the representation of incapable persons, the causes of action of such incapable persons and those of persons who are absent or presumed to be absent.

(3) The arbitral tribunal shall apply the rules of public policy.

Art. 1225. The following may not be submitted to arbitration: 1° disputes between professionals and consumers; 2° disputes between employers and employees; 3° disputes relating to residential leases. This prohibition remains applicable even after the end of the contractual relations referred to above.

The new article 1224 of the NCPC refers to the nature of the disputes that can be settled by arbitration, which excludes weaker parties who must be protected, as in consumer law. In labour law, the question of whether disputes relating to an employment contract shall not be settled by arbitration. Finally, disputes arising from bankruptcy proceedings cannot be adjudicated by an arbitral tribunal. However, the receiver of a company may, for example, conclude an arbitration agreement to settle a dispute with a debtor. Similarly, an arbitral tribunal may hear a dispute covered by an arbitration agreement stipulated in a contract that was to be performed before the initiation of bankruptcy proceedings.

THE ARBITRATION AGREEMENT

Art. 1227. (1) An arbitration agreement is an agreement by which the parties decide to submit to arbitration all or some of the disputes which have arisen or may arise between them in respect of a particular legal relationship, whether contractual or not. It is not subject to any formality requirements.

(2) It may be concluded in the form of an arbitration clause or a compromise agreement. An arbitration clause is an agreement by which the parties to a contract undertake to submit to arbitration any disputes which may arise in connection with that contract. An arbitration agreement is an agreement by which the parties to a dispute submit it to arbitration.

The arbitration clause or arbitration agreement is not subject to any requirement regarding form; it can be concluded orally.

Art. 1227-2. The arbitral tribunal shall rule on its own jurisdiction, including any objection to the existence or validity of the arbitration agreement. For this purpose, an arbitration clause which forms part of a contract shall be treated as an agreement separate from the other terms of the contract. It is not affected by the nullity, lapse or termination of the contract. The nullity of the arbitration clause does not imply the nullity of the contract.

The Luxembourg legislation enshrines the principle of competence-competence, which is universally accepted in comparative law. It also refers to the principles of severability and autonomy of the arbitration clause, by which the dispute resolution clause is independent of the main contract and is not affected by the defects of the latter or its possible nullity. The effect of such a provision is to protect the power of arbitrators to rule on their own jurisdiction in a matter to override delaying tactics.

Art. 1227-3. Where a dispute arising out of an arbitration agreement is brought before a state court, the latter shall declare that it lacks jurisdiction, unless the arbitration agreement is null and void due to the non-arbitrability of the case, or if it is manifestly null and void for any other reason. The state court may not declare of its own motion that it does not have jurisdiction. If the arbitral tribunal declares that it does not have jurisdiction, or if the arbitral award is set aside for a reason that precludes a resubmission to the arbitral tribunal, the case shall be continued before the court or tribunal originally seized as soon as the parties or one of them has notified the Registry and the other parties of the occurrence of the relevant event.

The new enacted legislation establishes the negative effect of the jurisdictional principle, which precludes judicial scrutiny of the enforceabilty of an arbitration agreement save for the case of its obvious and manifest nullity. The second element of the jurisdictional principle is the positive effect, under which the arbitrators must be the first (but not the only) judges of their own jurisdiction; the oversight of the Luxembourg judge is postponed to the stage of any action involving enforcement or annulment of the arbitration award made on the basis of the arbitration agreement.

When a dispute to be resolved by arbitration is addressed to a national court, it will decline jurisdiction only if one of the respondents invokes this exception, unless the arbitration agreement is manifestly null and void or unenforceable.

Art. 1227-4. As long as the arbitral tribunal has not yet been constituted or when it appears that an arbitral tribunal cannot grant the measure sought, the existence of an arbitration agreement does not prevent a party from bringing an action before a state court for the purpose of obtaining a measure of inquiry or an interim or protective measure. Such an application does not imply waiver of the arbitration agreement.

Before the constitution of the arbitral tribunal, only the state court may order urgent measures. Certain measures, such as garnishments, cannot be granted by an arbitral tribunal because of its lack of enforcement powers, in particular against third parties.

THE ARBITRAL TRIBUNAL

Art. 1228. The parties are free to determine the seat of the arbitration or to delegate this determination to the person who may have been entrusted with organising the arbitration. Failing such determination, the seat shall be fixed by the arbitral tribunal, taking into account the circumstances of the case, including the convenience of the parties. The arbitration shall be deemed to take place at the seat of the arbitration, notwithstanding the possibility for the tribunal, unless otherwise agreed, to hold hearings, take evidence, sign decisions and meet at any place it deems appropriate. Arbitral decisions shall be deemed to have been rendered at the seat of the arbitration.

