

LUXEMBOURG

DELOS GUIDE TO ARBITRATION PLACES (GAP)

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Several legal, historical and cultural advantages make the Grand-Duchy of Luxembourg a safe and stable seat for conducting arbitration proceedings. A first-class European business centre and home to the world's leading financial and banking institutions, Luxembourg enjoys a high degree of political and regulatory stability.

Located in the heart of Europe, Luxembourg is naturally and historically an arbitration-friendly venue. Given that legal professionals and judges are trained in France, Belgium and, to a lesser extent, Germany, the pro-arbitration law and politics of these neighbouring jurisdictions often influence the arbitration scholarship and case law in Luxembourg. Moreover, multicultural and multilingual local practitioners regularly confront and are comfortable with dealing and solving intricate issues of comparative and private international law.

Key places of arbitration in the jurisdiction	Luxembourg City is the main centre for business and arbitration in the Grand Duchy. The Chamber of Commerce of the Grand-Duchy of Luxembourg established its own Arbitration Centre in 1987 under the patronage of the International Chamber of Commerce (ICC). The Arbitration Centre conducts proceedings under its own arbitration rules. ¹ Additionally, the Arbitration Centre may conduct proceedings under the ICC Rules of Arbitration.
Civil law / Common law environment?	Luxembourg is a civil law country. French and Belgian law and case law have a persuasive value in courts and are taken into account by the legislator during the law-making process. Rules governing arbitration are codified in the New Code of Civil Procedure ("NCPC"), under Part II, Book III, Title I "On Arbitration", Articles 1224 to 1251.
Confidentiality of arbitrations?	Absent specific provisions and case law on confidentiality, scholars consider that parties may provide for confidentiality in the arbitration agreement. Arbitrator confidentiality falls under criminal law rules on professional secrecy (see section 4.5.1 below).
Requirement to retain (local) counsel?	There is no requirement to retain local counsel in proceedings before an arbitral tribunal.
Ability to present party employee witness testimony?	For the conduct of arbitration proceedings, the NCPC (Article 1230) defers to the rules of civil procedure applied before Luxembourg courts. Courts consider that arbitrators do not have to apply these rules strictly, provided that general principles of civil procedure are upheld (<i>i.e.</i> principe du contradictoire, see section 4.5 below). Given that courts often rely on employee testimonies, arbitrators may assume a similar approach.
Ability to hold meetings and/or hearings outside of the seat?	Absent specific rules on the matter, commentators consider that parties may dissociate the legal seat from the place where the hearings have been materially held (see section 4.5.3 below).

¹ Accessible on the chamber's website at: <http://www.cc.lu/services/avis-legislation/centre-darbitrage>.

Availability of interest as a remedy?	Availability of interest as a remedy would depend on the applicable law. Interest is available as a remedy under Luxembourg law, if applicable.
Ability to claim for reasonable costs incurred for the arbitration?	Nothing precludes arbitrators from awarding reasonable costs. Under recent Luxembourg case law legal fees may be recovered as part of the loss suffered.
Restrictions regarding contingency fee arrangements and/or third-party funding?	There are no restrictions regarding contingency fee arrangements and/or third-party funding.
Party to the New York Convention?	Party to the New York Convention since 1983.
Other key points to note	∅
WJP Civil Justice score (2018)	∅

ARBITRATION PRACTITIONER SUMMARY

Luxembourg is a first-class European business centre and home to the worlds’ leading financial and banking institutions. This feature has a twofold impact to the arbitration practice in Luxembourg, rendering Luxembourg practitioners and judges highly attuned to the practice of arbitration:

- i. Where the Luxembourg corporate law is applicable to shareholder agreements and international financial contracts containing arbitration clauses, parties to arbitration proceedings need to seek Luxembourg corporate and private international law specialists.
- ii. Luxembourg is, de facto, an unavoidable venue for enforcing foreign arbitral awards.

Moreover, preeminent arbitration specialists are associated in the Think Tank for the Development of Arbitration in Luxembourg. The Think Tank has been working for the past years on a draft bill aiming at a complete overhaul of the Luxembourg rules on arbitration, which are currently codified in the New Code of Civil Procedure (“**NCPC**”), under Part II, Book III, Title I “On Arbitration”, Articles 1224 to 1251. The draft has been influenced by the recent French arbitration reform and the UNCITRAL Model Law as applied and interpreted in Belgium. It is hoped that the bill will be passed in the next 2 to 3 years.

