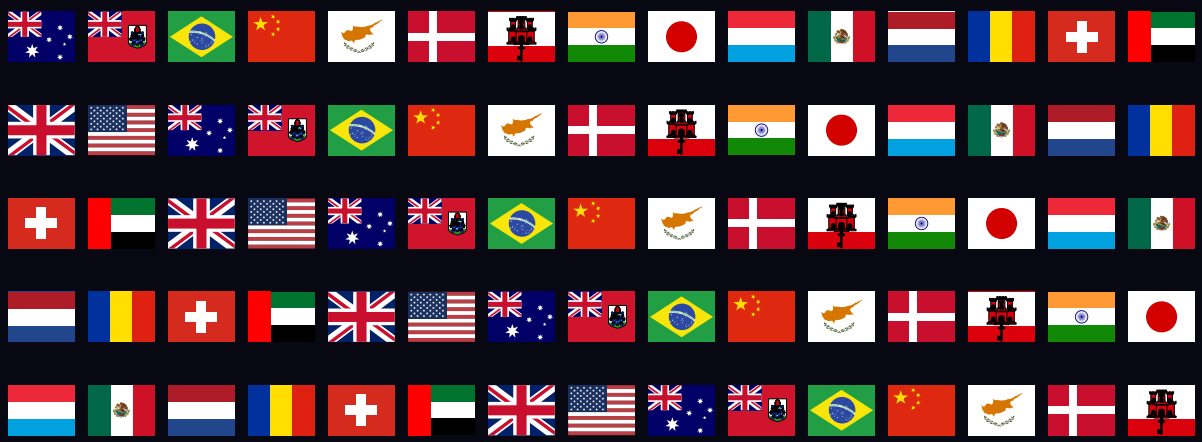
COMPLEX COMMERCIAL LITIGATION

Luxembourg



LEXOLOGY
Getting The Deal Through

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Complex Commercial Litigation

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Quick reference guide enabling side-by-side comparison of local insights into the litigation market and legal framework; pre-action considerations (including alternative dispute resolution); bringing and defending a claim; procedural steps; funding; costs; appeals; cross-border enforcement; the advantages and disadvantages of litigating in this jurisdiction; and recent trends.

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BACKGROUND

Frequency of use

How common is commercial litigation as a method of resolving high-value, complex disputes?

To this day, bringing a case to court remains the preferred method for litigants. Commercial litigation is common and relatively complex in Luxembourg because the country is an international financial centre where economic and banking activities are highly developed. The courts must take these particularities into account to ensure efficient and qualitative justice. Only professional magistrates sit in commercial matters, which reinforces the confidence of the litigants.

Law stated - 08 October 2021

Litigation market

Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

The commercial litigation market in the Grand Duchy of Luxembourg is quite extensive and varied as the country is a European and global financial centre mainly focused on the service sector.

The courts in Luxembourg City, the capital of the Grand Duchy of Luxembourg, deal mainly with international disputes involving European or international parties (investment funds, banks, trustees, etc).

The country being divided into two judicial districts, the courts of Diekirch (northern part of the Grand Duchy of Luxembourg) are responsible for dealing with disputes that are more regional and where the financial stakes are less important (eg, family law, criminal law).

Law stated - 08 October 2021

Legal framework

What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

The Luxembourg legal system is subject to civil law. Luxembourg commercial law is a branch of private law. Generally speaking, commercial law is less protective for the parties than civil law, as it is supposed to apply to informed litigants. It should be noted that it does not govern all commercial relations.

The legal framework governing commercial disputes is therefore quite broad and includes the following sources:

- the Commercial Code;
- special laws (company law, unfair competition law, financial guarantees, etc);
- the Civil Code, which applies in the absence of specific commercial provisions (eg, for contract law);
- European law, directly applicable in Luxembourg;
- case law; and
- customs and usages.

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Before this multitude of sources, the main practical difficulty for the parties will be to correctly qualify the factual elements in order to identify the applicable legal standard.

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BRINGING A CLAIM - INITIAL CONSIDERATIONS

Key issues to consider

What key issues should a party consider before bringing a claim?

