

Litigation 2018

Luxembourg

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Overview

1 Court system

Describe the general organisation of the court system for civil litigation.

In Luxembourg, the civil disputes are adjudicated by the civil and criminal branch of the judiciary, which is divided into three instances: (i) the lower judiciary courts, (ii) the District Courts and (iii) the Superior Court of Justice composed of the Court of Appeal and the Supreme Court.

The courts are totally independent from other branches of power and this independence is ensured by the fact that judges enter the profession by an exam or contest. Furthermore, to be appointed to (higher) positions within the court system, judges are elected by their peers.

The decisions rendered by the courts are not binding on other courts. Nevertheless, they are referred to and constitute guidelines, especially for lower courts that will follow cases decided by the superior courts.

The Luxembourg courts do not use juries, only professional magistrates.

2 The legal profession

Describe the general organisation of the legal profession.

The very first requirement to be admitted to the Luxembourg Bar is to hold a master's degree from a law school. The candidate must also attend complementary courses in Luxembourg law (CCDL) and prove he or she has a good knowledge of the three national languages. The candidate is then allowed to practise law as an *avocat*.

After a two-year traineeship, and a successful test, the candidate will pass from the list II of the Bar to the list I and is then allowed to practise law as an *avocat à la cour*.

EU based lawyers may practice in our jurisdiction under their original title (list IV of the Bar). This possibility is open to every lawyer officially registered at the Bar of a member state of the European Union, in possession of a title in accordance with the Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a member state other than the one in which the qualification was obtained.

Also, a foreign lawyer may attend and intervene in a hearing solely if he or she is presented to the court by the President of the Bar.

There are generally no distinctions between the powers of the different types of lawyers, apart from the fact that only an *avocat à la cour* can represent parties in civil written proceedings in the district and higher courts.

3 General

Give a brief overview of the political and social background as it relates to civil litigation.

Luxembourg is a moderately litigious jurisdiction. Because of the nature of the activities carried on in Luxembourg, which are predominantly oriented towards finance and corporate transactions, many shareholder disputes arise. Likewise, many plaintiffs who have obtained money judgments or arbitral awards will try to enforce them in Luxembourg, as banks or financial institutions will most likely hold assets owned by the defendants.

The Luxembourg government does not intervene in the litigation. Currently, there is no reform of civil litigation envisaged.

Jurisdiction

4 Jurisdiction and venue

What are the criteria for determining the jurisdiction and venue of the competent court for a civil matter?

Concerning the territorial legal venue of the competent court in civil matters, the parties can agree on a territorially competent court. If no agreement has been made, the main and default criterion to determine the competent court is the defendant's domicile. In the case where the defendant is a company, the competent court is the court sitting in the judicial district of the company's head office.

However, the law provides some exceptions to this rule, based on the nature of the matter. For example, in real estate matters the competent court is that of the location of the building and in matters of succession, the competent court is that of the place where the deceased was domiciled at the time of death.

5 Forum shopping

Does your jurisdiction commonly attract disputes that have a nexus with other jurisdictions?

Luxembourg is an attractive jurisdiction as, for example, (i) it does not have a discovery process, (ii) proceedings are public but documents filed in front of the court are not publicly available and (iii) documents in English, German and French are accepted without translation and no court fees are due on filing.

These elements keep the cost of litigation at a minimum, especially if compared to Anglo-Saxon jurisdictions.

6 Pendency in another forum

How will a court treat a request to hear a dispute that is already pending before another forum?

If the dispute the Luxembourg court is requested to hear is identical to the one pending before another forum and both courts are competent, the defendant can request that the courts of Luxembourg keep the file on hold (if the other court was first requested to hear the dispute) to avoid the risk of contradictory judgments.

If the dispute the Luxembourg court is requested to hear is linked to a dispute pending before another forum, the courts of Luxembourg may, at their discretion, wait until the dispute is decided by the other court, depending on the circumstances.

7 Deference to arbitration

How will the courts treat a dispute that is, or could be, subject to an arbitration clause or an agreement to arbitrate, including in interim proceedings?

