The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Luxembourg: Litigation (2nd Edition)

This country-specific Q&A provides an overview of Litigation that may occur in Luxembourg.

This Q&A is part of the global guide to Litigation. For a full list of jurisdictional Q&As visit http://www.inhouselawyer.co.uk/practice-areas/litigation-second-edition/

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1. **What are the main methods of resolving commercial disputes in your jurisdiction?**

   Litigation in front of state courts is the most common dispute resolution mechanism, although alternative dispute resolution methods are increasingly being used in Luxembourg.

   The different methods of alternative dispute resolution are as follows:

- arbitration;
- conciliation (Articles 70 to 72 of the New Code of Civil Procedure (NCCP));
- mediation; and
- the ombudsman.

Regarding mediation, there exists a specific institution (the Centre de Médiation Civile et Commerciale (CMCC)), which offers a voluntary process for the amicable resolution of civil, commercial or social disputes.

2. What are the main procedural rules governing commercial litigation?

The Luxembourg legal system is governed by the constitution of the Grand Duchy of Luxembourg, promulgated in October 17th, 1868. It is a parliamentary democracy. The executive power, the legislative power and the judicial power are therefore separated from each other.

The Luxembourg system of law is based on civil law, and it rests on two main principles: the adversarial principle, and the principle of 'party disposition' (principe du dispositif).

The principle of party disposition means that parties are free to determine the contours of the proceedings with their respective claims and defences, and have the burden of having to allege and demonstrate the facts that support their claims. They are free to present their defence. However, this principle has to be qualified by the fact that the judge also plays a role in proceedings. Indeed, the courts give the necessary impetus to the proceedings as regards to their conduct and the collection of evidence, if needed, and they rule on the dispute submitted to them by applying the relevant rules of law.

The adversarial principle is the very essence of judicial procedure since it constitutes a condition to a fair trial and entails the respect for the rights of the defence. Without this principle, implying that each party is informed at any time of the procedural steps

taken by the other involved actors, whether it is its opponents, judges or other stakeholders in the procedure, proceedings cannot enjoy credibility and acceptance of the parties, which are necessary to ensure the legitimacy of the procedure itself and of the decision adopted at the end of it.

Regarding civil matters, written submissions are required. However, before the Lower courts and the District court sitting in commercial matters, oral argument may be used.

3. What is the structure and organisation of local courts dealing with commercial claims? What is the final court of appeal?

Judicial courts sit on civil, commercial and criminal matters and are organised on the basis of a three-tier structure:

- The 'Justice de paix' (hereafter the lower courts) and the 'Tribunal d'arrondissement' (hereinafter the district court): lower courts have jurisdiction in civil and commercial matters that do not exceed EUR 10.000. Appeals against the decisions of the lower courts are filed with the district courts. The district courts have jurisdiction to rule on disputes above EUR 10.000 in civil and commercial matters;
- The Court of appeal hears recourses against first-degree judgements rendered by the district courts;
- The Supreme Court ('Cour de Cassation') has jurisdiction to review decisions of the Court of appeal and certain other decisions that are not subject to any further appeal. Review by the Supreme Court is restricted to questions of law.

4. How long does it typically take from commencing proceedings to get to trial?

The duration of the trial depends on the type of procedure: the oral procedure (applicable in commercial matters, except if the written procedure has been opted for) is, in principle, significantly shorter than the written procedure. The written procedure may be spread over a period of one to two years.

5. **Are hearings held in public and are documents filed at court available to the public? Are there any exceptions?**

Court hearings are public, unless such publicity is dangerous to order or morality, in which case the court declares it by a judgment. In any case, all judgments must be rendered publicly.

However, In Luxembourg, court filings are not open to the public.

6. **What, if any, are the relevant limitation periods in your jurisdiction?**

In principle, the statute of limitations in civil matters is 30 years, and 10 years in commercial matters. There are specific matters for which shorter statutes of limitations are provided for by the Civil code (i.e.: 10 years for construction matters, 3 years for the payment of salary). The starting point of the statute of limitations is the day when the obligation becomes due (or when the harm occurred, in tort cases).

7. **What, if any, are the pre-action conduct requirements in your jurisdiction and what, if any, are the consequences of non-compliance?**

Parties to a lawsuit are not required to initiate a specific procedure before filing a lawsuit. Parties may, however, freely provide in an agreement that they will endeavor to settle any dispute through a mediation procedure/arbitration, or that any lawsuit will be subject to the prerequisite that notice must be given first.

Indeed, in contractual matters, a letter of notice has to be sent before initiating a lawsuit. This is not a condition for admissibility of the action to be introduced, but this

will prove the soundness of the action.

