Kluwer Arbitration Blog

Luxembourg Modernizes its Arbitration Law

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On April 19, 2023, a new law on arbitration was adopted in Luxembourg, aimed at modernizing the current provisions to attract arbitrations to the Grand Duchy. The multiculturalism and multilingualism that characterize this small country make it a prime location for the developing field of arbitration. The urge for a new regulation of arbitration was all the more compelling having in mind that the current provisions date back to the Napoleonic codification of the Code of Civil Procedure of 1806, with only a few, "surgical" updates (eg the law of April 20, 1939, or the Grand-Ducal Decree of December 8, 1981). Indeed, Luxembourg arbitration law has never been thoroughly modernized and the current provisions were no longer in line with the times and were unsuitable in light of the globalization of the economy. The reform is moreover in line with the current worldwide movement of reforms, aimed at favouring the use of arbitration as an alternative method of dispute resolution.

The Result of an Intense Comparative Analysis

Arbitration in Luxembourg has only recently begun to develop, and has been slowed down both by the inadequacy of the old provisions and by Luxembourg's late ratification, compared to other European countries, of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Luxembourg waited until 1983 to ratify the Convention, whereas other countries, such as France, had ratified it as early as 1959, which gave them a competitive advantage over those who only signed up to the Convention later. With this reform, Luxembourg is taking two steps forward: it is not just catching up, but is making bold choices, which now place it among the European countries most favourable to arbitration.

Indeed, the project is the result of a long reflection by a working group of jurists, lawyers, judges and law professors, who met regularly between 2013 and 2017. It is largely inspired by the current French model. However, it borrows many aspects directly from the UNCITRAL Model Law, as well as from Belgian and Swiss law. It is indeed the result of a careful analysis of comparative law, which made it possible to identify and incorporate the best of the various regulations studied and compared by the working group.

The French Inspiration

As already mentioned, the reform is based mostly on the French model.

For instance, and this is one of the main innovations, the creation of the so-called "support judge" (*juge d'appui*), under the new article 1229 of the Nouveau Code de Procédure Civile ("NCPC"), is admittedly inspired by article 1505 of the French Code de Procédure Civile. A party may bring a matter before the *juge d'appui,* either before or after the arbitral tribunal is constituted, to overcome any obstacles that may arise – and often do arise in practice – pertaining to the arbitral procedure. This makes it possible to obviate any obstructive behaviours. Just like in the French text, Luxembourg retains under the new article 1229, last paragraph, of the NCPC, although implicitly, as this term is never expressly mentioned as such, its own "universal jurisdiction" at the *juge d'appui* level. It is, as a matter of fact, a form of "universal jurisdiction", because anyone who is a party to an arbitration clause will be able to bring the matter before a Luxembourg *juge d'appui* (i) when Luxembourg has a connection with the litigious matter (ie because Luxembourg is the seat of the arbitration or Luxembourg law governs the arbitral procedure), or (ii) the parties have identified Luxembourg as having jurisdiction to deal with procedural obstacles in the arbitral procedure or, more generally, (iii) if there is a significant link between the matter and Luxembourg. But the *juge d'appui* also has jurisdiction, just like a French *juge d'appui*, in case one of the parties is exposed to the risk of a denial of justice, regardless of the existence of a connecting factor with Luxembourg. This scenario, far from being purely theoretical, is often encountered, especially in arbitrations against companies owned by a State or State entities. By presenting itself as a universal jurisdiction, Luxembourg thus aspires to take a leading place in the world of international arbitration.

Again, the French inspiration is also apparent in the new article 1231-9 of the NCPC, which confers the power on the arbitral tribunal to order provisional or conservatory measures, just like the French article 1468, 1st paragraph, of the Code de Procédure Civile, which provides that "*The arbitral tribunal may order the parties, subject to the conditions which it determines and as the case may be subject to an astreinte, any conservatory or provisional measure that it deems appropriate. However, the State has exclusive jurisdiction to order seizures and judicial securities"*. However, Luxembourg departs from the French text as it grants the parties the possibility to derogate from this provision, a possibility which is not contemplated by the French law.

The Belgian-Inspired Provisions

Because the French code does not contain any further provisions on conservatory and provisional measures (except for providing under article 1468 second paragraph that *"the arbitral tribunal may modify or complete the provisional or conservatory measure it ordered"*), the Luxembourg legislator "completed" the above mentioned new article 1231-9 of the NCPC regime borrowing from the articles 1692-1696 of the Belgian Code Judiciaire*,* as well as from articles 17D-17I of the UNICITRAL Model Law as amended in 2006. This provides a full and detailed framework regarding provisional and conservatory measures, which is missing from the French Code.

Another Belgian-inspired provision is, for instance, the new article 1231-12 of the NCPC which, just as article 1709 of the Belgian Code Judiciaire*,* grants third parties the possibility to request to join arbitral proceedings, subject to the parties and the arbitral tribunal's consent.

The Inspiration from the UNCITRAL Model Law

Many provisions are inspired by the UNCITRAL Model Law. For example, article 1231-10 of the NCPC is directly copied from article 25 of the UNCITRAL Model Law on default of arbitration parties. Article 25 also already inspired laws in many other jurisdictions, such as article 1706 du Belgian Code Judiciaire, article 1048 of the German Zivilprozessordnung, article 600 of the Austrian Zivilprozessordnung and article 31 of the Spanish Law 60/2003 on Arbitration.

