Trends and Developments

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A Surge of Interest in Luxembourg Arbitration

In recent years, Luxembourg is clearly experiencing a resurgence of interest in arbitration. This is however not unexpected as Luxembourg enjoys certain factors which naturally contribute to the development of arbitration.

Thus, in regard of the many advantages that Luxembourg possesses to promote the use of arbitration, such as multilingual culture, political stability, location, and the availability of lawyers from numerous cultural and legal backgrounds, with deep knowledge of different legal systems, it is not surprising that Luxembourg has become one of the main arbitration centres worldwide.

In addition to the presence of more than 2,800 lawyers, the country counts on its territory various legal institutions such as, among others, the Court of Justice of the EU, the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law and, more recently, the European Public Prosecutor's Office. All these institutions are a magnet for legal expertise from all over the world.

Arbitration framework

Despite this arbitration friendly environment, Luxembourg was in need of a modern and efficient legislative framework on arbitration, adapted to the new requirements of international trade and finance. Consequently, the Luxembourg arbitration community was strongly involved over the past years on lobbying activities to achieve the enactment of such new piece of legislation.

In that regard, the Luxembourg Arbitration Association, which was founded in 1996 and is dedicated to the promotion and development of arbitration practice in Luxembourg, recently restarted to actively organise a series of events to share expertise and information on arbitration-related matters. The Association also provides a comprehensive database of Luxembourg and international qualified arbitrators and practitioners, and launched in 2019 the very first edition of the Luxembourg Arbitration Day.

Reforming arbitration provisions

The most notable development over the past year constitutes nevertheless the long-awaited draft bill reforming the arbitration provisions in the Luxembourg Code of Civil Procedure that was submitted to Parliament on the 15 September 2020 by the Minister of Justice.

Such bill, based on the work of a Think Tank of legal experts for the development of arbitration in Luxembourg, retained the best amongst the international arbitration rules and Belgian and French law on this subject. Furthermore, the bill intends to redefine the legal bases of the arbitration regime by relying on the provisions of the UNCITRAL model law on international commercial arbitration.

Consequently, the entire arbitration regime under national law is restated, from the execution of the arbitration agreement, to the enforcement of the final award, and it is clear that the draft bill will provide the country with a body of coherent, modern rules recognised by the international business community and international arbitration practitioners, with the objective to create a streamlined arbitration regime in Luxembourg, offering the advantages of flexibility, speediness

and confidentiality, and representing a valid and effective alternative to the local courts.

All the above clearly demonstrates that arbitration is experiencing a real upswing in Luxembourg, which is further reflected by the emergence of several significant court decisions over the past years. Therefore, this article aims at presenting the development of arbitration law and practice in Luxembourg by reviewing selected court decisions, and by giving a brief presentation of the above-mentioned draft law.

Recent Court Cases

Micula v Romania, Judgment of the Luxembourg Court of Appeal of 11 February 2021, No 15/21

On 11 February 2021, the Luxembourg Court of Appeal handed down a landmark case consisting in the first decision in Luxembourg on the recognition and enforcement of arbitral awards issued by the International Centre for Settlement of Investment Disputes (ICSID). Furthermore, the Court reaffirmed the autonomous recognition regime and confirmed the recognition and the enforcement of arbitral award issued by an ICSID arbitration panel pursuant to the "Washington Convention" strictly limiting the degree of judicial review and the possibility to refuse recognition.

The facts

Thus, as to the facts of the case, it should be noted that in the 1990s, the Romanian state granted various financial advantages to foreign investors in order to attract outside capital and from which the Swedish investors Micula benefited. In 2005, in order to join the European Union, Romania had to question these incentives, which were considered state aids contrary to European competition law. As soon as it applied for accession, Romania was however caught in a normative vice: maintaining the advantages was contrary to European Union law, but revoking them violated the standards of protection of international investment law, in particular the Bilateral Investment Treaty (BIT) between Sweden and Romania. Based on the latter, the investors referred however the matter to an arbitration tribunal under the aegis of the ICSID.

The dispute went from being a substantive one to a jurisdictional one. Despite Romania's defences and even the European Commission's observations as amicus curiae, the arbitral tribunal declared nevertheless itself competent.

In an award of 11 December 2013, the arbitral tribunal ordered Romania to compensate the Micula brothers in the amount of EUR 178 million for breach of the fair and equitable treatment clause of the Sweden-Romania arbitration tribunal and the investors consequently sought to garnish various accounts held by Romania in the Grand Duchy of Luxembourg.

As the recognition of a foreign award does not automatically allow for its enforcement, exequatur proceedings were however necessary to enforce the claim under the said award.

The decision

In the decision at hand, the Court of appeal dealt with the recognition petition of the said arbitral decision. Thus, for the first time in Luxembourg, the Court of appeal had to deal with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Washington Convention" or "ICSID Convention") ratified by the Luxembourg parliament on 8 April 1970, and which lays down specific rules in relation to the recognition of ICSID awards. While the Luxembourg courts have clarified on numerous occasions the modalities surrounding the 1958 New York Convention, case law relating to the 1965 Washington Convention remains non-existent.