The party must first check that their claim falls within the jurisdiction of the Luxembourg courts and that the applicable law is Luxembourg law. This is an important consideration for an internationally orientated country such as Luxembourg. If this is the case, the claimant must, in a second step, verify that their claim has not expired; otherwise, their claim will be deemed inadmissible. The limitation period of an action is 10 years in commercial matters.

Third, in order for the party to be able to bring an action, they must have an interest in acting and have standing (ie, they must be the owner of the right that they wish to enforce).

Fourth, the filing of a claim requires sufficient evidence to prove the claim.

Fifth, the party wishing to bring a claim must check that they will then be able to enforce the decision given by the Luxembourg courts.

Last, there is the question of the appropriateness of filing a claim, particularly with regard to the costs that legal action may entail (lawyers' fees, bailiffs' fees and court costs). The amount of the claim must therefore be taken into account with regard to the costs that it will require.

Law stated - 08 October 2021

Establishing jurisdiction

How is jurisdiction established?

The jurisdiction of the courts must be considered according to the subject matter, the value of the dispute and the residence of the parties.

First of all, it should be noted that there is no commercial court in Luxembourg. It is the common law courts, known as 'civil and commercial' courts, that deal with commercial disputes. Given this specificity, commercial disputes can be brought according to an oral or a written procedure.

The courts of general law will sit in commercial matters for disputes relating to commercial acts between all persons. The Commercial Code specifically mentions disputes between traders, against traders, between shareholders and/or directors of commercial companies, or relating to economic interest groups.

The parties may not derogate from the rules of jurisdiction relating to the subject matter of the dispute. If a litigant submits a dispute of a commercial nature to another court, for example to the Administrative Court, the court erroneously seized will have to declare itself incompetent.

The court to which the case is referred then depends on the value of the dispute. If the amount at stake is less than €15,000, the matter must be brought before the tribunal de paix (magistrate's court). Above this limit, the district court (tribunal d'arrondissement) has jurisdiction. It should be noted that at the district court, the second, sixth and 15th chambers sit only in commercial matters.

As regards the court with territorial jurisdiction, this will in principle be the court located in the judicial district in which the defendant has their residence (subject to exceptions).

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Indeed, it is possible to derogate from the rules of territorial jurisdiction. The parties to the proceedings may designate by mutual agreement, or even have stipulated in advance in a contract, the court with territorial jurisdiction to settle the dispute between them. These so-called choice of court clauses are valid and must be respected by the courts, which will have to declare themselves territorially incompetent in the event of an error on the part of the plaintiff.

Quite similar rules apply to international disputes (ie, involving a party resident outside Luxembourg).

In a case where the defendant is domiciled in a member state of the European Union, it is European Regulation (EU) No. 1215/2012 that governs the territorial jurisdiction. In principle, a defendant domiciled in a member state must be sued in the courts located in that member state. However, the regulation provides for options, at the choice of the plaintiff. For example, if the dispute relates to the performance of a contract, the defendant may be sued in the court of the place of performance of the contractual obligation that is the basis of the claim.

In a case where there are several defendants domiciled in different member states, they may all be sued before the same court, provided that the claims are closely connected so there is an interest in ruling them together.

Finally, in international disputes, the choice of court clause will also apply.

There is no way of preventing a party from initiating duplicate proceedings before a court in another member state. On the other hand, if the claim made abroad is similar and made between the same parties, the court seized in second will in principle have to suspend its decision while the Luxembourg court rules on its own jurisdiction. If the Luxembourg court declares itself competent, the other court seized will necessarily have to declare itself incompetent.

The same process applies in a similar way for national disputes, when two Luxembourg courts are seized of the same dispute.

Law stated - 08 October 2021

Preclusion

Res judicata: is preclusion applicable, and if so how?

Yes, res judicata is applicable. The presumption of truth that attaches to what has already been decided in the course of a proceeding may work either positively in favour of the plaintiff, since they can rely on this presumption to justify their claim, or negatively against the plaintiff if what has been decided previously contradicts their position and their opponent can invoke it to contest the claim.

When res judicata is placed in a procedural context, it is the negative effect that will apply, insofar as the opposing party may invoke the exception of res judicata to prevent what was definitively judged previously from being submitted to the judge's appreciation again. A person who wishes to avail themself of the exception of res judicata must prove that there is a threefold identity of subject matter, cause of action and parties (who must be acting in the same capacity) between the claim submitted to the court and the one invoked by their opponent.

