# The Dispute Resolution Review

Eighth Edition

Editor
Jonathan Cotton

Law Business Research

# The Dispute Resolution Review

The Dispute Resolution Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Dispute Resolution Review - Edition 8
(published in February 2016 – editor Jonathan Cotton)

For further information please email
Nick.Barette@lbresearch.com

# The Dispute Resolution Review

Eighth Edition

Editor
Jonathan Cotton

Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

SENIOR ACCOUNT MANAGERS
Thomas Lee, Felicity Bown, Joel Woods

ACCOUNT MANAGER
Jessica Parsons

MARKETING ASSISTANT
Rebecca Mogridge

EDITORIAL ASSISTANT
Sophie Arkell

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Caroline Herbert

SUBEDITOR
Anna Andreoli

CHIEF EXECUTIVE OFFICER
Paul Howarth

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

www.TheLawReviews.co.uk


ISBN 978-1-909830-83-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

www.TheLawReviews.co.uk

# ACKNOWLEDGEMENTS

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

ADAMS & ADAMS

ARTHUR COX

ATTIAS & LEVY

AZB & PARTNERS

BAKER & PARTNERS

BONELLIEREDE

BREDIN PRAT

BUFETE HERNÁNDEZ ROMO

CONSULEGIS ABOGADOS

CRAVATH, SWAINE & MOORE LLP

DITTMAR & INDRENIUS

HENGELER MUELLER

HERGÜNER BİLGEN ÖZEKE ATTORNEY PARTNERSHIP

JUN HE LAW OFFICES

KBH KAANUUN

KYRIAKIDES GEORGOPOULOS LAW FIRM

LS HORIZON LIMITED

MANNHEIMER SWARTLING ADVOKATBYRÅ AB

MAPLES AND CALDER

MOHAMMED AL-GHAMDI LAW FIRM IN ASSOCIATION WITH
NORTON ROSE FULBRIGHT US LLP

MOLITOR AVOCATS À LA COUR

MOTIEKA & AUDZEVIČIUS

NIEDERER KRAFT & FREY

OSLER, HOSKIN & HARCOURT LLP

PATRIKIOS PAVLOU & ASSOCIATES LLC

PINHEIRO NETO ADVOGADOS

PIPER ALDERMAN

SCHRECK LAW OFFICES

SHIN & KIM

SLAUGHTER AND MAY

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

STRELIA

SZECSKAY ATTORNEYS AT LAW

TSMP LAW CORPORATION

ȚUCA ZBÂRCEA & ASOCIAȚII

URÍA MENÉNDEZ

UTEEM CHAMBERS

WOLFF GSTOEHL BRUCKSCHWEIGER ADVOKATURBÜRO

WU & PARTNERS, ATTORNEYS-AT-LAW

YOUNG CONAWAY STARGATT & TAYLOR, LLP

# CONTENTS

# EDITOR'S PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 45 jurisdictions. In a world where commercial disputes frequently cross international boundaries, it is inevitable that clients and practitioners across the globe will need to look for guidance beyond their home jurisdictions. *The Dispute Resolution Review* offers the first helping hand in navigating what can sometimes, at first sight, be an unknown and confusing landscape, but which on closer inspection often deals with familiar problems and adopts similar solutions to the courts closer to home.

This eighth edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward looking and the contributors offer their views on the likely future developments in each jurisdiction.

Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments. For instance, over the past year the EU has adopted a new regulation on jurisdiction which fortifies the freedom of parties of any nationality to choose to litigate in their preferred forum and grants Member State courts discretion to stay proceedings in favour of proceedings already on foot in non-Member State courts. At the other end of the spectrum, 2015 saw the Supreme Court in the United Kingdom clarify the law on penalty clauses 101 years after the seminal House of Lords' case on this issue (see the review of *ParkingEye Ltd v. Beavis* and *Cavendish Square Holding BV v. El Makdessi* [2015] UKSC 67 at page 181). But even seemingly local decisions such as this have a broad audience and can have far-reaching consequences in global commerce. It is always a pleasure – and instructive for my own practice – to observe the different ways in which jurisdictions across the globe tackle common problems – sometimes through concerted action under an umbrella international organisation and sometimes individually by adopting very different, but often equally effective, local solutions.

Over the lifetime of this review the world has plunged into deep recession and seen green shoots of recovery emerge as some economies begin to prosper again, albeit

uncertainly. One notable development over the course of 2015 has been the sharp and sustained fall in the oil price (along with commodities more generally). This has had, and will continue to have, far-reaching economic and geo-political effects which may take some time to manifest themselves fully. As many practitioners will recognise from previous global shocks, these pressures typically manifest themselves in an increased number of disputes; whether that is joint venture partners choosing to fight over the diminishing pot of profits, customers seeking to exit what have become hugely expensive long-term contracts, struggling states renegotiating or exiting their contracts (or simply expropriating commercial assets) or insolvency-related disputes as once-rich parties struggle to meet their obligations. The current economic climate and short to medium term outlook suggests that dispute resolution lawyers operating in at least the energy and commodities sectors will continue to be busy and tasked with resolving challenging multi-jurisdictional disputes for years to come.