This article echoes the practice of delocalisation of arbitration: fixing the seat of the proceedings in Luxembourg does not necessarily require holding the hearings in Luxembourg. But by determining the seat of the arbitration, the parties agree on the place where the award is deemed to be made, which has a direct impact on remedies and review of the award.

Art. 1228-3. In the absence of agreement between the parties, any dispute relating to the constitution of the arbitral tribunal shall be settled by the person responsible for organising the arbitration or, failing that, by the supporting judge.

Art. 1228-4. If the parties fail to agree on the method of appointing an arbitrator, the procedure shall be as follows:

1° In the event of arbitration by a sole arbitrator, if the parties do not agree on the choice of arbitrator, the arbitrator shall be appointed by the person responsible for organising the arbitration or, failing this, by the supporting judge;

2° In the event of arbitration by three arbitrators, each party shall choose one arbitrator and the two arbitrators so chosen shall appoint the third arbitrator; if a party fails to choose an arbitrator within one month of receipt of the request to do so from the other party or if the two arbitrators fail to agree on the choice of the third arbitrator within one month of acceptance by the last arbitrator of his appointment, the person responsible for organising the arbitration or, failing this, the supporting judge shall make the appointment;

3° Where the dispute is between more than two parties and the parties are unable to agree on how the Arbitral Tribunal should be constituted, the person responsible for organising the arbitration or, failing this, the supporting judge, shall appoint the arbitrators;

4° All other disagreements relating to the appointment of the arbitrators shall likewise be settled by the person responsible for organising the arbitration or, failing this, the supporting judge.

As noted during the preparatory work on the draft legislation, the one-month period stipulated for a party to choose an arbitrator, after which the supporting judge may proceed to appoint them, seems more appropriate than the eight-day period provided for in the past.

Art. 1228-7. An arbitrator may only be challenged if there are circumstances likely to raise legitimate doubts as to his impartiality or independence, or if he does not possess the qualifications required by the parties. In the event of a dispute as to whether an arbitrator should be challenged, the difficulty shall be settled by the person responsible for organising the arbitration or, failing this, by the supporting judge, who shall refer the matter to the court within one month of the disclosure or discovery of the disputed fact to the court within a month of the disclosure or discovery of the contentious information.

This article imposes a disclosure obligation on arbitrators. This is a welcome provision in order to prevent potential conflicts of interest.

Art. 1228-8. The arbitrator may only be dismissed with the unanimous consent of the parties. Failing unanimity, the difficulty shall be settled by the person responsible for organising the arbitration or, failing that, by the supporting judge, who shall refer the matter to the court within one month of the disclosure or discovery of the disputed fact.
As regards the time limit for lodging an objection, the new law takes its inspiration from the French model by extending the period to one month, contrary to the United Nations Commission on International Trade Law model legislation, which provides for a time limit of 15 days.

THE SUPPORTING JUDGE

Art. 1229. The supporting judge in charge of the arbitration proceedings is the Luxembourg judge when the seat of the arbitration has been fixed in the Grand Duchy of Luxembourg, or, if the seat has not been fixed, when :

1° the parties have agreed to submit the arbitration to Luxembourg procedural law; or

2° the parties have expressly given jurisdiction to the Luxembourg courts to hear disputes relating to the arbitration proceedings; or 3° there is a significant link between the dispute and the Grand Duchy of Luxembourg.

The Luxembourg supporting judge always has jurisdiction if one of the parties is exposed to a risk of denial of justice.

Article 1229 sets out four connecting factors and grounds for international jurisdiction of the Luxembourg judge in arbitration, primarily when the seat is located in Luxembourg. The other three criteria are alternative: by the will of the parties in choosing Luxembourg law as procedural law for the arbitration (lex curia); where there is a significant link between the dispute and Luxembourg, such as the place of performance of a disputed contract or the domicile of a defendant; or in the event of the risk of denial of justice.

THE ARBITRATION PROCEEDINGS

Art. 1231. The arbitral tribunal shall decide the dispute in accordance with the applicable rules of law. In international matters, the applicable rules are those chosen by the parties or, failing that, those that the Tribunal considers appropriate. The arbitral tribunal shall act as an amiable composition if the parties have asked it to do so.

According to the preparatory work on the legislation, "international matters" should be understood not with reference to the French definition of international arbitration, but according to the ordinary rules of private international law. The arbitrator(s) will be able to rule as in the capacity of an amiable compositeur – with the power to seek an equitable solution to the dispute, by setting aside if necessary the legal rules otherwise applicable or the strict application of a contract – offering opportunities for the renegotiation of contracts, for example.

Art. 1231-3. The arbitral tribunal shall always guarantee equality of the parties and respect of the adversarial principle.