The Swiss Influence

Finally, regarding the negative implications of the principle of *kompetenz-kompetenz*, it is the Swiss concept that was retained by the Luxembourg legislator, rather than the French one. The new article 1227-3 of the NCPC does not prevent the Luxembourg national judge from entering a decision on the issue of jurisdiction even if the arbitral tribunal is already in place, just like article 7 of the Swiss Federal Act on Private International Law. On the other hand, article 1448 of the French Code de Procédure Civile prevents a judge from entering any decision on jurisdiction, even just to decline its own jurisdiction, as soon as the arbitral tribunal is in place.

As one can read from the Parliamentary Debate, this was specifically debated by the Luxembourg legislator. The legislator wanted to offer certain protections to “the weaker party” (“*partie faible”*) that is the less economically empowered party in a contract. Therefore, the legislator provided the option to such parties to bring the matter to a judge and let the judge decide if the arbitration clause is valid or not, even if the arbitral tribunal is already constituted, in order to avoid situations which may give rise to a rush to arbitration by the most economically empowered party.

A Staggered Entry into Force and an Opt-In Mechanism for Selected Provisions

The new law will progressively substitute the “old” arbitration law. Indeed, from April 24, 2023, the new law became immediately applicable for already constituted arbitral tribunals with regards to the provisions concerning the arbitral tribunal (the new articles 1228-1228-9 of the NCPC) as well as for awards rendered, either in Luxembourg or abroad, after April 24, 2023 (articles 1233-1249 of the NCPC). In addition, for arbitration clauses which were entered into before April 24, 2023, the law grants the parties an opt-in possibility for some of the new provisions, that is the new articles 1227-1227-4 of the NCPC regarding the arbitration clause itself.

Conclusion: The Reform is Greatly Appreciated and Brings High Expectations for Luxembourg as a Rising Leading Arbitration Jurisdiction

The reform is applauded by the practitioners and expected to be very successful, as Luxembourg has several advantages that make it a fertile ground for international arbitration. As emphasized by the authors of the reform themselves “*the multiculturality and plurilingualism increase the faculties of the Luxembourg actors to absorb from a social point of view the content of complex*

international matters. This facility at the sociological level is complemented by the work of Luxembourg lawyers, who are accustomed to dealing with foreign laws and adopting a comparative method in the application of the law". Not to mention Luxembourg's geographical location, in the heart of Europe, as well as the political continuity and stability of Luxembourg's regulatory environment, which may favour the Grand Duchy as a choice for arbitral seats. Added to this is the current clogging of national jurisdictions, which prompts increasing recourse to alternative dispute resolution methods.

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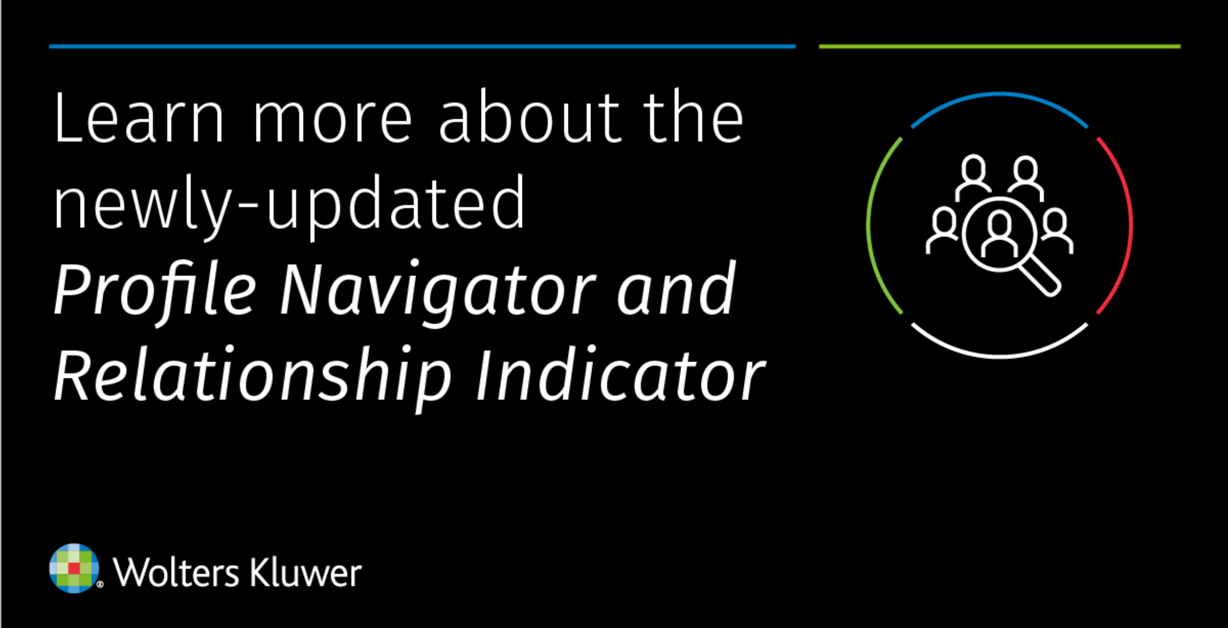

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