The dispute resolution Review

Fifth Edition

Editor

Richard clark

Law Business Research

The Dispute Resolution Review

This article was first published in The Dispute Resolution Review, 5th edition
(published in February 2013 – editor Richard Clark).

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Richard Clark

Law Business Research Ltd

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-907606-56-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 870 897 3239

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET BA-HR DA (BA-HR)

ARTHUR COX

ASHTAR ALI & CO, ADVOCATES AND CORPORATE CONSULTANTS

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MOLITOR AVOCATS Á LA COUR

MOTIEKA & AUDZEVIČIUS

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CONTENTS

EDITOR'S PREFACE

Richard Clark

Following the success of the first four editions of this work, the fifth edition now extends to some 58 jurisdictions and we are fortunate, once again, to have the benefit of incisive views and commentary from a distinguished legal practitioner in each jurisdiction. Each chapter has been extensively updated to reflect recent events and provide a snapshot of key developments expected in 2013.

As foreshadowed in the preface to the previous editions, the fallout from the credit crunch and the ensuing new world economic order has accelerated the political will for greater international consistency, accountability and solidarity between states. Governments' increasing emphasis on national and cross-border regulation – particularly in the financial sector – has contributed to the proliferation of legislation and, while some regulators have gained more freedom through extra powers and duties, others have disappeared or had their powers limited. This in turn has sparked growth in the number of disputes as regulators and the regulated take their first steps in the new environment in which they find themselves. As is often the case, the challenge facing the practitioner is to keep abreast of the rapidly evolving legal landscape and fashion his or her practice to the needs of his or her client to ensure that he or she remains effective, competitive and highly responsive to client objectives while maintaining quality.

The challenging economic climate of the last few years has also led clients to look increasingly outside the traditional methods of settling disputes and consider more carefully whether the alternative methods outlined in each chapter in this book may offer a more economical solution. This trend is, in part, responsible for the decisions by some governments and non-governmental bodies to invest in new centres for alternative dispute resolution, particularly in emerging markets across Eastern Europe and in the Middle East and Asia.

The past year has once again seen a steady stream of work in the areas of insurance, tax, pensions and regulatory disputes. 2012 saw regulators flex their muscles when they handed out massive fines to a number of global banks in relation to alleged breaches of UN sanctions, manipulation of the LIBOR and EURIBOR rates and money-laundering

offences. The dark clouds hanging over the EU at the time of the last edition have lifted to some degree after the international efforts in 2012 saved the euro from immediate and catastrophic collapse, although the region continues to prepare for a period of uncertainty and challenging circumstances. It is too early to tell what, if any, fundamental changes will occur in the region or to the single currency, but it is clear that the current climate has the potential to change the political and legal landscape across the EU for the foreseeable future and that businesses will be more reliant on their legal advisers than ever before to provide timely, effective and high-quality legal advice to help steer them through the uncertain times ahead.

Richard Clark
Slaughter and May
London
February 2013

Chapter 35

LUXEMBOURG

Michel Molitor and Paulo Lopes Da Silva[1]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

i Structure of the law

The Luxembourg legal system is based on the written law tradition.

The sources of law are international treaties, European Community law, the constitution, statutes and regulations, and the general principles of law.

Case law

National case law

Theoretically, judges are not bound by judicial decisions given in other cases; each decision must always be confined to the actual case before the judge. But in practice, earlier court decisions in comparable cases are sure to be seriously considered. In particular, where a statute is open to interpretation, judges have the power to make law through the interpretation of it.