Finally, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at page 747 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

**Jonathan Cotton**
Slaughter and May
London
February 2016

# Chapter 28

# LUXEMBOURG

*Michel Molitor*[1]

## I INTRODUCTION TO THE 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 Union 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 267 of the Treaty on the Functioning of the European Union, 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 European Union law.

1 Michel Molitor is the managing partner at MOLITOR Avocats à la Cour.

### 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 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 can be 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 (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

From a legal point of view, Luxembourg has not experienced major jurisprudential developments this year. However, some well-known cases widely reported in the media are still ongoing.

In this regard, the Luxembourg-based investment company Leyne Strauss-Kahn & Partners (LSK) and its subsidiary, Assya Asset Management, were put respectively into bankruptcy and liquidation in late 2014. With a liability estimated at tens of millions of euros, these companies and their former directors, including notably the French former president of the International Monetary Fund Dominique Strauss-Kahn, are currently facing numerous claims. *Inter alia*, financial institutions, private investors, a

major insurance company, and the Direct Taxation Authority have introduced claims to recover large amounts of money. There is no doubt that these proceedings will continue to receive considerable attention pending the upcoming Luxembourg courts' decisions.

Similarly, the *Landsbanki Luxembourg* case opposing the eponymous bank to the victims of alleged sub-prime mortgage scams is still under way. Only the criminal claims filed in Luxembourg are over, since they have all been dismissed on the grounds that the damage suffered by the borrowers of the toxic loans was caused only by the prospecting activities carried out in France and Spain, where criminal proceedings for fraud are still pending against Landsbanki Luxembourg. As regards the civil claims in Luxembourg, no final binding decision has been rendered to date. Meanwhile, the liquidator of Landsbanki Luxembourg has again started procedures before the French courts for seizure of immoveable properties, since the French Court of Cassation overruled the suspension of the seizures ordered by the investigating judge Renaud van Ruymbeke in a decision dated 19 February 2015. The liquidator also introduced the same claims before the Luxembourg courts which, he felt, might have international jurisdiction over the matters at issue based on the criterion of the location of the borrowers' accounts.

As for legislative changes, the main reform related to litigation undertaken in 2015 is the introduction of the plea bargaining procedure into Luxembourg law that followed the enactment of the Law of 24 February 2015 modifying the Code of Criminal Procedure in order to introduce judgment upon consent. In brief, the 'judgment upon consent' procedure authorises the public prosecutor to reach an agreement with the person accused of criminal offences, provided that these are not subject to a sentence of more than five years of imprisonment. The agreement reached must contain recognition of guilt as well as the offences and sanctions agreed upon. Upon review of the legality and adequacy of the agreed-upon sentence, the criminal courts may, by way of a judgment, approve the agreement and confirm the conviction or declare it null and void.

## 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.

### 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.

### iv 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) and before the Court of Appeal, 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.

### v 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.

### vi 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 (EU) No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on the Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters, which came into force on 10 January 2015 and replaces Regulation No. 44/2001, 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.

### vii Assistance to foreign courts

*Assistance in evidence*

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 (again, 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.

### viii 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.

### ix 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.

### iii Data protection

Any operation or set of operations whereby personal data is, for example, collected, recorded, organised, stored, retrieved, consulted, used or disclosed by transmission, dissemination or otherwise being made available, including operations performed by lawyers in the normal course of business, are considered as processing of personal data and therefore fall within the scope of the Luxembourg Law on the Protection of Individuals with Regard to the Processing of Personal Data, 2 August 2002, as amended (the Data Protection Law).

The Data Protection Law would therefore apply to a legal practice if:

*a* the data controller is established on Luxembourg territory; or

*b* the data controller, although not established on Luxembourg territory or in any other Member State of the European Community, uses a means of processing located on Luxembourg territory, with the exception of processing used only for the purposes of transit, regardless of the method used to collect the user data.

In this respect, the data processing of information, which is defined as 'any information of any type regardless of the type of medium, including sound and image, relating to an identified or identifiable natural person' (data subject), must comply with the provisions set out under the Data Protection Law.

The collection of personal data must be performed in a fair and lawful manner in particular for specified, explicit and legitimate purposes and not further processed in a way that is incompatible with those purposes.[2]

As regards legal practice, personal data may be processed in particular if:

*a* it is necessary for compliance with a legal obligation to which the controller is subject; or

*b* it is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.

As a rule, any processing of personal data must be notified to the Data Protection Authority (CNPD) beforehand. Some cases are, however, exempted from this obligation, in particular processing operations carried out by lawyers, notaries and process-servers that are necessary to acknowledge, exercise or defend a legal right.[3]

As regards the access and analysis of data, such processing will need to comply with the provisions set out in the Data Protection Law, but will be exempted from the notification obligation to the CNPD, as mentioned above.

It is also standard, prior to establishing a client relationship, to:

*a* inform them about the collection of their data and that they have a right to access it and may ask for a correction if it is inaccurate or incomplete;[4] and

*b* request their consent via the lawyer's terms and conditions.