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In fact, the recognition and execution of foreign arbitral awards are usually mainly governed by the New York Convention of 1958 (the "New York Convention"), whose scope and applicability has already been clarified in a series of Luxembourg law precedents. As the New York Convention provides that, under certain conditions, a state court may refuse to recognise and enforce an arbitral award, the Luxembourg courts had also made it clear that where a convention on the recognition and enforcement of arbitral awards has been ratified by Luxembourg, the domestic provisions of Article 1251 of the Luxembourg Code of Civil Procedure (which provides specific grounds for refusing to recognise and enforce an award) do not apply. However, no such decision had been issued so far with regard to the Washington Convention.

The Romanian State, in order to obtain the refusal of the exequatur of the arbitral award, argued that the arbitral award in question should not be granted recognition, on the grounds of Article 1251 of the Luxembourg Code of Civil Procedure.

Reminding the governing principle it held in relation to the New York Convention, ie, that the internal provisions provided by Article 1251 of the Luxembourg Code of Civil Procedure do not apply in case an international convention applies, the Court of appeal rejected however the application of any internal provisions which could warrant a refusal of an exequatur request of an ICSID award.

While the conclusion may seem self-evident, in regard of the prior decisions rendered based on the New York Convention, a clarification was however needed to get the legal certainty that the competence-competence principle also applies to the Washington Convention. The Washington Convention foresees an autonomous recognition mechanism, and states that ICSID awards are automatically recognised in any ratifying State, as if they were a final judgment of the national courts, and does not provide for grounds of refusal by national courts.

The Court of Appeal's decision enforced such mechanism, and therefore refused national requirements to be applied to the recognition of ICSID awards.

It appears therefore that national courts have very little discretion, if any, to oppose the recognition of such an arbitral award. Indeed, the Luxembourg judge may only proceed to the verification of the existence of the award, as provided for under Article 54-1 of the Washington Convention.

The impact of this decision in the Grand Duchy of Luxembourg is notable, as it sets clear boundaries to national law and the power of national courts in cases where the Washington Convention applies. Indeed, based on this landmark decision, the Washington Convention, as a strict and autonomous instrument, does not give any ground to challenging the recognition of an ICSID award, leaving the debate fully opened when it comes to the enforcement of such recognised award in Luxembourg.

Judgment of the District Court of and in Luxembourg of 8 January 2021, No 2021TALCH11/00001

On 8 January 2021, the Luxembourg District Court handed down another landmark case affirming for the first time that in regard of the application of the principle under which criminal proceedings stay the civil procedures, (*le criminel tient le civil en état*) the enforcement proceedings of an arbitral decision should be stayed whenever criminal proceedings were initiated at the same time, and in close connection with the enforcement of the latter arbitral decision.

The facts

As to the facts of the case, it should be noted that two entrepreneurs of Moldovan and Romanian nationality had acquired 100% of the shares of two Kazakh companies. As, prior to their acquisition both investors had however obtained permission from the Republic Kazakhstan to explore and develop various oil and gas fields in Kazakhstan under subsoil use contracts, they decided to build a liquefied petroleum gas plant in Kazakhstan.

At the end of 2008, the Kazakh authorities identified however a number of serious shortcomings in the activities of the Kazakh companies. Indeed, after receiving information that one of the investors was using the companies for illegal activities in order to invest in countries subject to UN sanctions, the Kazakh authorities conducted an investigation into the activities of the companies. This investigation revealed a number of serious shortcomings, including tax evasion and breaches of obligations under the subsoil use contracts. Because of these breaches, the Ministry of Oil and Gas of the Republic of Kazakhstan terminated the subsoil use contracts awarded to the companies.

Alleging a violation of the Energy Charter Treaty, the investors however initiated an arbitration procedure, which resulted in an arbitral award, which ordered the Republic of Kazakhstan to pay damages to the investors.

The investors initiated various enforcement proceedings of this award around the world, and on 17 December 2017, they initiated attachment proceedings in Luxembourg.

Since the issuance of the award however, and as some doubts concerning the conditions under which the award was issued arose, criminal proceedings were initiated, on suspicions that the latter award was obtained by fraud.

Indeed, the investors seemed voluntarily to have misled the Arbitral Tribunal, and further the Luxembourg courts, in an attempt to obtain the exequatur of the Arbitral Award, by presenting documents they knew to be false and manipulated. The Republic of Kazakhstan therefore filed a criminal complaint in Luxembourg.

The decision

In the decision at hand, the District Court of Luxembourg, which had to rule on the validity of the attachment made by the investors, had therefore to deal primarily, on the issue of the stay on the basis of Article 3 of the Luxembourg Code of Criminal Procedure (*le criminel tient le civil en état*). Under such principle, civil proceedings have to be suspended in the event of ongoing concurrent criminal proceedings. The Court acknowledged the principle and consequently decided to suspend the proceedings awaiting the outcome of the investigations and, potentially, indictments.

