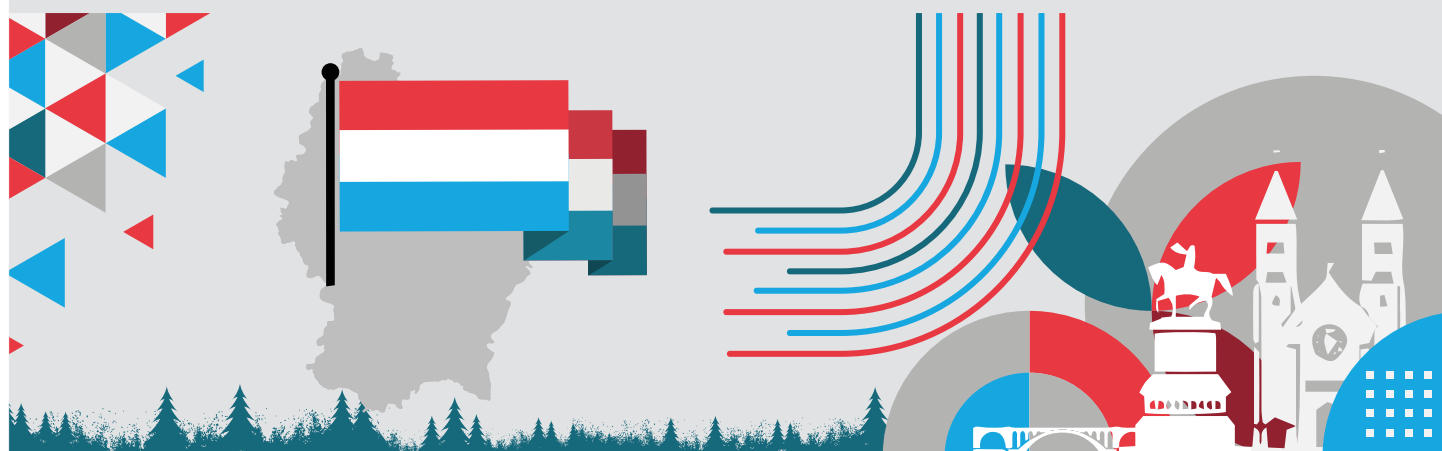


# ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS IN LUXEMBOURG



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The Grand Duchy of Luxembourg has a favourable setting for arbitration generally, as well as for the enforcement of arbitral awards.

The existence of the award, and the fact that it has obtained the exequatur are sufficient elements for obtaining interim remedies, while the latter is not necessary in the first phase. However, the effects of the award should not be stayed in the home jurisdiction for any reason. In a recent case, a title which had lost its efficiency was set aside by the court, who declared it did not meet the test to serve for an attachment.

The attachment procedure is therefore very simple: a copy of a valid award is provided to the bailiff with a list of identified third parties who are potentially debtors of the award debtor (we refer to such entity as the attached third party). It is not necessary to have any proof of this capacity or the effective existence of assets. For example, an attachment can be served by a bailiff within the hands of each and every bank licensed in Luxembourg, without it being necessary to identify a bank account number.

Once the bailiff has served the attached third party, and if this third party indeed is a debtor of the award debtor, it must freeze all assets owed to the award debtor, whatever those assets are, without limiting the freeze to the amount of the award.

This applies even where a State is an award debtor. Indeed, in contrast to the French and Belgian legislations, under Luxembourg law the applicant does not initially have to prove the nature of the State funds attached. Therefore, at the stage of the conservatory measure, all funds shall be attached provisionally. No prior authorisation from any authority is therefore required to initially attach such assets, while in the validation case the argument can be raised.



*In a recent case, an award creditor of a State went even further attaching the assets of a Luxembourg company that it claimed was an emanation of the State. The award creditor limited itself to alleging this capacity of emanation but did not even try to prove it. We are of the opinion that such a stand is extreme and questionable as it was presented, but it properly reflects how Luxembourg is currently favourable to enforcing arbitral awards.*

Once a conservatory measure (attachment) is served, the award debtor may challenge it in front of the judge sitting in summary proceedings either to have the attachment lifted or at least limited to the amount granted by the award.

First of all, it should be emphasised that, except where an exceptional urgency is recognised by the court (the threshold to that extent is pretty high), such proceedings may take from several weeks to several months.