8. How are commercial proceedings commenced? Is service necessary and, if so, is this done by the court (or its agent) or by the parties?

Depending on the required procedure that has to be followed to initiate the lawsuit, the defendant will be notified either by a bailiff (writ of summons) or by the court's clerk (request).

9. How does the court determine whether it has jurisdiction over a claim?

Because of the adversarial tradition of judicial proceedings in Luxembourg, the exceptions of incompetence are to be raised by the defendant at the very beginning of the trial, in *limine litis*. Only some of the exceptions of incompetence may be raised ex officio by the court seized. Consequently, the NCCP distinguishes between two categories of exceptions of incompetence: the absolute (Article 261 NCCP) and the relative ones (Articles 259 and 260 NCCP).

On the one hand, the absolute exceptions of incompetence cover all rules of substantive jurisdiction. These rules aim to organise the structure and hierarchy of the courts, in order to ensure the coherence of the judicial organisation. These exceptions, because of their public policy nature, may be raised by the defendant and must be raised ex officio by the court incompetently seized. These rules cover the assumptions in which the applicant has made its case before a court of an order, of a nature or of a degree different from that determined by law.

On the other hand, the relative exceptions to jurisdiction sanction rules of jurisdiction that are considered less fundamental for the purpose of maintaining the judicial organisational coherence. Their infringement can consequently only be raised by the defendant.

10. How does the court determine what law will apply to the claims?

There exists no code of private international law in Luxembourg. Therefore, when the applicable law has not been agreed on by the parties, the Luxembourg judge, in the absence of a choice of law made by the parties prior to the conflict, will either apply the existing international conventions or the EU regulations, or, where these international instruments are not applicable, some specific provisions of particular laws, dealing with private international law issues (as for instance the Law of 5 April 1992 relative to the financial sector), or it will decide on the basis of the developed doctrine and case law, built on some provisions of the Civil code.

11. In what circumstances, if any, can claims be disposed of without a full trial?

Under Luxembourg law, a case cannot be judicially solved without a full trial, although the trial might be limited to admissibility issues only.

However, once proceedings have been introduced, the parties can always settle the lawsuit.

The parties may require that the agreement they have reached remains confidential. A confidentiality clause should then be included in the agreement. In the absence of a confidentiality clause, the parties may freely use the agreement in support of a legal claim.

In theory, it is not necessary to enforce the settlement agreement since an applicant will only request the discontinuance of the proceedings if the settlement agreement concluded between the parties has been fully executed. The judge may also order measures to ensure the proper enforcement of the settlement agreement.

A settlement agreement can be cancelled in a number of cases. It may be cancelled in

the event of fraud or violence, or in the event that the settlement is based on documents that have been found to be forged.

12. What, if any, are the main types of interim remedies available in your jurisdiction?

The NCPC gives the judge sitting in summary proceedings general powers to order, in urgent matters, any interim measures to which there is no compelling objection or which are justified by the existence of a dispute (Article 932).

This judge may also order any conservatory or remedial measures that are necessary either to prevent imminent damage or to put an end to a manifestly unlawful disturbance (Article 933).

13. After a claim has been commenced, what written documents must (or can) the parties submit and what is the usual timetable?

In Luxembourg civil procedure law, a distinction must be made between written and oral proceedings.

In oral proceedings, the instruction phase is mainly the responsibility of the parties, who shall inform the Court when they consider that the case is ready to be pleaded. At the hearing scheduled for the pleadings, the parties will present their arguments orally. Exhibits may be communicated between parties before the hearing. In practical terms, a pleading note is also exchanged between parties at the hearing, and given to the judge.

Written proceedings are conducted under the supervision of a judge (‘juge de la mise en état’) who is in charge of the management of the case. Whenever written submissions are required during the instruction phase, the judge sets a time schedule

that is to be followed by the parties. Each party must communicate with the other party and file its submissions with the court pursuant to the time schedule fixed by the judge.

Once it is considered that everything has been said, the instruction phase shall be closed. The Court will then schedule a date for pleadings where each of the parties will be given the opportunity to orally plead the case. The Court will then schedule a date at which a decision will be handed down.

14. What, if any, are the rules for disclosure of documents? Are there any exceptions (e.g. on grounds of privilege, confidentiality or public interest)?

Under Luxembourg law, there is no discovery procedure as such in civil proceedings. In accordance with the adversarial principle, it relies upon each party to file in due time and on a voluntary basis the necessary evidence to justify its claims.