European case law

By virtue of Article 234 of the treaty establishing the European Community, the case law of the Court of Justice affects national courts through requests for preliminary rulings in the sense that Luxembourg courts, before giving a ruling, may ask the Court of Justice for a solution to problems caused by the application of Community law.

ii Structure of the courts

Civil law proceedings in Luxembourg are conducted, at the first level, in the district courts (there are two districts courts), which have jurisdiction in all civil and commercial

1 Michel Molitor is the managing partner and Paulo Lopes Da Silva is a partner at Molitor Avocats à la Cour.

matters for which the law does not confer jurisdiction on a specific court. Examples of these specific courts are:

a small claims are dealt with by a local court (there are three local courts), if the claim is worth less than €10,000;

b cases concerning contracts of employment are dealt with by an employment court (there are three employment courts);

c jurisdiction in disputes concerning leases lies with the local courts, whatever the value of the dispute; and

d all disputes relating to the national insurance system (problems of affiliation, qualification to receive pensions, contributions, administrative fines, etc.) are heard by the Insurance Arbitration Council.

There is no specific court for commercial matters; these are dealt with by specialised divisions of the district court.

Appeals are brought to the Court of Appeal for appeals against decisions made in district courts and employment courts, and to the district court for appeals against decisions made in a local court (except for special matters).

After appeal, if a party still wishes to contest a legal point other than any point relating to the facts of a case, the case is brought before the Court of Cassation in the last instance.

iii Structure of ADR procedures

There are different methods of alternative dispute resolution (i.e., arbitration and mediation) that have been generating interest in Luxembourg for some years.

Arbitration proceedings are provided by the Luxembourg New Civil Procedure Code ('the NCPC') and Luxembourg has also ratified international agreements regarding arbitration. Specific legislation concerning civil and commercial mediation was introduced in Luxembourg in February 2012.

II THE YEAR IN REVIEW

The application of banking secrecy rules often gives rise to subjects of discussion for authors and the courts. In 2011, Luxembourg courts delivered an interesting decision in relation to the effect of banking secrecy towards the beneficial owner.

In that decision, the Court of Appeal judged that even though the beneficial owner of a company has to be considered as a third party in respect to the company's relationship with a bank, he or she and his or her forced heirs are entitled to be informed about the existence of this relationship.[2]

Furthermore, in recent years, Luxembourg courts also had to handle a large amount of litigation in the field of investment funds.

In particular, the Luxembourg District Court had the opportunity to highlight that an investor or shareholder in a fund or company is not entitled to bring a civil action

2 C.A., 19 October 2011, No. 35715.

against a director or a service provider (for instance, a bank acting in a security deposit agreement) of the fund or company unless the claimant evidences a personal loss distinct from the one suffered by the fund or company.[3]

Finally, in the context of the *Madoff* case, despite the pending criminal proceedings, the Commercial District Court of Luxembourg has decided to continue the civil trial instigated by the liquidators of *Luxalpha SICAV* (an investment fund that made several investments in Madoff vehicles) against the depositary bank, its management company, its directors and auditors. The Court has considered that although criminal proceedings precede civil proceedings, this rule only prevents the civil court from issuing a judgment, but not from continuing to instruct the case.

III COURT PROCEDURE

i Overview of court procedure

The main rules governing court procedure are laid down by the NCPC. First instance civil proceedings and proceedings before the Court of Appeal differ from first instance commercial proceedings and proceedings before local courts.

ii Procedures and time frames

The main stages in court proceedings are as follows.

Before the district court (in civil matters) and the Court of Appeal:

a issue of a writ served on the defendant by a bailiff;
b exchange of written statements between lawyers and disclosure of documents, exchange of witness and expert evidence in some cases;
c closing of the investigation;
d trial; and
e handing down of the judgment.

Before the district court (in commercial matters), local courts, employment courts:

a issue of a summons to the defendant by a bailiff or by the clerk of the court, depending on the type of case;
b court hearing of the parties or of their representatives or both in order to plead the case; and
c handing down of the judgment.

As a principle, judges try to give strict guidance in terms of time frames, by issuing written notices or by calling parties before the courts to check the progress of the case, in order to have an exchange of written statements, documents and expert evidence within a reasonable time limit.