Secondly, the issue with summary proceedings is that the judge lacks jurisdiction if the matter is not clearly and indisputably a breach of the law. Should the case raised by the attached debtor not be crystal clear, only the judge sitting on the merits ruling on the validation of the attachment will be able to lift the attachment, or confirm it.

Having assets attached with third parties for a period of time clearly puts pressure on an award debtor. In a recent case where the depositary bank of bonds had been attached, the award debtor proceeded to pay the award creditor to avoid bad publicity, and being in default according to other indentures.

Once a conservatory measure is in place, to have it confirmed and validated, it is necessary to obtain the recognition of the award in Luxembourg. Therefore it is common practice to stay the attachment proceedings until the court has dealt with the issue of the recognition of the award. This also has an impact on the award debtor as if the summary judge declared itself incompetent, it can sometimes be years until a decision is handed down on the merits in regards to the validation or lifting of the attachment.

According to the New Code of Civil Procedure (the 'NCCP'), Luxembourg state courts can recognise two different types of international awards:

(1) The President of the district court can grant the exequatur to an international arbitral award rendered in Luxembourg, so that the parties may seek its enforcement or its annulment in Luxembourg (Articles 1233 to 1244 NCCP). In this case, an arbitral award may only be enforced in the Grand Duchy of Luxembourg by virtue of an exequatur order issued by the President of the district court of the jurisdiction in which the award was rendered. However, and in addition to that, the NCCP states

that dismissal of the action to set aside also confers exequatur on the arbitration award rendered in Luxembourg, or those of its provisions that are not affected by the Court of Appeal's ruling. The exequatur may not be granted if the award is manifestly affected by one of the grounds for annulment provided for in Article 1238 NCCP.

(2) The President can grant the exequatur to an international arbitral award rendered abroad, so that the parties may seek its enforcement in Luxembourg (Articles 1245 to 1249 NCCP). A foreign arbitral award – which is defined as an award rendered outside Luxembourg – may only be enforced in the Grand Duchy of Luxembourg by virtue of an enforcement order issued by the President of the district court of the jurisdiction in which the person against whom enforcement is sought is domiciled or resident, or, alternatively, of the jurisdiction of the place where the award is to be enforced. The enforcement of a foreign award is an ex parte procedure and will only be adversarial if the defendant appeals the decision of the President of the district court. The exequatur cannot be granted if the award is clearly affected by one of the grounds for annulment.

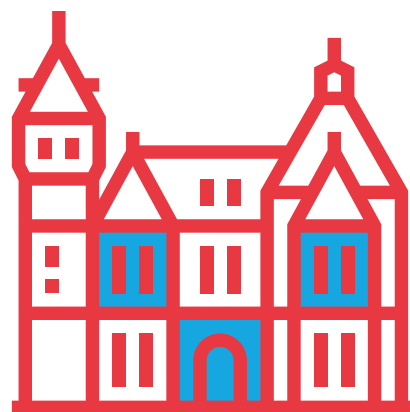


***The clear-cut position adopted by the Luxembourg courts when it comes to annulled awards should be emphasised, compared to certain jurisdictions. Indeed, in 2017, the Court of Appeal ruled that “the court does not confer effect in Luxembourg on an award that has no effect in its country of origin”<sup>1</sup>.***

The Court of Appeal based its solution on the primacy of the New York Convention, derived from the reference made by the former Article 1251 NCCP<sup>2</sup>, which sets out the grounds for refusal of exequatur under Luxembourg law, but reserves the application of international conventions. Thus, according to the foregoing reasoning adopted by the Luxembourg Court of Appeal, an award that has been set aside at its seat will not be enforceable in Luxembourg, and no validation of a conservatory measure could be granted.

Once the recognition of the award has been obtained, the award creditor can move to have the attachment validated. It is only once this validation is granted by the court that the award creditor will have knowledge of the amount attached in Luxembourg through a summons to order the third party to declare what was held at the date of service of the attachment.

If the State is an award debtor, the validation of the attachment may lead to discussions on the nature of the funds, and the property subject to the enforcement measures. Indeed, the scope of immunity from execution covers only public funds or public property. Some assets are thus protected by immunity from execution. These are assets used for the performance of a public service or the exercise of public authority. However, States can also be holders of commercial assets, not intended for public usage, and therefore not subject to the immunity from execution. Attachment on such assets can therefore be validated.



1 Cour d'Appel, 27 April 2017, n°59/17.

2 The same concept is now expressed in Article 1246 NCCP.