If court proceedings are initiated despite an existing arbitration agreement, the opposing party has to object and raise the defence in limine litis. Should the opposing party fail to object to the initiation of the court proceedings, the court would not raise the matter independently, and the opposing party would be deemed to have waived the right to raise such defence. If the opposing party objects in limine litis, the court will declare that it is not competent to hear the case.

The situation is slightly different in interim proceedings. The judge sitting in interim proceedings has, in older decisions, declared him or herself competent to order in futurum investigation measures, if an arbitral court has not yet been appointed and if the parties have not expressly decided that interim proceedings cannot be referred to.

In a more recent decision, the judge sitting in interim measures considered that an arbitration clause that provides that the parties will submit to arbitration any dispute in relation with the contract, includes the disputes for which the judge sitting in interim measures is competent. Therefore, all disputes were to be referred to arbitration, even the ones related to retainers, which are usually referred to in interim proceedings. We seem therefore to be on a case-by-case basis in regard to interim proceedings, where the drafting of the arbitration clause clearly seems the main criteria determining competence.

8 Judicial review of arbitral awards on jurisdiction

May courts in your country review arbitral awards on jurisdiction?

Courts will not review the merits of the award, except in specific and listed situations.

Arbitral awards may be challenged in the courts on the following grounds:

- A request to set aside an award is filed. It is necessary to obtain the enforcement order of the award from the president of the District Court first. Such order can be subject to an appeal before the District Court. The judgement of the District Court ruling on the setting aside of the award is subject to appeal before the Court of Appeal. The decision of the Court of Appeal is subject to appeal only on the application of the law before the Court of Cassation, who will not review the facts.
- The order of the president of the District Court refusing the enforcement of the award may also be subject to appeal. The president of the District Court cannot rule on the merits of the dispute. He can only verify whether or not the award is contrary to national public policy.

- Foreign awards have to be enforced by an order of the president of the District Court upon request of one of the parties. The grounds for refusing recognition and enforcement are those contained in the New York Convention, unless the award has been rendered in a state that is not a party to the New York Convention. In such case, article 1251 of the NCPC would be applicable.

9 Anti-suit injunctions

Are anti-suit injunctions available?

Anti-suit injunctions are not available in Luxembourg.

10 Sovereign immunity

Which entities are immune from being sued in your jurisdiction? In what circumstances? In what circumstances can creditors enforce a court judgment or arbitral award against a sovereign or a state entity?

The Grand Duke's legal situation is characterised by the inviolability of his person, meaning that the Grand Duke may not be accused, nor prosecuted. Moreover, he shall in no circumstances appear in court and no one can ask him or her to account for his or her acts. The inviolability implies a complete immunity of the Grand Duke in both criminal and political matters.

Apart from the Grand Duke's inviolability, the Constitution also guarantees immunity to a member of the Parliament. A member of the Parliament may not be prosecuted or pursued for his or her opinions, nor may an active member of the Parliament, who is guilty of a crime, an offence or a contravention, be arrested or prosecuted for the duration of the parliamentary session, except in cases of flagrante delicto or when the Chamber of Deputies authorised the member of the parliament's arrest or prosecution.

There are currently no legal restrictions on, or conditions to be satisfied prior to the enforcement of a judgment or an arbitral award, in Luxembourg, against a foreign state entity. Indeed, there is no legal basis that explicitly provide for immunity from execution. According to the very few publicly available decisions, immunity from execution solely applies to the assets allocated to the exercise of public authority or public services.

Our firm currently is involved in cases that concern the enforcement of decisions against foreign administrative authorities or foreign sovereign entities. We are not aware of any decision that would be publicly available with respect to sovereign immunity.

Procedure

11 Commencement and conduct of proceedings in general

How are proceedings commenced? To what extent will a court actively lead the proceedings and to what extent will the court rely on the parties to further the proceedings?