It is difficult to calculate the average duration of civil proceedings as it varies depending on the number of parties involved, the complexity of the matter and if it is at first level or on appeal.

3 T.A. Lux., 4 March 2010, *Luxalpha* case; T.A. Lux., 25 May 2011, No. 1240456.

iii Class actions

Luxembourg proceedings law has a very individualistic concept of legal action, to the extent that class actions are not permissible under Luxembourg law.

Professional groups or representative associations are entitled to take legal action before the courts for collective damage only where they evidence their own legal interest. This means that they must show that the legal action is guided by a specific corporate interest and should benefit all its members. But if the claimed interest corresponds to the general interest, the legal action is in principle declared inadmissible.

iii Representation in proceedings

Representation by a lawyer who is a member of the Luxembourg Bar is compulsory before the district court (with some exceptions, such as in the context of commercial proceedings), whereas parties can appear before the local courts and the employment courts either in person or through a representative, who might be a lawyer, spouse, parent, etc.

iv Service out of the jurisdiction

The following rules apply to service out of the jurisdiction regardless of whether the recipient is a natural or a corporate person.

If a document (for instance, a writ of summons or a judgment) in relation to a civil or commercial matter needs to be served in another EU Member State, the applicable rules are those provided for by EU Regulation No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service of Documents), and repealing Council Regulation (EC) No. 1348/2000.

This Regulation provides for different ways of transmitting and serving documents: transmission through transmitting and receiving agencies, transmission by consular or diplomatic channels, service by postal services and direct service. Transmitting agencies, to be determined by each Member State (the bailiff and the court clerk in Luxembourg), are competent to effect the transmission of judicial or extrajudicial documents to be served in another Member State. Receiving agencies, to be determined by each Member State (the bailiff in Luxembourg), are competent for the receipt of judicial or extrajudicial documents from another Member State. The central body, to be designated by each Member State (the Public Prosecutor of the Superior Court of Justice in Luxembourg) is responsible for supplying information to the transmitting agencies and seeking solutions to any difficulties that may arise during transmission of documents for service.

Luxembourg is also party to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. This Convention provides that each party must designate a central authority (the Public Prosecutor of the Superior Court of Justice in Luxembourg) responsible for receiving requests for service arising from a foreign authority or judicial officer (with respect to civil or commercial matters) and dealing with them.

In the absence of any applicable international provision (EU regulation, international treaty or bilateral convention), the NCPC applies to service abroad. The Bailiff sends a copy of the judicial document to the domicile of the recipient by registered

letter with acknowledgment of receipt unless the foreign state does not accept this kind of service. In the latter case, the Bailiff will require the Ministry of Foreign Affairs to serve it by diplomatic means.

v Enforcement of foreign judgments

The enforcement in Luxembourg of foreign judgments handed down in a country outside the EU is possible once such judgments are given enforcement title by the Luxembourg District Court.

As for judgments originating in an EU Member State, Council Regulation (EC) No. 44/2001 on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters allows the direct enforcement of judgments throughout the EU by means of a simplified procedure by which the district court will only check if the set of documents required is complete, without any review of the issue that was under consideration before the foreign court.

vi Assistance to foreign courts

Assistance in evidence

The Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters is designed to improve, simplify and accelerate cooperation between Member States as regards the taking of evidence in legal proceedings in civil and commercial matters.

Under this regulation, any EU courts (other than in Denmark) may request the competent court of another Member State to take evidence, or to take evidence directly itself. The execution of such a request may be refused only if:

a the request does not fall within the scope of Regulation No. 1206/2001 (if, for instance, it concerns criminal and not civil or commercial proceedings);
b the execution of the request does not fall within the functions of the judiciary;
c the request is incomplete;
d a person of whom a hearing has been requested claims a right to refuse, or a prohibition, from giving evidence; or
e a deposit or advance relating to the costs of consulting an expert has not been made.