As a rule, the transfer of personal data is not restricted within the EU, provided that data subjects are duly informed of such transfer. However, the data controller may not transfer personal data outside the EU to a state that does not offer a sufficient level of protection of individuals' privacy, liberty and fundamental rights with regard to the actual or possible processing of their personal data.

By exception to the above, the data controller may transfer personal data to a non-safe country if the data subject has expressly consented to the transfer or if the transfer is necessary, for example, for:

2 Articles 4 and 5 of the Data Protection Law.

3 Article 12.2(c) of the Data Protection Law.

4 Articles 26 and 28 of the Data Protection Law.

*a* the meeting of obligations ensuring the establishment, exercise, or defence of legal claims;
*b* the performance of a contract between the data controller and the data subject, or of pre-contractual measures taken in response to the data subject's request; and
*c* the conclusion or performance of a contract, either concluded or to be concluded in the interests of the data subject between the data controller and a third party.

The data controller may also transfer personal data to a non-safe country if duly authorised by the CNPD.

In this respect, additional rules on confidentiality may also apply. For example, the Code of Conduct of the Council of Bars and Law Societies of Europe (CCBE) requires that lawyers pay particular attention to their communications with lawyers in another Member State to ensure the confidentiality of the data they intend to transfer.[5]

### iv Other areas of interest

In Luxembourg, until the end of 2011, the only option available for attorneys wishing to work together was to do so in partnership.

The Law of 16 December 2011 has provided the possibility for attorneys to practise through a company.

## 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 Luxembourg law relating to the profession of attorney and 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.

5 Article 5.3 of the CCBE Code of Conduct.

If relevant, a court may on its own motion or at one of the parties' request 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

### i 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 policy, 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,[6] 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 Centre at the Luxembourg Chamber of Commerce or, the International Court of Arbitration of Paris. For instance, the Arbitration Rules of the Arbitration Centre at the Luxembourg Chamber of Commerce provide for specific rules as regards notification of documents.[7]

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.

6 Article 1230 of the NCPC.

7 Pursuant to Article 6 of the Arbitration Rules.

The only possibility to challenge an arbitral award is to take an opposition procedure against the order of the President of the District Court 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.[8]

### ii 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 negotiate a solution.

Although mediation is not yet widely used as a method of dispute resolution in Luxembourg, things seem to be changing in this respect. Together with the Luxembourg Chamber of Commerce, the CMBL has this year organised civil and commercial mediation training. This kind of project shows the intention to develop mediation in Luxembourg.

### iii 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*.

8 Court of Appeal of Luxembourg, civil judgment No. 30480, 5 July 2006.

## VII OUTLOOK AND CONCLUSIONS

As already mentioned, the most noticeable feature of 2015 was the introduction of the plea bargaining procedure into the Luxembourg legal system.

As a general rule, dispute resolution in Luxembourg remains characterised by an increase of financial disputes resulting from the crisis. However, traditional commercial disputes have not been left behind and represent a significant part of the caseload of the Luxembourg courts.

The long-awaited reform of the commercial lease would also, if adopted, most likely entail a growth of litigation between tenants and lessees. The new bill presented to Parliament in September 2015 by the Minister of Economy contains several innovations. It is provided, among other things, that the tenant of a commercial lease may at any time ask, albeit under certain circumstances, to terminate the lease contract in the case of financial difficulties that would make him risk bankruptcy in the short term. The provision that, where a sub-tenant already exists, allows the lessor to enter into direct leasing arrangements with that sub-tenant to the exclusion of the original tenant, and benefit directly from any consequent financial advantages, can also be considered as potentially problematic. These new specific obligations provided by the bill might cause sticking points between lessors and lessees. This is why practitioners in Luxembourg expect this reform to create a whole new set of issues, which will require the judges to develop a settled and constant interpretation. The bill nonetheless still needs to be analysed by the committee and adopted by Parliament before being enacted and coming into force.

## Appendix 1

# ABOUT THE AUTHORS

**MICHEL MOLITOR**

*MOLITOR Avocats à la Cour*

Michel Molitor, Avocat à la Cour, is the managing partner of MOLITOR Avocats à la Cour and has been a member of the Luxembourg Bar since 1985. His practice areas include dispute resolution and litigation, banking and finance, and employment.

Michel has a law degree from the University of Strasbourg and a PhD in political sciences from the University of Vienna.

He is an active member of the International Bar Association (IBA), the Luxembourg Banking Lawyers Association (ALJB) and the Luxembourg Investment Fund Industry Association (ALFI).

Michel has been listed in *Chambers Europe* where he 'is commended for his expertise, efficiency, reliability and client-focused service'. *The Legal 500 2015* listed MOLITOR as a top-tier dispute resolution firm and identifies Michel as a leading individual in this practice area. He is further ranked as a top insurance lawyer in *Who's Who Legal*.

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

**MOLITOR AVOCATS À LA COUR**

8 rue Sainte-Zithe
PO Box 690
2016 Luxembourg
Luxembourg
Tel: +352 297 298 1
Fax: +352 297 299
michel.molitor@molitorlegal.lu
www.molitorlegal.lu