This article provides for in Luxembourg arbitration law the principle of equality of opportunity to present one's case and respect for the adversarial process. This principle must be applied in the light of Article 6 § 1 of the European Convention on Human Rights and may be applicable in particular in matters of clandestine evidence.

Art. 1231-5. In the absence of legal obligations to the contrary or unless otherwise agreed by the parties, the arbitration proceedings shall be confidential.

This is one of the main advantages of the reform, which addresses the preference of economic players regarding business secrets or banking and financial transactions. It is specified in the preparatory work that this obligation will not invalidate the procedure and that breaches may be sanctioned by damages.

Art. 1231-6. If the arbitration agreement does not set a time limit, the duration of the mission of the arbitral tribunal shall be limited to six months from acceptance of the mission by the final arbitrator to do so. The legal or contractual time limit may be extended by agreement of the parties or by the person in charge of organising the arbitration if they have been authorised to do so by the parties, or, failing that, by the supporting judge.

Once the arbitrators accept their mission, the time limit for rendering an arbitration award is six months.

THE ARBITRATION AWARD

Article 1232. The deliberations of the arbitral tribunal shall be secret. The parties may, by a stipulation in the arbitration agreement or in the arbitration rules, authorise each of the arbitrators to append his separate or dissenting opinion to the arbitral award. The deliberations of the arbitral tribunal shall be secret. The parties may, by a stipulation in the arbitration agreement or in the arbitration rules, authorise each of the arbitrators to append his separate or dissenting opinion to the arbitral award.

Art. 1232-2. The arbitral award shall state the reasons on which it is based, unless the parties have dispensed the arbitral tribunal from stating the reasons.

Art. 1232-3. The arbitral award has the force of res judicata as soon as it is made. The arbitral tribunal shall deliver a signed copy of the award to each party. The award may be served by a party. The parties may, however, agree that this effect shall be attached to another method of service designated by them.

ENFORCEMENT OF THE AWARD:

ARBITRATION AWARDS HANDED DOWN IN LUXEMBOURG

Art. 1233. An arbitration award may be enforced only through an enforcement order issued by the president of the district court in whose jurisdiction the award was made. The procedure relating to application for enforcement is not adversarial. The application must be filed by the earliest party at the registry of the competent court together with the original or a copy of the award and the arbitration agreement. The claimant must elect domicile in the district of the court addressed. Service on the claimant relating to enforcement of the award or recourse may be carried out at the address elected. A copy of the award shall be attached to the enforcement order.

Under the new article 1233 of the NCPC, the judge of exequatur for awards made in Luxembourg is the president of the district court in whose jurisdiction the award was handed down, of Luxembourg or Diekirch. The exequatur order must state the court's reasoning and may be appealed against under the new article 1235 of the code.

Art. 1238. An action for annulment is only available if:

1. The arbitral tribunal has wrongly declared itself competent or incompetent.

2. The arbitral tribunal has been improperly constituted.

3. The arbitral tribunal has ruled without compliance with its terms of reference.

4. The award is contrary to public policy.

5. The award does not state its reasoning unless the parties have dispensed with the need for the reasoning of the arbitrators.

6. There has been a violation of the rights of defence.

Article 1238 lists the six grounds for an annulment through an action for annulment (lack of jurisdiction of the court, the court was improperly constituted, the court ruled without complying with the terms of reference given by the parties, non-compliance with the adversarial process, infringement of public policy, failure to state reasons unless otherwise agreed by the parties, and violation of the rights of the defence).

The ground of failure to state reasons is expressed in a more flexible manner than in French law. Article 1241 provides that this recourse is not suspensive, but that the enforcement of the award may be adjusted by the Court of Appeal. Article 1243 adopts the revision system from French law and Article 1244 enshrines the third-party objection.

ARBITRATION AWARDS HANDED DOWN ABROAD

Only courts of the territory where the foreign award was made can rule on an appeal for annulment. However, if the award is the subject of an exequatur ruling in Luxembourg, it can be examined by the Luxembourg appeal court through an appeal against the exequatur decision. The exequatur ruling of an arbitration award handed down abroad can be refused inter alia on the same six grounds that apply to the annulment of awards delivered in Luxembourg as set out in the new article 1238. Other grounds are the fraud of one party, if the award was based on forged evidence or testimonials.

The introduction of a preventive action for unenforceability, which would have allowed a party to an award to take preventive action before the courts to avoid the award being granted exequatur, provided a sufficient interest would have been evidenced, was finally given up by the lawmaker.