Luxembourg is furthermore party to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. Under this Convention, a judicial authority from another contracting state may, in civil or commercial matters, ask the Public Prosecutor of the Luxembourg Superior Court of Justice to obtain evidence.

Assistance in relation to foreign law

Luxembourg is party to the European Convention on Information on Foreign Law of 7 June 1968. Under the terms of this Convention, the parties undertake, when problems of foreign law arise in the course of legal proceedings, to supply information concerning their law and procedure in civil and commercial fields as well as on their judicial system.

Each contracting state must set up or appoint two bodies: a 'receiving agency', to receive requests for information from another contracting state and to take action

on its request (the Ministry of Justice in Luxembourg), and a 'transmitting agency' to receive requests for information from its judicial authorities and to transmit them to the competent foreign receiving agency (the Ministry of Justice in Luxembourg).

The requested state may not refuse to take action on the request for information unless its interests are affected by the case giving rise to the request or if it considers that the reply might prejudice its sovereignty or security.

vii Access to court files

Court hearings are in principle held in public, meaning that everybody may attend and listen to the trial.

However, third parties are not supposed to have access to the documents of the file (i.e., pleadings and supportive documents).

Judgments dealing with interesting legal issues or particular matters are published in legal journals. Furthermore, in specific areas (for instance, a judgment declaring a company bankrupt), the judgment is published in a local newspaper and made available to the Trade and Companies Register.

viii Litigation funding

It is possible for a non-party to litigation proceedings to finance those proceedings. Depending on the circumstances, this funding could be regarded as a loan or an act of liberality.

When the litigation involves a company of a corporate group, then in practice the company's fees will be funded by the mother company or by the beneficial owner.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

The law relating to the profession of attorney expressly forbids an attorney from assisting or representing parties with conflicting interest.

In addition, the Luxembourg Bar provides the attorney with guidelines and recommendations in relation to conflicts of interest, especially:

a refusing multiple mandates if there is a real risk of conflict at a later stage;

b if an attorney has advised several parties at a preliminary stage he or she should refuse to represent one of them in cases of litigation; and

c refusing cases against parties who are regular clients of the attorney.

Rules governing conflict of interest apply to all attorneys working in the same law firm.

Although not regulated by law and professional regulations, Chinese walls are in practice sometimes set up subject to the interested clients' prior approval.

ii Money laundering, proceeds of crime and funds related to terrorism

The Luxembourg law of 12 November 2004 as amended on the fight against money laundering and terrorist financing provides specific obligations, particularly for lawyers assisting their clients in the context of (1) transactions in respect of buying or selling of

real estate or business entities, (2) management of money, securities or other assets, (3) opening or management of a bank or securities account, (4) organisation of contributions necessary for the creation, operation or management of companies, or (5) creation, domiciliation, operation or management of trusts, companies or similar structures.

These obligations are:

a the establishment of adequate and appropriate internal proceedings;

b the identification of the client and the beneficial owner and of the purpose of the business relationship as well as the origin of the funds; and

c cooperation with the Luxembourg authorities in charge of the fight against money laundering and financing of terrorism (mainly, the Bar and the Public Prosecutor), including reporting suspicions. The attorney's professional duty of confidentiality is not applicable in this respect.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

Unlike in-house lawyers, attorneys and law firms are subject to rules of privilege provided for by the Luxembourg law relating to the profession of attorney.

Communications between attorneys and their clients are in principle confidential.

Communications between one Luxembourg attorney and another are also confidential unless otherwise specified or if the communication is by nature non-confidential. Relationships between Luxembourg and non-Luxembourg attorneys are governed by the Code of Conduct for European Lawyers. According to this Code, communications between attorneys are in principle non-confidential unless otherwise expressly specified in a covering letter or at the head of the communication.

ii Production of documents

Any party must evidence the facts on which it bases its claim or its defence. Supportive documents must be communicated to all the parties involved in the litigation as well as to the court.