Date of arbitration law?	Luxembourg rules on arbitration date back to the enactment of the NCPC in 1806, with reforms made in 1939 and 1981.
UNCITRAL Model Law? If so, any key changes thereto?	Arbitration rules do not follow the UNCITRAL Model Law. However, the Model Law is one of the influencing instruments in the upcoming reform bill prepared by the Think Tank for the Development of Arbitration in Luxembourg.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	There are no specialised judges. However, the judges are highly familiar with the principles of arbitration law for the reasons explained above.
Availability of <i>ex parte</i> pre-arbitration interim measures?	<i>Ex parte</i> interim measures are available for the constitution of the arbitral tribunal. Otherwise, the admissibility of <i>ex parte</i> applications for interim measures is subject to the applicant demonstrating the existence of exceptional circumstances.
Courts’ attitude towards the competence-competence principle?	Subject to either of the parties raising the issue, the principle is analysed and upheld by the courts, unless the arbitration agreement is null and void.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	The Luxembourg rules on arbitration follow closely the New York Convention grounds for annulment, while also providing additional grounds. Annulment proceedings may last from 6 to 11 months subject to appeals and the complexity of the case. One unusual feature of Luxembourg law is that, to seek annulment of a Luxembourg award, one must first request its exequatur before the District Court via an <i>ex parte</i> application to the President of the competent District Court which is usually expedited under one to two weeks.

<p>Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?</p>	<p>Following in the footsteps of French judges, Luxembourg courts have enforced arbitral awards annulled in the seat of arbitration. However, in 2015, Luxembourg departed from this position by deciding to stay exequatur proceedings in Luxembourg to await the result of annulment proceedings at the seat of the arbitral award.</p>
<p>Other key points to note?</p>	<p>∅</p>

JURISDICTION DETAILED ANALYSIS

1. The legal framework of the jurisdiction

The arbitration law is not based on the UNCITRAL Model Law. The Part II, Book III, Title I of the *Nouveau code de procédure civile* (the Luxembourg New Code of Civil Procedure, “**NCPC**”) codified the rules governing arbitration in Luxembourg in Articles 1224 to 1251.

Luxembourg ratified the New York Convention by virtue of the Law of 20 May 1983.² Luxembourg is also party to the European Convention, which it ratified by virtue of the Law of 26 November 1981.³

The latest major reform was introduced by the Grand-Ducal Regulation of 8 December 1981.⁴

2. The arbitration agreement

2.1 How do the courts in the jurisdiction determine the law governing the arbitration agreement?

Luxembourg judges eagerly recognise that the parties may choose to apply a different law to the arbitration clause than the law applicable to the rest of the agreement.⁵ Absent a specific case law on instances where parties have not chosen the law applicable to the arbitration clause, Luxembourg rules of choice of law concerning contracts should apply.

2.2 Is the arbitration agreement considered to be independent from the rest of the contract in which it is set forth?

Arbitration clauses are considered as a contract that is “accessory” to the contract in which the clause is set forth,⁶ which denotes a certain (but not entire) degree of severability from the main contract. Luxembourg case law has not gone as far as proclaiming complete autonomy of the arbitration clause from the main contract. If the main contract is null and void, in most cases, so will the arbitration clause be.⁷

2.3 What are the formal requirements (if any) for an enforceable arbitration agreement?

Luxembourg law distinguishes between the arbitration clause (*clause compromissoire*) (Article 1227 NCPC) and the arbitration agreement (*compromis*) (Article 1226 and 1227 NCPC).

There are no formal requirements for an enforceable arbitration clause.

The arbitration agreement must state the subject matter of the dispute and names the arbitrator(s) (Article 1227 NCPC). Moreover, an arbitration agreement may be concluded in form of minutes before the arbitral tribunal, in front of a public notary or in a private document, i.e. contract (Article 1226 NCPC).

² Luxembourg made the reciprocity reservation to the New York Convention, whereby it “*is applied on the basis of reciprocity to the recognition and enforcement of only those arbitral awards made in the territory of another Contracting State.*”, Law of 20 May 1983 approving the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Mémorial A - n°43 of 21 June 1983, p. 996.

³ Law of 26 November 1981 approving the European Convention on International Commercial Arbitration and its Annex, signed in Geneva on 21 April 1961, and the Agreement on the Application of the European Convention on International Commercial Arbitration, signed in Paris on 17 December 1962, Mémorial A - n°94 of 19 December 1981, p. 2283.

⁴ Grand-Ducal Regulation of 8 December 1981 amending and supplementing certain provisions of the single title entitled “On Arbitration” in Book III of Part Two of the Code of Civil Procedure, Mémorial A - n°91 of 16 December 1981, p. 2194.