Law stated - 08 October 2021

Applicability of foreign laws

In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

As a matter of principle, the Luxembourg courts apply Luxembourg law. In certain cases, they may be required to apply foreign law, particularly in contractual disputes.

The parties may conclude a clause providing for the law applicable to the contract and to any dispute arising therefrom.

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This choice is binding on the court, but it must not deprive the parties of the right to benefit from the mandatory rules (public policy) of Luxembourg law.

The choice of a foreign law may be an advantage for one party in contractual disputes, but the prohibition to derogate from the mandatory rules of Luxembourg law constitutes in this case a protection for the other party.

For international contracts including a party domiciled in another member state, European Regulation (EC) No. 593/2008 provides for the applicable law in the absence of choice by the parties. For example, the contract for the provision of services is governed by the law of the country in which the service provider has its registered office.

Law stated - 08 October 2021

Initial steps

What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

The initial steps that can be taken by the plaintiff to ensure that the judgment is effectively enforced by the defendant are essentially to block the defendant's assets in the hands of a third party in order to prevent the defendant from liquidating their assets prior to any judgment. Under Luxembourg law, there is a seizure procedure whereby the plaintiff can block in the hands of a third party the sums and effects belonging to the defendant (who is a debtor) before any proceedings on the merits. There is also a European bank attachment procedure that, as with the seizure procedure, prevents the debtor from using the money in their bank accounts until a judge decides on the merits of the claim.

A defendant cannot, strictly speaking, take steps to protect themself from a judgment that would require them to pay money to the creditor. They could, however, sell their assets and possibly move their bank accounts before the judgment is rendered.

Law stated - 08 October 2021

Freezing assets

When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

This procedure does not exist in Luxembourg. On the other hand, it is possible to use the seizure procedure in order to block the defendant's assets in the hands of a third party.

Law stated - 08 October 2021

Pre-action conduct requirements

Are there requirements for pre-action conduct and what are the consequences of non-compliance?

In Luxembourg law, there are no mandatory measures prior to a legal action (in particular, an obligation to negotiate in advance). In practice, the parties may include a prior conciliation or mediation clause in their contracts. These clauses are then binding on the court and are becoming increasingly common.

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Other interim relief

What other forms of interim relief can be sought?

The most common provisional measure is the seizure, which allows the claimant to block the assets (bank accounts, debts, shares, etc) of the debtor in the hands of a third party, in order to reduce the risk of non-payment in the event of a favourable judgment.

Law stated - 08 October 2021

Alternative dispute resolution

Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

Although ADR does exist in Luxembourg, there is no legal obligation for the parties to have recourse to it prior to a legal action unless the parties have provided for a contractual clause of prior negotiation.

If the parties decide not to use ADR, or if ADR is unsuccessful, this will have no impact on the dispute. In the event that an ADR is chosen by the parties prior to any court proceedings, or during the court proceedings, the parties may decide to continue with the court proceedings in the event that an agreement is not reached.

Law stated - 08 October 2021

Claims against natural persons versus corporations

Are there different considerations for claims against natural persons as opposed to corporations?

No, there are no different considerations for claims against individuals versus corporations.

Law stated - 08 October 2021

Class actions

Are any of the considerations different for class actions, multiparty or group litigations?

The considerations are different in these three cases in that the parties do not necessarily all have the same claims in a court action and the same representative.

First of all, as far as class actions are concerned, they have not yet been introduced into Luxembourg law, although a bill has been tabled. In this bill, legal action will be brought by a single representative on behalf of a group of consumers for the same act of misfeasance on the part of the same professional. Such an action would save time and money as the multiplication of individual actions is time-consuming, long and expensive.

On the other hand, in the event of a multiparty dispute, each of the parties will have a representative, as their interests are often not necessarily convergent or only on certain aspects. There will be as many representatives as there are claimants and the claims will very often be different (even if they are in the same direction. This is the case of claims for compensation but of a different amount). Multiparty litigation is therefore more complex and time-consuming.

In any case, the fact that there are several parties to a dispute, whether or not they are united in a legal action with the same or different claims, is generally intended to give them more leverage against a common adversary.

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