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Arbitration Reform – Highlights of the Law of 19 April 2023

The law of 19 April 2023 amending the second part, book III, heading I of the New Code of civil procedure reforming arbitration enters into force this Tuesday, 25 April 2023 (hereafter the “**Law**”).

The Law, inspired by French and Belgian law as well as provisions of the UNCITRAL model law on international commercial arbitration, is the first global and substantial reform on arbitration since the entry into force of the Code of civil procedure dated 1806. It aims at modernising this alternative dispute resolution process in order to contribute to the development of Luxembourg as a key place of arbitration.

The main provisions of the Law are:

- > **Protection of weaker parties by excluding specific matters from arbitration** such as claims arising between professionals and consumers or between employers and employees.
- > **Principle of consent.** To be valid, both arbitration clauses (entered into before a dispute – “*clauses d’arbitrage*”) as well as arbitration agreement (entered into after the dispute has arisen – “*compromis d’arbitrage*”), are not subject to any form or publicity requirements.
- > **Competence-competence principle.** The Law codifies the principle known as “*competence-competence*”, pursuant to which the arbitral tribunal is competent to decide on its own jurisdiction. It does however not prevent states Courts to rule on a jurisdiction issue even if the claim has already been filed before the arbitral tribunal.
- > **Repartition of jurisdiction in relation to provisional, conservatory and/or investigatory measures.** States Courts still have jurisdiction to decide on provisional, conservatory and/or investigatory measures as long as the arbitral tribunal is not instituted or if it appears that the arbitral tribunal cannot grant the requested measures (due to factual or legal impediment such as for example if one of the parties involved in the provisional measure is not a party to the arbitration proceedings). Once appointed, the Law recognises the arbitral tribunal’s jurisdiction to decide on such measures.
- > **Creation of a swift** (maximum duration of the proceedings set in principle to six months), **clear** (set of rules based on UNCITRAL model law), **public policy-driven** (re-affirmation of the principle of impartiality and independence of the arbitrators or mandatory reasoning of the award) **but also flexible procedural framework** concerning the constitution of the arbitral tribunal, the conduct of the arbitration or the content of the arbitral award, with a clear re-affirmation of the **principle of confidentiality** of the deliberations.
- > **Creation of a state Court supporting judge (“*juge d’appui*”) who can assist the parties to ensure the continuance of the arbitration procedure.** The supporting judge – i.e. the President of the District Court sitting as in summary matters (“*Président du Tribunal d’arrondissement siégeant comme en matière de référé*”) – can intervene, at the request of a party, an arbitrator or the arbitral tribunal, in case of difficulties arising during the arbitration in relation for instance to the composition of the arbitral tribunal.
- > **Limited recourses against Luxembourg arbitral awards** which may only be subject to:
 - > **annulment proceedings** (“*recours en annulation*”) before the Court of appeal sitting in civil matters on the basis of six (6) specific and limited grounds (such as absence of jurisdiction of the arbitral tribunal, violation of public policy or infringement of the rights of the defence). These proceedings **do not suspend the enforceability of the award** except if the enforcement of the award would be highly detrimental to a party; or
 - > **application for review** (“*recours en révision*”) in order to have the award revoked based on four (4) specific and limited grounds (such as fraud or if the award has been rendered on the basis of false evidence).
- > **Enforcement of Luxembourg and foreign arbitral awards by a simplified exequatur procedure.** Luxembourg and foreign awards may be enforced further to an **ex parte application** filed before the President of the District Court. Exequatur of Luxembourg awards may only be refused on the basis of six (6) specific and limited grounds (identical to the ones to obtain the annulment of the award). Exequatur of foreign awards may also be refused on the basis of these six grounds but also on the basis of four (4) additional grounds such as fraud. The order granting or refusing the exequatur may be appealed before the Court

of appeal. Appeal proceedings are adversarial and **do not suspend the enforceability of the award** except if the enforcement of the award would be highly detrimental to a party. For Luxembourg awards, the exequatur order cannot be appealed separately from an appeal against the award. For foreign awards, an application for review may also be filed against the exequatur order in case a fraud committed by the executing party is discovered after the expiry of the time limit to file an appeal against the order.

> **Partial and temporary coexistence of the new regime with the previous one.** The law specifies that (i) the provisions in relation to the arbitration clauses apply to arbitration clauses concluded after 25 April 2023 except as otherwise provided by the parties, (ii) the provisions in relation to the arbitral tribunal apply to arbitral tribunals instituted after 25 April 2023 and (iii) the provisions in relation to the judicial recourses against an award as well as the enforcement of an award apply to awards rendered after 25 April 2023.

The Law, which does not make a distinction between domestic and international arbitration, creates a liberal regime which should ease access to arbitration in Luxembourg. It also re-establishes Luxembourg as an enforcement jurisdiction by simplifying the exequatur procedure.

The arbitration practitioners, lawyers, parties and arbitrators already welcomed this overhaul of arbitration process, which should help Luxembourg, already known for its expertise in financial, corporate and investment matters, to grow as an arbitration hub.

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CORPORATE AND FINANCE LITIGATION

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