⁵ Luxembourg District Court, 26 July 2005, case n°27789, Para. 33, p. 117; BJL, 2006, p. 165.

⁶ Court of Appeal, 12 March 2003, Para. 32, p. 399.

⁷ G. HARLES, *National Report for Luxembourg (2017)* in I. PAULSSON and L. BOSMAN (eds), *ICCA International Handbook on Commercial Arbitration*, Jan 1984, p. 7, citing Court of Appeal, 12 March 2003, *loc. cit.*

2.4 To what extent, if at all, can a third party to the contract containing the arbitration agreement be bound by said arbitration agreement?

Absent a specific provision on the matter, courts traditionally uphold the arbitration clauses in contracts that have been transferred to new assignees.⁸ Additionally, in 2012, persuaded by French case law and scholarship on the theory of groups of contracts, the Luxembourg District Court⁹ accepted to extend the arbitration clause contained in a framework agreement to third parties that have signed implementation agreements based on the framework agreement.

2.5 Are there restrictions to arbitrability? In the affirmative:

2.5.1 Do these restrictions relate to specific domains (such as IP, corporate law etc.)?

The general arbitrability rule is provided by Article 1224 NCPC, which states that “*all persons may arbitrate in respect of their rights of which they can freely dispose*”.¹⁰

More specifically, Article 1225 NCPC provides that the parties may not submit the following issues to arbitration: “*status and legal capacity of persons, conjugal relations, requests for divorce and separation, the representation of persons without legal capacity, disputes concerning such persons without legal capacity and persons who are missing or presumed missing cannot be subject to arbitration.*”

Moreover, matters related to employment law, consumer¹¹ and most insurance contracts¹² may not be submitted to arbitration in an arbitration clause. However, the parties can resort to arbitration in an arbitration agreement, once the dispute has already arisen.¹³

According to case law, an arbitrator may apply *ordre public* provisions and disputes involving issues of *ordre public* are arbitrable.¹⁴

2.5.2 Do these restrictions relate to specific persons (i.e. State entities, consumers etc.)?

The prohibition of arbitration clauses in employment, consumer and insurance contracts stems from the lower bargaining power attributed to employees, consumers and the insured persons. As mentioned above, these parties may enter into arbitration agreements once the dispute has already arisen.

3. Intervention of domestic courts

3.1 Will the courts stay litigation if there is a valid arbitration agreement covering the dispute?

3.1.1 If the place of the arbitration is inside of the jurisdiction?

Yes. See question 3.1.2 below.

⁸ P. KINSCH, La législation luxembourgeoise en matière d'arbitrage, Bull. Cercle François Laurent, 1997, Vol. II, p. 1, para. 64, citing Luxembourg District Court, 20 May 1987, case n°297/87 (I) ; and Luxembourg District Court, 29 April 1988, case n°186/88 (II).

⁹ Luxembourg District Court, 1 June 2012, cases n° 124736, 124737, 124773, 126435 and 126576, commented by F. TREVISAN and L.-H. GAICIO, *Luxembourg: Extended benefits*, in *The 2012 Guide to Litigation & Dispute Resolution*, IFLR, 2012, p. 17, available at: <http://www.iflr.com/IssueArticle/3083690/Supplements/Luxembourg-Extended-benefits.html?supplementListId=86540>.

¹⁰ All translations of the NCPC quoted herein are adapted from the translations provided by the Handbook on Commercial Arbitration, Kluwer Law International, 1984, Supplement No. 65, July 2011.

¹¹ Article L.211-3 para 13 of the Consumer Code (*Code de la Consommation*).

¹² Article 47 of the law of 27 July 1997 on insurance contracts, as amended, first published in Mémorial A – n°65 of 3 September 1997, p. 2048. Pursuant to Article 3(3) of this law, this restriction does not apply to insurance contracts pertaining to coverage of large or exceptional risks.

¹³ Court of Appeal, 9 February 2000, Pas. 31, p. 301.

¹⁴ Court of Appeal, 9 February 2000, Pas. 31, p. 301.

3.1.2 If the place of the arbitration is outside of the jurisdiction?

Yes. However, where none of the parties raise the issue of the arbitration agreement the courts will retain their jurisdiction. This issue must be raised *in limine litis*,¹⁵ i.e. before responding on the subject matter of the case at hand.

3.2 How do courts treat injunctions by arbitrators enjoining parties to refrain from initiating, halt or withdraw litigation proceedings?

There is no case law on the matter in Luxembourg. Should the jurisdiction of a Luxembourg court be challenged, the judges will solely examine the issue under the lenses of their jurisdiction over the dispute and only if one of the parties raises the issue (see point 3.1.2 above). If the challenge is successful, the courts will simply decline jurisdiction and dismiss the case.