CONCLUSION

The wide-ranging reform undertaken by the Luxembourg law-maker proposes a coherent regime of rules designed to promote efficient arbitration proceedings in Luxembourg that respect the fundamental rights of the parties choosing this mode of dispute resolution. It should be noted that the issue of the negative effect of the jurisdictional principle needs to be resolved. By introducing more flexibility and balancing the rules on arbitration agreements and proceedings, the objective remains to promote the integrity of the Luxembourg marketplace while ensuring the full effectiveness of awards.

RECENT HIGHLIGHTED CASES

Our specialized arbitration team has achieved significant successes in recent high-profile cases, demonstrating our expertise and dedication. Allow us to highlight two examples that underscore our capabilities:

1. We were involved in a highly intricate US$1 billion investment treaty claim against a European country. The case centered around the challenges encountered by a creditor in enforcing a commercial arbitration award across multiple jurisdictions, including England, Austria, and the Netherlands. Despite these difficulties, we successfully secured enforcement in Luxembourg and Belgium. For more details regarding this case, please find below the links to the official site of the PCA (Permanent Court of Arbitration) and UNCTAD's Investment Policy Hub:

https://pca-cpa.org/en/cases/213/

https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/904/diag-and-va-v-czech-republic

2. Enforcing a €500 Million Commercial Award: Our team effectively represented and assisted a creditor in enforcing a €500 million commercial award within Luxembourg, leveraging the provisions of the New York Convention of June 10, 1958 on the recognition and enforcement of foreign arbitration awards. We achieved favorable outcomes at both the Court of Appeal (decision 55/17-VIII-exequatur) and the Supreme Court (Cour de Cassation 70/2018). The judgments for these decisions are publicly accessible online, underscoring our capability to handle high-stakes cases.

These cases exemplify our team's adeptness in navigating complex arbitration landscapes and delivering favourable results. Whether you require assistance with an investment treaty claim or seek to enforce a commercial award, you can rely on our expertise to guide you towards a favourable outcome.

HOW OUR ARBITRATION TEAM CAN ASSIST YOU?

As a leading Luxembourg law firm with a specialised focus on arbitration, we are uniquely positioned to guide and represent our clients in all aspects of the arbitration process. Our deep understanding of the recent reform of the Luxembourg arbitration law enables us to provide up-to-date, strategic advice tailored to the specific needs of each case. Here is how we can assist you:

- **Arbitration Strategy Development:** our seasoned team can assist in devising effective strategies for dispute resolution, considering all relevant legal, commercial, and practical aspects. We conduct a thorough analysis to advise on the most advantageous course of action – be it pursuing arbitration, litigation, negotiation, or other forms of alternative dispute resolution.

- **Drafting and Reviewing Arbitration Agreements:** we provide expert assistance in drafting arbitration clauses in commercial contracts, ensuring they are robust, clear, and enforceable. Moreover, we can review existing agreements and suggest modifications to optimise them in light of the latest legal changes and best practices.
- **Representation in Arbitration Proceedings**: from initiating the arbitration process to presenting the case and enforcing or challenging the award, our team is adept at handling the entire arbitration proceedings. We work diligently to protect our clients' interests, focusing on achieving favourable outcomes while minimising risks and costs.
- **Advisory Services:** we provide timely advice on matters related to conflicts of interest, procedural issues, disclosure obligations, and the role of competence-competence principle under the new law reform.
- **Confidentiality and Ethics**: upholding the new obligation of confidentiality introduced in the reform, we ensure that all proceedings are handled with utmost discretion. We also adhere to the highest ethical standards and professionalism.
- **International Arbitration**: with the extensive experience in international law, our arbitration team is skilled at managing cross-border disputes. We navigate the complexities of international rules and jurisdictions to provide comprehensive support for global disputes.

At our firm, we understand that every dispute comes with its own set of challenges. That's why we commit to a personalised approach, providing each client with a bespoke solution to meet their unique requirements. Whether you're a multinational corporation or a local business, you can trust our team to provide exceptional service and expert guidance through the complexities of arbitration law.

Feel free to get in touch with us to learn more about how we can assist you in arbitration matters.

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CHEVALIER & SCIALES
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Chevalier & Sciales is a Luxembourg law firm established in 2005 with specialist expertise in investment management, litigation, arbitration and dispute resolution, tax, banking, finance and capital markets, private wealth management and corporate transactions. Our dynamic litigation and transaction teams have an international reputation for bringing together excellence and intellectual rigour with a practical and business-minded approach in serving our clients.

Our aim is to offer a one-stop-shop service to our clients and to provide tailored solutions to meet their needs, responsively and cost-effectively. Our practice areas are structured to ensure a comprehensive understanding of our clients' business and markets. We work with recognised service providers to provide you with the assistance and services you require through every aspect of your transactions and business.

Chevalier & Sciales is highly recommended for its expertise in investment funds, litigation, arbitration and dispute resolution.

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