A claimant who contemplates the initiation of a lawsuit may seek evidence or specific documents through summary proceedings. The summary judge may, before any lawsuit is filed, appoint an expert or issue an injunction to produce a document. However, in regards to the latter, this may not be a fishing expedition and the claimant must specifically detail the information he requires (for example a copy of an email exchanged between such and such on a specific date).

A claimant may also gather written witness statements prior to any lawsuit.

In the course of a lawsuit, the judge may also ask the parties to take a position on any factual issues that may be relevant before the instruction phase is closed. Parties may offer evidence for their allegations through testimony.

Communications between an independent lawyer and their client are protected by professional secrecy as provided for under the law which regulates the profession of lawyers, and under the Criminal Code. Communications between independent lawyers

are in principle deemed confidential, unless such communications have been labelled as official or are to be considered as official by their nature. In-house lawyers are not covered by the professional secrecy rules.

Article 287 NCPC allows a third party who is ordered to issue a document to take a position on the application concerning him. He can apply to the judge who rendered the decision to ask him to revoke or amend the decision. To do so, the third party in the proceedings must invoke a legitimate reason to oppose the forced production of documents. It should be noted that this remedy is also available to the parties to the proceedings.

In regards to a party to the proceedings, as Luxembourg does not know of discovery process, a party will only disclose documents that comfort its position. It is not required to disclose documents that would damage its position.

15. How is witness evidence dealt with in commercial litigation in your jurisdiction (and in particular, do witnesses give oral and/or written evidence and what, if any, are the rules on cross-examination)? Are depositions permitted?

The NCPC distinguishes two different processes for witness evidence: written attestations and investigations.

Written statements are documents prepared by witnesses without the presence of the judge, at the request of one of the parties to the dispute, and which are communicated in the context of a dispute. Investigations are hearings of witnesses to which the judge proceeds after having ordered it. Both processes are therefore distinguished by the way they enter the debates: while the written statements are not subject to any prior checking and are directly included in the debates at the sole initiative of the parties, the investigations require the prior intervention of the judge who decides on the admissibility of the evidence and its relevance.

Cross-examination does not exist under Luxembourg law. Only the judge may ask

questions to a witness, questions which may be suggested by one party.

Regarding depositions, no other forms of witness evidence than the two described above are admitted under Luxembourg law.

16. Is expert evidence permitted and how is it dealt with? Is the expert appointed by the court or the parties and what duties do they owe?

Expert evidence is permitted under Luxembourg law. It can take different forms and can be either ordered by the judge itself or submitted by the parties at their own initiative, jointly or not.

The NCPC distinguishes three different forms of expert evidence, to be ordered by the judge: the verification of facts (‘constatation’), the opinion (‘consultation’), and the expertise (‘expertise’).

Regarding the verification of facts, the mission of the third party designated by the judge limits himself to a strict statement of facts. He must refrain from expressing any opinion on the factual or legal consequences that may derive from the material findings he has made. As a result, this mission does not necessarily have to be entrusted to a specialist or a technician. Article 13, paragraph 4 of the law of 4 December 1990 on the organization of the service of judicial officers even expressly provides for that it can be entrusted to a bailiff.

Entrusted with an opinion measure, the mission of the third person appointed by the judge goes beyond that of a simple observation, to extend into the technical field underlying the dispute. The opinion specifically aims to provide an insight into a technical issue, provided that it is purely technical and that it does not require complex investigations.

The NCPC does not provide for positive criteria delimiting the scope of an expertise. It limits itself to defining it in a negative way by providing that the use of expertise is only

available if the verification of facts or the opinion are not of such a nature as to provide the necessary elements of assessment to resolve the dispute. On this basis, it can be considered that the expertise involves a mission requiring complex investigations. It can therefore only be entrusted to a person with knowledge and proven technical skills.

Besides these three measures, the parties sometimes take the lead in the process and carry out measures similar to those of the verification of facts, opinions and expert witnesses statements, without being ordered by the judge. They can do so either unilaterally or jointly. The judge can take that kind of unilaterally submitted expert evidence into account when issuing its decision, providing that it has been regularly communicated to the other party and has been discusses by both parties during the proceedings.

17. Can final and interim decisions be appealed? If so, to which court(s) and within what timescale?

In principle, each judgment can be appealed as long as the appealing party has an interest. All judgements can therefore be appealed (subject to compliance with the applicable time limit), i.e. all court decisions rendered by the courts and which definitively settle the relations between the parties in the proceedings.

In addition, some intermediate judgments (e.g. a decision ordering an expert opinion) may also be appealed.

