
# Litigation & Dispute Resolution

# 2020

## Ninth Edition

Contributing Editor:
**Ted Greeno**

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# Global Legal Insights
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2020, Ninth Edition
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Published by Global Legal Group

# GLOBAL LEGAL INSIGHTS – LITIGATION & DISPUTE RESOLUTION

## 2020, NINTH EDITION

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*We are extremely grateful for all contributions to this edition.*
*Special thanks are reserved for Ted Greeno of Quinn Emanuel Urquhart & Sullivan for all of his assistance.*

Published by Global Legal Group Ltd.
59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 207 367 0720 / URL: www.glgroup.co.uk



ISBN 978-1-83918-067-5
ISSN 2049-3126

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# PREFACE

Since the last edition of this book, the global business community has been forced to face the many new challenges that have been thrown up by the Coronavirus pandemic and the almost universal lockdown measures that have been taken in response to it. Courts all over the world have also had to adapt and change.

It might be said that the lockdown strategies pursued by governments would not have been sustainable but for the internet and the ability it affords us to work remotely. Certainly, courts around the world have adapted to this way of working, with procedural hearings and depositions, and even full-scale trials, being conducted exclusively on videoconference platforms. The use of video technology to take witness evidence is, of course, not new. It goes back 20 years or more. However, it was not embraced by commercial litigators because its lack of immediacy impaired the quality of the evidence and sometimes last-minute technical hitches could disrupt and delay trials. Over the last few months, however, the improved technology available and the need to make remote hearings work have shown that they are a reasonable, if not ideal, substitute for in-person attendance.

It remains to be seen how permanent the move to remote hearings becomes. I doubt that trials will be held remotely once all Coronavirus restrictions are lifted. Courts will revert to in-person hearings, but it is surely likely that videoconferencing technology will be used more than it was before the lockdown for procedural hearings and other hearings where no oral evidence is required, both in international litigation and arbitration. The saving of the time and cost of travel, as well as the environmental benefits, will be a significant incentive.

One factor that may play on the need for remote hearings is the potentially sharp increase in litigation that is likely to flow from the forthcoming lockdown-induced recession. A growing volume of cases will inevitably put pressure on the capacity of courts to cope with the increased demand. We are yet to know how serious a recession it will be, but the stress on contracts and cash flows that recessions bring always leads to an increase in commercial disputes. Litigation, even of a weak defence, is sometimes the least worst option for cash-strapped companies. Recessions also tend to expose long-running fraudulent schemes, as the money moved around to create an impression that nothing is missing ultimately runs out. As Warren Buffett famously said, albeit in a different context, it is only when the tide goes out that you discover who has been swimming naked.

In such times, a swift and efficient commercial court system is all the more essential to the economic health of a nation. This time round, disputes will be even more international in nature than in the last recession. Countries can therefore help themselves and each other by easing cooperation between them for the service of process, the taking of evidence, the enforcement of judgments or awards and the swift resolution of jurisdiction challenges.

To that end, this book aims to provide an insight into how such issues are managed by the court systems and procedures of jurisdictions around the world, with a particular focus on practical considerations. I hope it is a useful guide for all lawyers who advise businesses that trade internationally.

Finally, I am grateful to all the contributors from across the globe for the clarity and expertise of their contributions.

Ted Greeno
Quinn Emanuel Urquhart & Sullivan

# Luxembourg

Jackye Elombo
LEGALIS

## Court structure

The Grand Duchy of Luxembourg is composed of three main jurisdictional orders:

The **Constitutional Court** is the highest authority, which examines the constitutionality of laws excluding those that approve treaties. If, during a trial before a judicial or administrative jurisdiction, a party questions the constitutionality of a law, and if the issue of constitutionality is deemed vital to the solution of the dispute, the matter must be referred to the Constitutional Court for preliminary rulings.

**Administrative**, composed of the Administrative Tribunal (for the first instance) and the Administrative Court (for the appeal process), assigned to hear and adjudicate administrative and tax-related disputes.