3.3 On what ground(s) can the courts intervene in arbitrations seated outside of the jurisdiction? (Relates to the anti-suit injunction but not only)

Luxembourg courts do not issue anti-suit injunctions. Otherwise, they may grant interim measures in support of foreign arbitration proceedings or enforce foreign awards (see point 4.4 and 4.5.4 below).

4. The conduct of the proceedings

4.1 Can parties retain outside counsel or be self-represented?

In the absence of specific provisions on the matter, commentators consider that lawyers and non-lawyers alike may represent the parties in arbitration.¹⁶ No rule prohibits self-representation.

4.2 B. How strictly do courts control arbitrators' independence and impartiality? For example: does an arbitrator's failure to disclose suffice for the court to accept a challenge or do courts require that the undisclosed circumstances justify this outcome?

Arbitrator independence and impartiality standards are the same as those governing judges under Article 521 NCPC. A party may challenge an arbitrator if he/she:

- is a relative, partner or spouse of one of the parties;
- has been involved in a litigation against or is a creditor/debtor of one of the parties;
- is an administrator, manager,¹⁷ presumptive heir, guardian or curator of one of the parties;
- has advised, pleaded or written on the dispute;
- has previously known judge or arbitrated the dispute at hand;
- has requested, recommended or contributed to the costs of the proceedings;
- has testified as a witness; or
- has shared a meal or a drink with one the parties in their house, or received presents from such party.

¹⁵ Luxembourg District Court, 2 February 1934, Para. 14, p. 209; Luxembourg District Court, 24 April 2007, no. 1115/2007 (VIII), cited in G. HARLES, *op. cit.*, at p. 7, footnote 7.

¹⁶ P. KINSCH, *loc. cit.*, at p. 90.

¹⁷ Luxembourg District Court, 31 July 1959, Para. 18, p. 97; Luxembourg District Court, 10 February 1960, Para. 18, p. 101.

Moreover, a party may challenge an arbitration if there is a fundamental enmity between him/her and one of the parties or in case of oral or written assaults, insults or threats have been made since the beginning of the proceedings or within the six months preceding the proposed challenge.

Article 1235 NCPC restricts challenges of arbitrators to causes that have arisen since the conclusion of the arbitration agreement.

There is no specific case law on failure to disclose or whether the mere existence of such failure would suffice for the challenge to succeed. The cited rule indicates that the challenge may succeed only where an arbitrator's failure to disclose a cause for challenge is discovered after the conclusion of the arbitration agreement.

4.3 On what grounds do courts intervene to assist in the constitution of the arbitral tribunal (in case of ad hoc arbitration)?

Luxembourg courts will intervene where i) an uncooperative party does not appoint its arbitrator or delays such appointment; ii) where the two party-appointed arbitrators do not agree on the president of the tribunal and/or iii) there is a challenge to the impartiality of one of the arbitrators.

In the first case, a party may make an *ex parte* application for the appointment of an arbitrator to the President of the competent District Court (Article 1227 NCPC). The decision of the President appointing an arbitrator will be notified to the other party and to the appointed arbitrator. It may not be appealed.¹⁸

The more diligent party may request the President of the District Court to appoint the third arbitrator (Article 1227 NCPC). The proceedings are contradictory and may be appealed.

An interested party may challenge an arbitrator's impartiality before the District Court. This is an *ex parte* procedure,¹⁹ which is identical to the challenge of a judge under article 521 NCPC.²⁰ In practice, *ex parte* proceedings are expedited under one to two weeks in Luxembourg.

4.4 Do courts have the power to issue interim measures in connection with arbitrations?

Yes. Traditionally, Luxembourg courts (*juge des référés*)²¹ have considered that they have the power to order interim measures in support of arbitration proceedings.²² This position has been set back in a 2009 decision in which the Court of Appeal²³ considered that judges do not have jurisdiction to issue interim measures where the arbitration clause refers "all disputes relating to the agreement" to arbitration. The commentators, however, consider that this decision should not be regarded as a precedent. In the matter at hand, the claimant sought an interim measure that was tantamount to asking the judge to rule on the merits of the case, which the arbitration clause covered.²⁴

4.4.1 If so, are they willing to consider ex parte requests?

Yes. Some of the proceedings concerning interim measures may be *ex parte* before a specialised judge (the *juge des référés*). Interim measures would be granted on the condition that the applicant demonstrate the

¹⁸ Court of Appeal (Ch. Vac.), 2 august 2013, case n°40133, JTL, 2009, n°30, p. 160.