In order to appeal, a party must:

- have been a party to the proceedings leading to the adoption of this decision;
- have an interest in lodging the appeal (i.e. the judgment under appeal must have been prejudicial to his or her interests).

As a general rule, the time limit for appeals is 40 days from:

- the notification of the judgment, if it is contradictory;
- the expiry of the time limit of the opposition period, if the judgment is given by default.

However, some provisions provide for a much shorter time limit (e.g. 15 days in bankruptcy cases).

In addition, the time limit for appeals is increased for people living abroad (additional time of 15 days).

18. What are the rules governing enforcement of foreign judgments in your jurisdiction?

Since the coming into force of Regulation Brussels I Bis, it is no longer necessary to turn to a Luxembourg judge in order to enforce a judgment rendered by a court of another EU Member State. A claimant may now directly turn to the relevant authorities of the place of enforcement.

Therefore, a judgment of another Member State may now directly be entrusted with a Luxembourg bailiff in order to enforce it or to carry on a preventive seizure of assets.

Nevertheless, a prior formality will have to be completed. The judgment must be formally served to its recipient prior to carrying out any enforcement measure.

In the absence of an applicable international treaty (for some countries outside the European Union), the recognition and enforcement of foreign judgments must be sought from the competent court by means of a writ of summons and written proceedings.

19. Can the costs of litigation (e.g. court costs, as well as the parties' costs of instructing lawyers, experts and other professionals) be recovered from the other side?

Legal costs (including in particular bailiff fees and the remuneration of any experts) are in principle borne by the party who loses the case. These costs do not include lawyer

fees, which must be paid by each of the parties. Luxembourg does not have court fees.

In addition, at the request of a party, the judge may order the other party to pay procedural compensation.

20. What, if any, are the collective redress (e.g. class action) mechanisms in your jurisdiction?

In Luxembourg, it is not possible to launch a class action. Nevertheless, several defendants with a common interest may bring a joint claim.

21. What, if any, are the mechanism for joining third parties to ongoing proceedings and/or consolidating two sets of proceedings in your jurisdiction?

The procedural rules applicable in Luxembourg effectively provide for the possibility for a third party to join an ongoing procedure.

There are two types of interventions:

- voluntary intervention
- forced intervention

Voluntary intervention is the act by which an interested third party requests to be admitted to the proceedings. Voluntary intervention is carried out by an act of lawyer to lawyer or by an oral statement in the context of an oral procedure. It does not require a bailiff's act.

This procedure is only admissible from those who could have formed a third party opposition against the decision. The intervener must be a third party and must have a legitimate interest to justify its participation in the proceedings.

Concerning forced intervention, this is the case where one of the parties to the proceedings forces a third party to enter the proceedings. To be admissible, the forced intervention must take the form of a real summons.

The forced intervention can only be directed against a third party to whom it is in the interest of opposing the judgment and who could have made a third party-opposition against the decision to be taken.

22. Are third parties allowed to fund litigation? If so, are there any restrictions on this and can third party funders be made liable for the costs incurred by the other side?

In Luxembourg, there are currently no specific rules concerning the financing of a dispute by a third party. Consequently, the financing of a dispute by a third party is available to the parties to the proceedings, subject to compliance with the lawyer's ethical or legal obligations.

23. What is the main advantage and the main disadvantage of litigating international commercial disputes in your jurisdiction?

In our opinion, the main disadvantage of litigating international commercial disputes in Luxembourg is that, under Luxembourg law, as already mentioned, there is no discovery procedure. In accordance with the adversarial principle, it relies upon each party to file in due time and on a voluntary basis the necessary evidence to justify its claims.

A party will only disclose documents that comfort its position. It is not required to disclose documents that would damage its position.

The main advantage of litigating commercial disputes in Luxembourg, on the other hand, lays in the absence of any hurdles to the enforcement of judicial decisions

against assets of foreign states or of central banks of foreign states, while such hurdles exist in foreign countries like Belgium (Article 1412quinquies Belgian judicial code) or France (Article L153 French monetary and financial code). Also, recovery of costs from the losing party is extremely limited.

24. What is the most likely growth area for disputes in your jurisdiction for the next 5 years?

For reasons outlined before, Luxembourg is likely to become a place of choice for the enforcement of arbitral awards or judgments against State owned assets, since such enforcement is not restricted by legislation, unlike in Belgium or France.

25. Will be the impact of technology on commercial litigation in your jurisdiction in the next 5 years?

This is extremely difficult to assess as, as of today, technology has not yet impacted litigation in Luxembourg. To our knowledge, no step has been taken so far in regards to implementing technology in the Luxembourg judicial system.