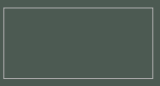
The Dispute Resolution Review

Sixth Edition

Editor
Jonathan Cotton

Law Business Research



The Dispute Resolution Review

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The Dispute Resolution Review

Sixth Edition

Editor
Jonathan Cotton

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

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EDITOR'S PREFACE

Building on the previous five editions under the editorship of my partner Richard Clark, I am delighted to have taken on the role of editor from him. *The Dispute Resolution Review* has grown to now cover 54 countries and territories. It is an excellent resource for those, both in-house and in private practice, whose working lives include involvement in disputes in jurisdictions around the world.

The Dispute Resolution Review was first published in 2009 at a time when the global financial crisis was in full swing. Against that background, a feature of some of the prefaces in previous editions has been the effects that the turbulent economic times were having on the world of dispute resolution. Although at the time of writing the worst of the recession that gripped many of the world's economies has passed, challenges and risks remain in many parts of the world.

The significance of recession for disputes lawyers around the world has been mixed. Tougher times tend to generate more and longer-running disputes as businesses scrap for every penny or cent. Business conduct that was entrenched is uncovered and gives rise to major disputes and governmental investigation. As a result of this, dispute resolution lawyers have been busy over the last few years and that seems to be continuing as we now head towards the seventh anniversary of the credit crunch that heralded the global financial crisis. Cases are finally reaching court or settlement in many jurisdictions that have their roots in that crisis or subsequent 'scandals' such as *LIBOR*.

The other effect of tougher times and increased disputes is, rightly, a renewed focus from clients and courts on the speed and cost of resolving those disputes, with the aim of doing things more quickly and for less, particularly in smaller cases. The Jackson Reforms in my home jurisdiction, the United Kingdom, are an example of a system seeking to bring greater rigour and discipline to the process of litigation, with a view to controlling costs. Whether such reforms here and in other countries have the desired effect will have to be assessed in future editions of this valuable publication.

Jonathan Cotton
Slaughter and May
London
February 2014

Chapter 33

LUXEMBOURG

Michel Molitor[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 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 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

Enforcement of financial collateral arrangements often gives rise to litigation.

Recently, the Luxembourg courts have rendered several decisions regarding the possibility of suspending or setting aside pledge enforcement.

In order to challenge inappropriate pledge enforcement, the pledgor is eligible to seek damages from the pledgee as compensation for the loss suffered. But the decisions rendered in this context refused the pledgor the possibility to have the enforcement declared null and void and recover the pledged assets. Therefore, the summary judges now tend to refuse to order conservatory measures aiming to suspend an ongoing pledge enforcement.

In July 2013, the Commercial District Court has, in a case involving Kaupthing Bank, judged that in the event of manifest fraud, the Court may order that unduly appropriated pledged assets must be returned to the pledgor.

Furthermore, several decisions have been delivered in the context of the *Madoff* case. Depending on the circumstances, Luxembourg courts have considered either that

the promoting bank has breached its duty to provide information or that the client was a sophisticated investor, meaning that he or she was able to assess the risk associated with its investment policy for himself.

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.

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) 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.

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 the 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.

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 (Articles 4 and 5 of the Data Protection Law).

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

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 (Articles 26 and 28 of the Data Protection Law); 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:

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.

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 (Article 5.3 of the CCBE Code of Conduct).

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.

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 (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 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 (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 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).

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. Especially, 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*.

VII OUTLOOK & CONCLUSIONS

At the end of 2012 and in the course of 2013, several applications were lodged against Landsbanki Luxembourg (in liquidation) and its former directors. The applicants claim to be victims of sub-prime mortgage scams. The trials arising from these legal actions and the judgments are awaited with great interest by the entire Luxembourg Financial Centre.

Appendix 1

ABOUT THE AUTHORS

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Michel Molitor is the managing partner of Molitor Avocats à la Cour, a leading independent business law firm in Luxembourg, and has been a member of the Luxembourg bar since 1985. His practice areas include dispute resolution & litigation, banking & finance, and employment.

Michel began his law career in banking after obtaining a law degree from the University of Strasbourg (France) and a PhD in political sciences from the University of Vienna (Austria).

He is a 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'. It further states: 'International and domestic clients, including banks and other financial institutions, are regular clients for contentious work.' The Legal 500 2013 listed Molitor as a top-tier dispute resolution firm and identifies Michel as a leading individual in this practice area. *Best Lawyers Luxembourg* has also ranked Michel for his expertise in litigation and corporate. He is further ranked as a top insurance lawyer in *Who's Who Legal*.

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

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