¹⁹ Luxembourg District Court, 10 February 1960, *loc. cit.*

²⁰ Cf. point 4.2 above regarding the grounds for a challenge.

²¹ The *juge des référés* is a specialised judge that has the jurisdiction to issue interim orders.

²² See, for instance, Court of Appeal, 30 January 1989, case n° 1989. This case has not been published in a review, as first instance and appeal civil and commercial law cases are not yet publicly accessible. However, one may request them from a dedicated department of the Ministry of justice (*Service de documentation juridique*) by writing at the following address: credoc@justice.etat.lu. For more information on the available services, available at <http://www.justice.public.lu/fr/aides-informations/credoc/index.html>.

²³ Court of Appeal, 21 October 2009, JTL, 2010, p.72.

²⁴ See, case comments by P. KINSCH in JTL, 2010, p. 73.

existence of exceptional circumstances, justifying that the judges forgo the principle of an adversarial process.²⁵

4.5 Other than arbitrators' duty to be independent and impartial, does the law regulate the conduct of the arbitration?

Article 1230 NCPC governs the general rules on the procedure that arbitrators need to follow. The said article provides that, unless the parties have otherwise agreed, the arbitrators shall follow the deadlines and forms followed by State courts. Early on,²⁶ the courts adopted a flexible view, considering that the procedure prescribed by Article 1230 NCPC is not to be rigorously required, but should be adapted and reconciled with the flexible nature of arbitration. The only restriction to the matter is the respect of general rules of civil procedure (*i.e.*, *audi alteram partem* principle or *principe du contradictoire*).

4.5.1 Does it provide for the confidentiality of arbitration proceedings?

Luxembourg law does not contain provisions on confidentiality, and the courts have not had the opportunity to rule on the issue to date. Commentators consider however that parties may provide for confidentiality in the arbitration clause/agreement.

Article 458 of the Criminal Code defines unlawful disclosure of professional secrets as an offence sanctionable by 6 months imprisonment and a fine of EUR 500 to EUR 5,000. Scholars consider that arbitrators would be bound to confidentiality under this provision.

One needs to keep in mind the fact that, should one of the parties decide to appeal the award before the courts, the judgement issued on award would be a matter of public record.

4.5.2 Does it regulate the length of arbitration proceedings?

Yes. Under Article 1228 NCPC, absent agreement of the parties on the matter, the arbitral tribunal must render the award within a 3 months period from the date of the conclusion of the arbitration agreement. If arbitrators issue an award after the expiry of this time-limit, they are considered to have extended the scope of their powers, which would constitute a basis annulment.²⁷ The tribunal does not have the authority to extend this time limit.²⁸ According to case law,²⁹ where the parties did not choose an initial time limit, they may agree to extend this very short deadline by 3 months increments. The parties' agreement to extend the duration of the proceedings may be explicit or implied from their conduct.³⁰ A party that refuses to extend the time limit without reasonable grounds may be considered in breach of the arbitration agreement/clause; such breach may be a cause for the rescission of the arbitration agreement and allow the judge to retain jurisdiction over the matter.³¹

Despite the above, in an *obiter dictum*, the Luxembourg Court of Appeal seems to acknowledge a common practice whereby parties waive the requirement for a specific period within which an award may be rendered.³²

²⁵ T. HOSCHEIT, *Le droit judiciaire privé au Grand-Duché du Luxembourg*, Ed. Paul Bauler, 2012, p. 637 ff.

²⁶ Court of Appeal, 22 July 1904, paras. 6, 517.

²⁷ Court of Appeal, 2 April 2014, Para. 161, p. 164

²⁸ Luxembourg District Court, 5 July 2006, BJJ, p. 140.

²⁹ Court of Appeal, 2 April 2014, *loc. cit.*

³⁰ Luxembourg District Court, 5 July 2006, *loc. cit.*, p.141.

³¹ Luxembourg District Court, 15 January 2009, JTL, 2009, p. 134.

³² Court of Appeal, 2 April 2014, *loc. cit.*

4.5.3 Does it regulate the place where hearings and/or meetings may be held?

No. Nevertheless, the Luxembourg case law and scholarship considers an award “made” in Luxembourg as Luxembourgish,³³ even if the parties choose to apply the law of another jurisdiction to the procedure. This further means that annulment proceedings are available in Luxembourg. According to commentators, the parties should still be able to dissociate the legal seat from the place where the hearings have been materially held.³⁴

4.5.4 Does it allow for arbitrators to issue interim measures?

Although not expressly provided for in the NCPC, arbitrators may grant interim measures. However, to enforce them, where necessary, one should first need to proceed through an *exequatur* proceeding before the President of the District Court in the jurisdiction of which the arbitration proceedings take place. It is a general understanding that the arbitral tribunal may not issue interim measures against third parties.³⁵

4.5.5 Does it regulate the arbitrators’ right to admit/exclude evidence?

There is no specific requirement on this point. The only restriction is that general rules of civil procedure be upheld (*i.e.*, *audi alteram partem* principle or *principe du contradictoire*, as explained under point 4.5 above).