Luxembourg is a civil law system. Proceedings are initiated by a summons to appear in court (assignation) and instituting the proceedings, which is notified by a bailiff to the defendants. The summons clarifies the basis of the action and of the claim.

In civil written proceedings, the court will instruct the case, in other words, it will issue an agenda according to which parties are invited to file their brief within certain time frames, and will schedule hearings to discuss with the parties' counsels the status of the instruction.

This procedure is different in commercial litigation, as no exchange of briefs occurs, this being a purely oral procedure. Indeed, the case will then be set on a specific date on which the parties will expose orally their arguments.

12 Statement of claim

What are the requirements for filing a claim? What is the pleading standard?

To file a claim, one must have standing to sue as well as a personal interest to sue.

The pleading standard is determined by the New Code of Civil Procedure, which requires a clear identification of the plaintiff and of the defendant. The subject of the dispute and the summary of the pleas must also be set out in the writ. If the writ does not contain those indications, it can be declared inadmissible subject to the defendant proving it suffered damage by having his or her defence disorganised.

13 Statement of defence

What are the requirements for answering claims? What is the pleading standard?

Answers in civil procedures must be submitted in written form, by a lawyer admitted to the Bar.

Once the exchange of briefs has occurred, the magistrate will put an end to submissions and, during a hearing, will summarise orally the parties' positions, and ask the lawyers if anything should be added. Usually, pleadings are very short, if any.

In commercial proceedings, written submissions are not required by the code, but are usually prepared by the lawyers to facilitate the court's work.

14 Further briefs and submissions

What are the rules regarding further briefs and submissions?

The writ served by the plaintiff is similar to a judicial contract that cannot be modified during the proceedings by new demands or claims. The plaintiff would then need to serve a new writ. The plaintiff may nonetheless request the court to appoint an expert or hear a witness.

Furthermore, the plaintiff may file an additional demand.

In regard to the defendants, they are not bound by the judicial contract and can file counterclaims if there is a sufficient link with the writ.

Amicus curiae briefs are not foreseen by the New Code of Civil Procedure. Nevertheless, any party claiming a personal interest to intervene can submit a petition motivating its desire to have its say. The court will decide on the admissibility of such intervention in the decision it will render.

15 Publicity

To what degree are civil proceedings made public?

Civil courts filings are not publicly available. Judgments are publicly available, but they are anonymised; they are not available online.

Civil hearings are open to the public, but no TV cameras or photographers during the court hearing are allowed, without specific court permission. No audio recording is allowed.

Pretrial settlement and ADR

16 Advice and settlement proposals

Will a court render (interim) assessments about any factual or legal issues in dispute? What role and approach do courts typically take regarding settlement? Are there mandatory settlement conferences between the parties at the outset of or during the litigation?

The court can render interim assessments on specific procedural issues, or require bonds.

Also, on the merits, courts can rule initially that one party committed a breach of contract, and appoint an expert to assess the damage suffered by the other party.

If a court is informed that discussions are ongoing between the parties to reach to a settlement, it will agree to stay the proceedings in order for the parties to discuss freely. However, the courts do not have an active role in such discussions. Courts cannot convey the parties to settlement conferences.

17 Mediation

Is referral to mediation or another form of ADR an option, or even mandatory, before or during the litigation?

The referral to mediation is an option. It is however compulsory, before the litigation, if the parties have contractually agreed to try to settle the issue through a mediation or another form of ADR prior to initiating the proceedings. Indeed, if the defendant raises in limine litis the existence of such a provision that has been disregarded by the plaintiff, the court should declare itself incompetent to take notice of the litigation.

Interim relief

18 Forms of interim relief

What are the forms of emergency or interim relief?

The New Code of Civil Procedure provides a specific framework for emergency proceedings to be admissible:

- in case of emergency and if there is no serious challenge;
- to prevent an imminent damage; and
- to stop a manifestly unlawful act.

Indeed, the judge sitting in interim proceedings is the judge of the evidence and will not consider the merits of the case.

The judge will issue an order which is immediately enforceable, notwithstanding an appeal.