Thus, it has been confirmed that the principle expressed by the adage *le criminel tient le civil en état* is of public order, in the sense that the judge seized of the civil action is obliged, even ex officio, to stay the proceedings from the moment the public action is instituted. The test lies on the identity of the facts submitted to the civil and criminal courts, and the decision rendered by one of the courts cannot fail to have an influence on the decision of the other.

The Court held that when a sufficient nexus between the criminal investigation and the civil case exist, the stay of the proceedings should be granted. The District Court ruled that even if the claimant has an enforceable judicial title, like in this case, this does not prevent the Court knowing of the enforcement of the same from applying the principle the *le criminel tient le civil en l'état*.

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Most notably, the Court mentioned that the enforcement of the award would amount to money laundering, in case the criminal court would afterwards hold the investors' behaviour as criminal.

The impact of this landmark case is notable whereas in a similar case dating from 2010, the same Court came to exact opposite conclusion, and refused to grant the stay, because of the existence of a criminal investigation. In the latter case, the Court held, in accordance with Belgian and French case law, that the aforementioned principle *le criminel tient le civil en état* is only applied if the decision to be taken on the public action is likely to influence the decision to be taken by the civil court.

The adoption of a new draft bill due to the need for a modern and efficient legislative framework on arbitration

The codification of the law of arbitration in civil and commercial matters dates back to the Napoleonic era, more specifically to the Code of Civil Procedure of 1806. Since then, Luxembourg arbitration law, although regularly practised in Luxembourg, has not been revamped, despite the globalisation of the economy and legislative reforms of arbitration in neighbouring countries.

Even though Luxembourg's arbitration legislation has been the subject of a very few specific reforms, however, these reforms have never led to a "complete overhaul", which the Council of State had already called for since 1980.

The draft law recently submitted by the Minister of Justice is the result of the work of a group of lawyers qualified in arbitration and judicial procedure who met between 2013–17 to carry out an in-depth study of the subject and to propose a draft bill of law. This bill is therefore the result of the combined theoretical and practical expertise of this group of professionals, who based the draft on the actual needs of the business world.

Three fundamental choices were made by the draft law, the combination of which has contributed to some major innovations. For instance the confirmation of the competence-competence doctrine, the creation of the Luxembourg supporting judge, the exclusion of certain matters from its scope of application, in particular matters deemed protective for a party considered weak (including consumer law, employment law, rent leases and personal status) or the replacement of the District Court by the Court of Appeal as appeal court for an award made in Luxembourg.

- The first choice is a choice of methodology. Faced with the risks of drafting an entirely new text, devoid of all references to an existing body of rules that could serve as a reference, the project is based on existing rules, namely French law, Belgian law and the UNCITRAL model law on international commercial arbitration. The effort consisted in collecting the most appropriate rules from each of these bodies of law, in order to compose the best possible draft according to two fundamental choices relating to content.
- The second choice concerns the substance of the matter, which was to create a liberal regime, ie, a regime that easily allows recourse to arbitration. Thus, the idea was simply to limit the scope of application of the rules in order to exclude a certain number of disputes that should not fall within the scope of classical arbitration. The aim is clearly to improve the regulation of arbitration in civil and commercial matters. The draft therefore does not affect international investment arbitration, which remains governed by public international law.
- The third choice was to reject the distinction made in French law between domestic and

international arbitration. This rejection was essentially based on two arguments. On the one hand, this distinction seemed inappropriate for Luxembourg, as there is no decisive argument to justify a differentiated treatment as long as certain matters are automatically excluded. On the other hand, arbitration in Luxembourg is mostly international, which makes a separate body of rules for domestic arbitration unnecessary. The draft bill therefore clearly follows the choice of the unitary model promoted by the UNCITRAL model law on international commercial arbitration, which is widely echoed throughout the world on this point.

The draft bill will now be commented on and discussed in parliament. There is confidence that this draft bill, once voted into law, will surely help streamline and enhance arbitration in Luxembourg, and prepare arbitration for the new challenges that are posed by the fast globalisation of business and finance.

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Bonn Steichen & Partners (BSP) is an independent full-service law firm based in Luxembourg, committed to providing the very best legal services to its domestic and international clients in all aspects of Luxembourg business law. Talented and multilingual, the firm's lawyers work side by side with clients to help them reach their objectives and support them with tailor-made legal advice, creating in the process professional relationships based on mutual trust and respect. BSP's lawyers have developed extensive expertise in banking and finance, capital markets, corporate law, dispute resolution, employment law, investment funds, intellectual property, private wealth, real estate and tax. Building on the synergy of different professional experiences and the diverse cultural background, BSP stands ready to meet its clients' legal needs, no matter how challenging they are.

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