Should the arbitrator follow general procedural provisions applicable to courts, such testimony would be admissible. Theoretically, judges should weigh the credibility of such testimony against the employee/employer relationship. In practice, however, the reliance on employee testimony in court is widespread.

4.5.6 Does it make it mandatory to hold a hearing?

No. There is no legal requirement regarding this matter. The only restriction to the matter is the respect of *due process principles* (as explained under point 4. above). Commentators consider that where a party requests a hearing, the arbitrator should grant it, as there would be a high risk that the issued award will be successfully challenged on the above-mentioned ground.³⁶

4.5.7 Does it prescribe principles governing the awarding of interest?

No. Should Luxembourg law apply, interest would be awarded.

4.5.8 Does it prescribe principles governing the allocation of arbitration costs?

No. Under Luxembourg general procedural law principles, if applicable, arbitrators would have discretion in the allocation of costs.

4.6 Liability

4.6.1 Do arbitrators benefit from immunity to civil liability?

No. Absent case law on the matter, arbitrators’ civil liability should be examined under contract law principles.

4.6.2 Are there any concerns arising from potential criminal liability for any of the participants in an arbitration proceeding?

To our knowledge, there have been no prosecutions linked to a participation in an arbitration proceeding.

³³ Cf. Section 5(E) below.

³⁴ KINSCH, *loc. cit.*, at p. 115.

³⁵ HARLES, *op. cit.* p. 14.

³⁶ HARLES, *op. cit.* p. 13.

Should arbitrators disclose any information communicated to them for the purposes of the arbitration proceedings, they may be prosecuted under Article 458 of the Criminal Code (*Code pénal*).

Conducting or participating in fraudulent or fictitious arbitration proceedings may fall under prosecutable offences, such as forgery (Articles 193 *et seq.* Criminal Code), fraud (articles 489 *et seq.* Criminal Code) or money laundering (Articles 506-1 *et seq.* Criminal Code).

5. The award

5.1 Can parties waive the requirement for an award to provide reasons?

Yes. Article 1244 NCPC provides that, unless parties agree otherwise, an award rendered in Luxembourg may be annulled if the award is not reasoned. Given that grounds for declining enforcement of foreign awards are less strict than grounds for annulment of Luxembourg awards (see point 5.5 below), one may infer that this option is also open to arbitrations seated abroad.

5.2 Can parties waive the right to seek the annulment of the award?

There is no provision on the matter and it is uncertain whether such waiver would be upheld by courts.

5.3 What atypical mandatory requirements apply to the rendering of a valid award rendered at a seat in the jurisdiction?

Other than the requirements relating to time limits (see point 5.5 below), all arbitrators must sign the award. The law requires that dissent is mentioned in the award if a minority of arbitrators refuses to sign it followed by the signature of the rest of the arbitrators (Article 1237 NCPC).

5.4 Is it possible to appeal an award (as opposed to seeking its annulment)?

No. Parties may however agree on an appellate proceeding before an otherwise composed arbitral tribunal.

5.5 What procedures exist for the recognition and enforcement of awards, what time-limits apply and is there a distinction to be made between local and foreign awards?

Luxembourg law and case law attribute "*nationalities*" to awards, distinguishing between awards "*made*"³⁷ or "*rendered*"³⁸ in Luxembourg (or Luxembourg awards) and awards "*made*" or "*rendered*" abroad (or foreign awards).³⁹ Early case law⁴⁰ seemed to apply a purely territorial criterion, *i.e.*, the physical place where the award was rendered as transpiring from the text of the award itself (*i.e.*, where the award was signed). According to commentators, this case law should be interpreted in the sense that the place where the award is made is the agreed seat of arbitration and should not preclude parties from dissociating the legal seat from the place where the hearings have been materially held.⁴¹ Moreover, the fact that a proceeding followed foreign arbitration rules does not affect the nationality of the award.⁴²

Consequently, recognition and enforcement of Luxembourg awards (a) differ from those of foreign awards (b). One can further distinguish the foreign awards issued or not in a signatory state of the New York Convention (c).