19 Obtaining relief

What must a petitioner show to obtain interim relief?

See also question 18. The plaintiff must prove that there is an urgency to take a decision and/or that an irreparable damage is imminent, or an unlawful act should be stopped.

Decisions

20 Types of decisions

What types of decisions (other than interim relief) may a court render in civil matters?

In civil matters, the court can render the following decisions:

- a provisional court order: decisions on procedural steps; are not either definitive decisions nor substantive decisions;
- an interlocutory decision: substantive decisions ruled during the proceeding but which don't close the trial. For example, the court decides that there has been a breach of contract and appoints an expert to determine the quantum of the damages.
- Final decisions are decisions that close the proceeding.

21 Timing of decisions

At what stage of the proceedings may a court render a decision? Are motions to dismiss and summary judgment available?

In written civil proceedings, the court will render its decision once the instruction phase is terminated (that is, when the parties consider that all matters have been discussed in their briefs), and a hearing has taken place during which the parties have presented the arguments laid down in their briefs.

In oral proceedings, the court will render its decision after a hearing has taken place during which the parties have presented the arguments laid down in their briefs.

Courts can, upon petition, render a decision deciding only on admissibility. It can be compared to a summary judgment motion.

22 Default judgment

Under which circumstances will a default judgment be rendered?

In oral proceedings (proceedings without mandatory assistance by a lawyer), a default judgment can be rendered if the defendant has been duly served the writ at his or her domicile (but did not personally receive it) and has not appeared in front of the court.

In written proceedings (proceedings with mandatory assistance by a lawyer), a default judgment can be rendered if the defendant has been duly served the writ at his or her domicile (but did not personally receive it) and has not appointed a lawyer to represent him or her in the proceedings.

23 Duration of proceedings

How long does it typically take a court of first instance to render a decision?

Usually it takes a civil court of first instance around 12 to 18 months to render a decision.

Commercial cases are usually shorter, as no exchange of briefs occurs. An average time frame would be between four and 12 months.

Parties

24 Third parties – joinder, third-party notice, intervenors

How can third parties become involved in proceedings?

A third party can become involved in the proceedings voluntarily (standing must be proven) or can be forced to join (if it is in the interest of one party to see this third party join the proceedings, for example, an insurance company that insured the contested claim).

It should be noted that only a party to the proceeding is bound by the decision rendered. If a third party is affected by the decision, it can intervene by a tierce opposition to dispute a decision rendered without it being a party to the proceedings. The court of first instance will then hear this issue again.

Evidence

25 Taking and adducing evidence

Will a court take or initiate the taking of evidence or will it rely on the parties to request the taking of evidence and to present it?

In principle, each party bears the burden of proving the facts it alleges. Disclosure proceedings do not exist in Luxembourg. However, a judge can exceptionally order the disclosure of specific pieces of evidence, at the request of an interested party or at its own initiative, if he or she deems it necessary and only if a commencement of proof has been established by the party requesting such measure.

26 Disclosure

Is an opponent obliged to produce evidence that is harmful to it in the proceedings? Is there a document disclosure procedure in place? What are the consequences if evidence is not produced by a party?

There are no discovery proceedings, as such in Luxembourg.

There is no general obligation to provide evidence harmful to the litigant.

Nonetheless, a party may request the judge to order a party or a third party to disclose a specific and determined document. The judge may, at his or her discretion, accept or refuse such request based upon the circumstances.

27 Witnesses of fact

Please describe the key characteristics of witness evidence in your jurisdiction. Is witness preparation allowed?

Parties to a dispute can freely file witness statements. Such statements may not be prepared with the help of the parties' lawyers.

The parties can also request the judge to call a witness. The questions to be asked to the witness should be already detailed by the requesting party.

If the judge accepts such request, he or she will be the person asking the questions to the witness. The lawyers may not directly question the witness and should always go through the judge. This is the reason why witness preparation is strictly forbidden.

28 Expert witnesses

Who appoints expert witnesses? What is the role of experts?