Depending on the type of case (civil or commercial), the proof must consist of a written document or may also be brought through a witness statement or hearing or legal presumptions. In any case, the court itself assesses the credibility of the supportive documents.

If relevant, a court may on its own motion or at one of the party's requests appoint an expert responsible for examining documents stored electronically or other technical issues. In relation to documents stored overseas, courts may use mechanisms applicable for assistance in evidence (see above).

A court may also, on its own motion or following a party's request, order one party to the litigation or a third party (including a group company) to deliver documents considered relevant.

VI ALTERNATIVES TO LITIGATION

ii Arbitration

Arbitration is commonly used to resolve contract and commercial litigation, but it is more and more often used for cross-border disputes that occur within the borders of the Grand Duchy, due to its geographical and economic position.

Arbitration proceedings are provided by the NCPC, which has also ratified international agreements regarding arbitration (including the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958). In addition, the Luxembourg Chamber of Commerce has its own Arbitration Centre, created in 1987, and has put its Secretariat at the service of parties interested in using arbitration to settle their dispute.

Arbitration can only take place if both parties have agreed. This agreement is made through an arbitration clause included in the contract or, after the performance of the contract, through the conclusion of a written agreement to arbitrate.

The principle stated in Article 1224 of the NCPC is that in order to submit a dispute to arbitration, the issue has to relate to rights of which parties have free disposal. Therefore, disputes involving family law, criminal law or, more broadly, involving public order, are non-arbitral.

There are two kinds of arbitration proceedings in Luxembourg:

a Ad hoc arbitration: the parties use arbitration without submitting the proceedings to the rules of any arbitration institution. In this case, the parties and the arbitrators have to use time limits and forms required before local courts (Article 1230 of the NCPC), for example, the service of documents and the communication of exhibits.

b Institutional arbitration: the parties will often agree to use the rules of an established organisation such as the Arbitration Rules of the International Court of Arbitration of Paris, or the Arbitration Centre at the Luxembourg Chamber of Commerce. For instance, the Arbitration Rules of the Arbitration Centre at the Luxembourg Chamber of Commerce provide for specific rules as regards notification of documents (pursuant to Article 6 of the Arbitration Rules).

Luxembourg arbitration decisions may be either binding or non-binding, depending on the terms of the arbitration clause agreement. Binding arbitration decisions have the same significance as a court judgment. The decisions are rendered enforceable by an enforcement order issued by the President of the District Court of Luxembourg.

The only possibility to challenge an arbitral award is to take an opposition procedure against the order of the President of the District Court in order to have it declared null and void.

The Court of Appeal regularly hands down decisions relating to arbitration. For example, the Court of Appeal has pronounced on the nationality of an arbitration award. Although the parties had submitted the arbitration proceedings to Belgian law, the regime of the annulment of the arbitral award was subject to Luxembourg law because the award was issued in Luxembourg (Court of Appeal of Luxembourg, civil judgment No. 30480, 5 July 2006).

iii Mediation

Specific legislation concerning civil and commercial mediation was introduced in Luxembourg by the Law of 24 February 2012 on the Introduction of Mediation in Civil and Commercial Matters. The Mediation Centre of the Luxembourg Bar ('CMBL') was set up on 13 March 2003.

The CMBL can be contacted by any legal entity or natural person within the context of their civil, commercial or social dispute resolution. The mediators are then chosen from a list approved by the CMBL, taking into consideration the nature of the dispute and the wishes of the parties.

At the beginning of the process, the mediator must ensure that the parties sign a mediation convention in which they undertake to settle the conflict using the mediation proceedings.

The process is entirely confidential.

The mediator's mission is to help the parties to find a negotiated solution.

Mediation is not yet widely used as a method of dispute resolution in Luxembourg.

iv Other forms of alternative dispute resolution

Ombudsman

In Luxembourg, it is possible to call on the ombudsman in relation to claims against public administration. The ombudsman analyses the claim and issues a recommendation to the public administration as to whether he or she finds the claim justified.