The arbitration section of the NCPC does not provide for a time limit for enforcement of awards. However, one may apply *mutatis mutandis* its Articles 2224 and 2262 prescribing that Luxembourg judgements must

³⁷ The criterion is borrowed from Article 1 of the New York Convention; KINSCH, *loc. cit.*, at p. 113.

³⁸ This term is implied from the wording of Article 1250 NCPC.

³⁹ Court of Appeal, 2 April 2014, *loc. cit.*

⁴⁰ Court of Appeal, 24 November 1993, case n°14983, commented by KINSCH, *loc. cit.*, at p. 113.

⁴¹ KINSCH, *loc. cit.*, at p. 115.

⁴² KINSCH, *loc. cit.*, at p. 115.

be enforced within a 30 years' time limit. It is debated whether these provisions should apply to foreign awards.⁴³

5.5.1 Enforcement of Luxembourg awards.

The applicant may enforce a Luxembourg award following an *ex parte* application with the President of the District Court of the seat of arbitration⁴⁴. Prior to the application, the applicant should file the original of the award with the clerk of the District Court. The judge does not have jurisdiction to review the award on the merits, having the possibility to refuse enforcement for *ordre public* reasons.⁴⁵

In the event the court refuses to enforce the award, the applicant may challenge the decision before the Court of Appeal.⁴⁶

The enforcement debtor may challenge the decision granting leave for enforcement in an annulment proceeding, on the grounds provided for in Article 1244 NCPC if:

- (1) *the award is against public order;*
- (2) *the dispute may not be settled by arbitration;*
- (3) *there was no valid arbitration agreement;*
- (4) *the arbitral court exceeded its competence or powers;*
- (5) *the arbitral court failed to decide on one or several points of the dispute and if the omitted points cannot be separated from the points that were decided;*
- (6) *the award was made by an irregularly constituted arbitral tribunal;*
- (7) *there was a violation of due process [i.e. principle of an adversarial process or *droits de la défense* in the French text];⁴⁷*
- (8) *the award is not reasoned, unless the parties expressly exempted the arbitrators from giving reasons;*
- (9) *the award contains contradictory dispositions;*
- (10) *the award was obtained by fraud;*
- (11) *the award is based on evidence that has been declared false by a final judicial decision or on evidence that is admitted to be false;*
- (12) *since the award has been rendered, a document or other element of proof is discovered which would have had a decisive influence on the award and which was withheld by the action of the adverse party."*

One unusual feature of Luxembourg law is that to seek annulment of a Luxembourg award, one must first request its *exequatur* before the District Court (Article 1246 NCPC). This preliminary *exequatur* proceeding is expedited quickly.

If based on paras. (1) to (9) of Article 1244 NCPC, the annulment proceedings must be commenced within the month of the notifications of the enforcement decision. Applications for annulment under paras. (10) to (12)

⁴³ C. MEDERNACH, "Report for Luxembourg" in ICC Bulletin – 2012 special supplement, p. 249.

⁴⁴ There are two District Courts in Luxembourg, one for the District of Diekirch and the other for the District of Luxembourg.

⁴⁵ HARLES, *op. cit.*, at p. 22.

⁴⁶ HARLES, *op. cit.*, at p. 22, under footnote 31, citing Court of Appeal, 26 March 2009, case n°33236.

⁴⁷ Our note.

must be filed within the month when the applicant has been made aware or should have been aware of the respective issue affecting the award.

5.5.2 Enforcement of foreign awards.

In order to enforce a foreign award in Luxembourg, an application must be made before the President of the District Court of either i) the domicile (or residence) of the party against which the enforcement is sought or ii) the place where the award is to be enforced (Article 1250 NCPC). These are *ex parte* proceedings that mirror the *exequatur* proceedings of a foreign judgement under Article 680 *et seq* NCPC.

As a prerequisite, the applicant must provide the judge with, either originals or certified copies of the award and the arbitration clause or arbitration agreement (Article 1250 para. 4). Although this is only a requirement for awards seated in a country that is a signatory of the New York Convention, it is recommended to provide the judge with a certified translation of the award into either French, German or Luxembourgish.

Article 1252 lists grounds for refusal of *exequatur* by reference to paras. 3 to 12 of Article 1244 NCPC (see above). Under Article 1251 NCPC, the judge will refuse the enforcement if:

- "(1) *the award can still be appealed before arbitrators and if the arbitrators have not ordered the provisional enforcement of the award notwithstanding appeal;*
- (2) *the award or its execution is against public order or if the dispute could not be settled by arbitration;*
- (3) *it is established that there are grounds for annulment as provided in Art. 1244(3) to (12)".*

The court will notify the enforcement debtor on the decision granting leave for enforcement. Said party may challenge it before the Court of appeal.⁴⁸ A recourse on a point of law is available before the Luxembourg Supreme Court in civil and commercial matters (*Cour de Cassation*).