An expert witness is appointed by the judge when the dispute requires specific technical expertise. The name of the expert can be suggested by the parties. For instance, expert witness can be required to provide his or her opinion on medical issues.

29 Party witnesses

Can parties to proceedings (or a party's directors and officers in the case of a legal person) act as witnesses? Can the court draw negative inferences from a party's failure to testify or act as a witness?

Everybody can be a witness with the exception of:

- people under legal disability such as a minor or adult with mental incapacity or people under criminal conviction;
- the parents and the persons related directly with the parties, and the descendants of the spouse in divorce proceedings;
- the parties to the trial. The sole manager of a company or the chief executive officer are considered as being the company itself and can therefore not be heard as witnesses; and
- persons who can put forward a good reason such as professional secrecy or protection of private life.

The judge can draw all the consequences from the statement of a party or from the failure of a party to testify or act as a witness. But the judge cannot consider this failure as direct or definitive evidence.

30 Foreign law and documentation

How is foreign law or foreign-language documentation introduced into the proceedings and considered by the courts?

Documents filed in front of the court should be in one of the official languages of Luxembourg (French, German or Luxembourgish).

However, the courts usually accept documents in English.

Foreign law is considered as a fact, which must be proved by the party asserting it. Generally, affidavits by experts are used to this end.

31 Standard of proof

What standard of proof applies in civil litigation? Are there different standards for different issues?

In commercial matters, the proof can be brought by any means.

In civil matters, and if the dispute exceeds €2,500, a written proof is necessary.

Appeals

32 Options for appeal

What are the possibilities to appeal a judicial decision?
How many levels of appeal are there?

Only interlocutory and final decisions (see question 20) can be appealed.

There are generally two levels of appeal in Luxembourg (Court of Appeal and Court of Cassation).

Each level will take several months, depending on the workload of the courts.

33 Standard of review

What aspects of a lower court's decisions will an appeals court review and by what standards?

The Court of Appeal hears appeals related to the decisions rendered by the District Courts or by the lower judiciary courts, which have ruled upon a matter within their exclusive jurisdiction.

The appeal will involve the review of the whole case, both the facts and the application of the law. The Court of Appeal considers the facts of the case that is submitted to it, and may either confirm the decision of the first instance, or may annul totally or partially the resolution of the first instance.

The Supreme Court only deals with matters where there was a violation of the rule of law by the judges, without judging the facts of the case.

34 Duration of appellate proceedings

How long does it usually take to obtain an appellate decision?

Each level of appeal (Court of Appeal and Court of Cassation) will take several months, depending on the workload of the courts and the complexity of the case.

Special proceedings

35 Class actions

Are class actions available?

Class actions are not currently available in Luxembourg even though there are discussions to introduce a class action for consumers.

36 Derivative actions

Are derivative actions available?

Shareholders cannot initiate a derivative action in the name of the company in which they hold shares, as they are not considered as creditors of the company. A different answer could be envisaged in case they have granted a loan to the company.

Derivative actions are actions in which a creditor acts in the name of his debtor against the debtor of his debtor to obtain payment. The payment is made to the debtor who will then proceed to the payment of his creditors according to their ranking.

37 Fast-track proceedings

Are fast-track proceedings available?

If a debt is proven, one can obtain an order to pay by filing an ex parte request in front of the President of the District Court. However, if this order is contested, the dispute will be submitted to the judge sitting in summary proceedings. Since this proceeding usually takes several months, this proceeding is not often used.

38 Foreign-language proceedings

Is it possible to conduct proceedings in a foreign language?

No, it is not possible to conduct proceedings in a language different from the judicial language.

Effects of judgement and enforcement

39 Effects of a judgment

What legal effects does a judgment have?

The whole content of the judgments rendered binds the parties. However, in case of an appeal they are enforceable only if the judgment specifically mentions that it is immediately enforceable (exécution provisoire). Also, conservatory measures may be taken on the basis of a judgment, for example, freezing measures or attachments.

Third parties are not bound by the judgment.