Settlement agreement

In practice, especially when the solution to the litigation is not obvious, parties tend to negotiate and enter into out-of-court settlement agreements. These kinds of arrangements are usually confidential and are, for example, very common in labour law cases.

Under Luxembourg law, settlement agreements have the authority of *res judicata*.

VII OUTLOOK & CONCLUSIONS

The *Madoff* case and ongoing Luxembourg proceedings have attracted attention from many quarters. The trial arising from the legal actions taken by the liquidators of the Luxalpha will of course take time and the Commercial District Court of Luxembourg should not issue its judgment before the close of the criminal investigations. Meanwhile, this judgment is awaited with great interest by the entire Luxembourg Financial Centre.

Furthermore, in legal circles, one can observe a stricter supervision regarding compliance with the professional rules that apply to the legal profession in relation to combating money laundering and terrorist financing.

Appendix 1

ABOUT THE AUTHORS

MICHEL MOLITOR

Molitor Avocats à la Cour

Michel Molitor is the managing partner of Molitor Avocats à la Cour and has been a member of the Luxembourg Bar since 1985. He is head of the firm's banking and finance and insurance departments.

He was educated at Vienna University, PhD, 1985 (Politikwissenschaft); Strasbourg University, France, 1983 (Maître en Sciences Politiques); and Strasbourg University, France, 1982 (Maître en Droit Privé).

He is fluent in English, French, German and Luxembourgish.

He is a member of the following associations: the Banking Committee of the International Bar Association (IBA), the Luxembourg Banking Lawyers Association (ALJB) and the Luxembourg Investment Fund Industry Association (ALFI).

He has been listed in *Chambers Europe,* which states: 'International and domestic clients, including banks and other financial institutions are regular clients for contentious work. They value the particular expertise and exceptionally diverse practice of Michel Molitor in this field.' He has also been featured in *PLC Which Lawyer?*, which recommends him for his expertise in dispute resolution and labour and employment. The *Legal 500 EMEA* listed Molitor as a top-tier dispute resolution firm and identifies Michel Molitor as a 'leading individual'.

He is continuously ranked as both a top management labour and employment lawyer and as a top insurance lawyer in *Who's Who Legal*.

PAULO LOPES DA SILVA

Molitor Avocats à la Cour

He has been a partner at Molitor Avocats à la Cour since 2002 and a member of the Luxembourg Bar since 1998.

He co-heads the firm's litigation and dispute resolution department. He specialises in banking and commercial litigation, especially complex court cases and behind-the-scenes negotiations.

He is regularly involved in commercial cross-border aspects of the law and very active in banking litigation, particularly matters involving the liability of banks and their directors.

He was educated at Strasbourg University, France, 1997 (DEA en Droit des Affaires/Master in Commercial law); and Strasbourg University, France, 1996 (Maître en Droit).

He is fluent in English, French, German, Luxembourgish and Portuguese.

He is a member of the following associations: the International Bar Association (IBA); and the European Employment Law Association (EELA).

He was recommended by *PLC Which Lawyer?* under real estate.

The Legal 500 EMEA and *The Legal 500 US Special Edition* rank Paulo among Luxembourg's top litigation lawyers, 'well reputed' and an 'excellent counsel', 'extremely professional', 'empathetic to clients', and has 'an entrepreneurial spirit' (*Legal 500 EMEA*).

His publications include the Luxembourg chapter on litigation and dispute resolution in Global Legal Group's *The International Comparative Legal Guide to Litigation & Dispute Resolution* 2008, 2009, 2010, 2011 and 2012.

MOLITOR AVOCATS À LA COUR
8 rue Sainte-Zithe
P.O. Box 690
2016 Luxembourg
Luxembourg
Tel: +352 297 298 1
Fax: +352 297 299
michel.molitor@molitorlegal.lu
paulo.dasilva@molitorlegal.lu
www.molitorlegal.lu