5.5.3 Enforcement of foreign awards seated in a signatory state of the New York Convention.

The procedure for enforcement of arbitral awards seated in a signatory country to the New York Convention is identical to that for the regular foreign awards. In terms of grounds for refusal of enforcement, the Luxembourg courts will strictly apply only the provided in the New York Convention⁴⁹, and not the grounds mentioned for regular foreign awards under 1251 NCPC. Hence, an interested party may challenge awards rendered in a signatory country to the New York Convention solely on grounds listed under its Article V of the New York Convention.

5.6 Does the introduction of annulment or appeal proceedings automatically suspend the exercise of the right to enforce an award?

Following in the footsteps of French judges,⁵⁰ Luxembourg courts have considered, for a time that annulment proceedings at the seat do not preclude enforcement of such award in Luxembourg.⁵¹ Luxembourg judges have departed from this position in 2013,⁵² by denying an applicant's right to exercise freezing orders in

⁴⁸ Court of Appeal, 26 July 2005, *loc. cit.*; Court of Appeal, 26 March 2009, *loc. cit.*, cited in HARLES, *op. cit.*, at p. 24, under footnote 34.

⁴⁹ Court of Appeal, 25 June 2015, Para. 37, p. 383.

⁵⁰ French Cour de Cassation, Civ 1^{re}, 23 March 1994, *Hilmarton* case n° 92-15137, Rev. Arb. 1994, p. 327, commented by Ch. JARROSSON; French Cour de Cassation, Civ 1^{re}, 29 June 2007, *Putrabali* case n° 05-18053, Rev. Arb. 2007, p. 517, commented by E. Gaillard.

⁵¹ Court of Appeal, 28 January 1999, case n° 27789, Para. 31, p. 95.

⁵² Court of Appeal, 18 December 2013, case n° 40145 and 40147, JTL, 2014, p. 51.

Luxembourg. In 2015, the Court of Appeal confirmed the departure from the earlier precedents⁵³ in a case where judges decided to stay *exequatur* proceedings in Luxembourg to await the result of annulment proceedings at the seat of an arbitral award.

5.7 When a foreign award has been annulled at its seat, does such annulment preclude the award from being enforced in the jurisdiction?

Yes. The rationale behind the answer to question 6, is that annulment of an award at the seat of arbitration would constitute a ground for refusing *exequatur* in Luxembourg.⁵⁴

5.8 Are foreign awards readily enforceable in practice?

Even prior to commencing *exequatur* proceedings, one may seek authorisations from the courts to proceed to freeze movable or immovable assets in Luxembourg based on the non-exequated award alone.⁵⁵ Once the court grants a leave for enforcement through the traditional *exequatur* proceeding, the courts may confirm the decision on freezing the asset that then becomes final.

6. Funding arrangements

6.1 Are there restrictions to the use of contingency or alternative fee arrangements or third-party funding at the jurisdiction?

Rules governing the legal profession in Luxembourg prohibit contingency fees. A certain degree of proportionality is allowed where it constitutes an additional means of remunerating the lawyer's services, *i.e.*, where a certain proportion of the claim is billed in addition to time-based billing. There is no provision prohibiting third-party funding.

6.1.1 If so, what is the practical and/or legal impact of such restrictions?

In the absence of arbitration-related case law on the matter, one should consider that these rules are applicable to lawyers registered with the Luxembourg bar only.

7. Is there likely to be any significant reform of the arbitration law in the near future?

Yes. The *Think Tank for the Development of Arbitration in Luxembourg* has been working for the past years on a draft bill aiming at a complete overhaul of the NCPC section on arbitration. The draft is a synthesis of the recent French arbitration reform and the UNCITRAL Model Law, as applied and interpreted in Belgium. The Luxembourg Ministry of Justice is currently reviewing the bill. It is hoped that the bill will be passed in the next 2 to 3 years.

⁵³ Court of Appeal, 25 June 2015, *loc. cit.*, commented by G. CUNIBERTI, "L'exécution au Luxembourg des sentences annulées dans l'Etat du siège de l'arbitrage", at p. 387.

⁵⁴ Court of Appeal, 25 June 2015, *loc. cit.*, at p.386.

⁵⁵ Reference is made to the *saisie-arrêt* proceedings under Articles 693 NCPC *et seq.*