40 Enforcement procedure

What are the procedures and options for enforcing a domestic judgment?

To enforce a domestic judgment, one must serve the judgment to the losing party through a bailiff. If the judgment specifies it is immediately enforceable, the successful party can use all legal means to enforce it and specifically can proceed through a bailiff.

If the judgment is not immediately enforceable, the successful party must wait until the time period to file an appeal has expired (usually 40 days), but can in the meantime proceed with conservatory measures such as freezing the assets of the opponent.

41 Enforcement of foreign judgments

Under what circumstances will a foreign judgment be enforced in your jurisdiction?

In case of a European judgment, Brussels I Recast will apply and the decision will be immediately enforceable.

For other countries, and assuming that no convention has been signed, the decision will be submitted to the court to obtain an exequatur. Such proceedings will request the filing of briefs and usually take several months.

Costs

42 Costs

Will the successful party's costs be borne by the opponent?

Costs, not including lawyers' fees, are usually borne by the losing party. There are no court fees per se to be paid when a case is started. Costs are limited to bailiff fees and translation costs, if applicable.

Two exceptions exist:

- The court can order the losing party to pay a lump sum to the other party for the costs incurred. This amount is usually low and does normally not exceed a few thousand euros.
- The Supreme Court recently decided that if a proceeding is manifestly spurious and vexatious, the plaintiff may be ordered to pay the other party's lawyer's fees.

43 Legal aid

May a party apply for legal aid to finance court proceedings? What other options are available for parties who may not be able to afford litigation?

In Luxembourg, legal aid is available to finance court proceedings and specifically lawyers' fees. A party who may not be able to afford litigation could turn to third-party funding.

44 Contingency fees

Are contingency fee arrangements permissible? Are they commonly used?

Lawyers' fees may not be solely based on the outcome of the litigation. Therefore contingency fees are possible, however, only if the lawyer and his client agree on partial fixed fees and a success fee.

45 Third-party funding

Is third-party funding allowed in your jurisdiction?

Third-party funding is virtually unknown in Luxembourg. Nevertheless, there are no legal or regulatory obstacles to a third party financing a litigation.

46 Fee scales

Are there fee scales lawyers must follow? Are there upper or lower limits for fees charged by lawyers in your jurisdiction?

There are no fee scales. The lawyer will determine its fees based on the time spent, the decision issued, the value of the dispute, the result obtained and the reputation of the lawyer. If the fees are disputed, the client can file a request with the Bar for the Bar to determine if these fees seem to be appropriate in view of the dispute.



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Fabio Trevisan is a partner and head of BSP'S dispute resolution practice. His practice focuses on a wide spectrum of complex commercial, corporate and financial litigation and arbitration. He has played a role in a number of high-profile cases, with over two decades of experience in managing and conducting litigation for his clients in almost all sectors.

Fabio has experience in all forms of dispute resolution including litigation, mediation and arbitration as well as general banking, corporate and commercial dispute resolution. He has extensive experience of applications for enforcing and obtaining freezing injunctions in international arbitration, enforcements of ICSID awards, and more generally in the recovery of assets.

Fabio has further developed a reputation in connection with his work related to real estate matters. He represents institutional lenders, developers, general contractors and other business entities in a variety of commercial transactions and real estate law issues, including financing, corporate structuring, real estate development.

In addition, he has extensive experience in commercial contracts, drafting and negotiating a number of complex commercial agreements for clients across a wide variety of industry sectors.

Thanks to his native origins and having an extensive experience in representing Italian clients, Fabio is also the founder and head of BSP's Italian desk.



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Laure-Hélène Gaicio-Fievez holds a master's 2 in Law and Business Taxation from the University of Aix-en-Provence, France. After a first experience as in-house counsel for a small business in France, she joined the firm in 2010 where she has been promoted as a counsel. Laure-Hélène focuses on arbitration, general commercial law and litigation. She advises on a wide range of domestic and international arbitration proceedings and she has already published various articles mostly in that field.

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