The Administrative Tribunal controls the legality of administrative acts (regulative decisions) and decisions (individual). It rules in principle on applications for annulments of any administrative decisions opposing local government authorities and users, while it hears applications for rectification in cases expressly provided for by law. The Administrative Court is the Supreme administrative jurisdiction; the appeal body primarily hears cases brought against the decisions of other administrative jurisdictions and arbitrates disputes between the government and the Court of Auditors.

**Judicial**, composed of civil, commercial and criminal sections. The court of laws is divided into three instances:

- first instance courts: Justices of Peace (*Justice de Paix*); and District Courts (*Tribunal d'arrondissement*);
- the Courts of Appeal: District Court (*Tribunal d'arrondissement*) for decisions of Justices of Peace; and Court of Appeal (*Cour d'Appel*); and
- the Court of Cassation (*Cour de Cassation*).

**Justices of Peace** deal with small claims in civil and commercial matters, and with certain matters assigned by law (such as rental agreements and labour claims). For commercial matters, Judges of Peace only sit for smaller disputes, of which an object may not exceed the amount of EUR 10,000. They also have jurisdiction over summary procedure in the field of enforcement (e.g. attachments of earnings). In criminal matters, they act as a Police Tribunal (*Tribunal de police*) which has jurisdiction over small criminal matters.

**District Courts** have jurisdiction in civil and commercial matters for all cases not specifically attributed by law to any other court. There are no specific courts for commercial matters. Commercial disputes are usually brought before special chambers of the District Court, usually called the "commercial court".

In criminal cases, District Courts act as a correctional chamber,[1] or as a criminal chamber dealing with acts defined by law as crimes punishable by life or fixed-term custodial sentences, or by imprisonment of more than five years.

Finally, District Courts act as Family Courts having jurisdiction over divorce and child and youth protection cases, as determined by law.[2]

**Courts of Appeal** act as second instance courts and have general jurisdiction over decisions handed down by the District Courts. They re-examine cases already judged in a court of first instance, in civil, commercial, criminal and family matters, and also have jurisdiction over cases decided by labour tribunals.

The **Court of Cassation** has jurisdiction over Court of Appeal rulings as well as judgments rendered as last resort by the District Courts. An appeal to the Court of Cassation does not constitute a third path of appeal. The Court of Cassation does not rule on the merits but checks the exact application of the law by Courts of Appeal, District Courts and lower tribunals.

The Court of Appeal, the Court of Cassation and the Public Prosecutor's Office form together to act as the Superior Court of Justice.

Besides these ordinary law courts, Luxembourg has set up some **specialised jurisdictions**, such as:

**Social courts** composed by the Council of Arbitration for social security (*Conseil arbitral de la sécurité sociale*), which has jurisdiction throughout the country in social security matters, and the Higher Council for social security (*Conseil supérieur de la sécurité sociale*), which deals with appeals lodged against the ruling of the first.

**Rent Commission** (C*ommission des loyers*), a quasi-legal authority which governs disputes concerning issues with rent. It is considered a conciliation body, so it must be consulted before bringing a case to court.

### Procedure and representation

The New Code of Civil Procedure (*Nouveau Code de Procédure Civile*, or "**NCPC**") encompasses most of the rules that apply to the proceedings before the courts, in particular for civil and commercial matters. When dealing with commercial matters, commercial courts apply specific rules of procedure provided by the NCPC and the Commercial Code.[3] In criminal matters, the Code of Criminal Procedure (*Code de Procedure Pénale*, or "**CPP**") applies. Although the set of rules governing the organisation and functioning of the State and its authorities (collections of divergent texts) was codified in 2016, two laws, regulating non-contentious administrative procedure and laying down the rules of procedure before the administrative courts, encompass the procedural rules in administrative matters.[4] Administrative courts, in comparison to judicial courts, largely apply the rule of precedent.

For **proceedings before the lower court**, Justice of the Peace, commercial proceedings, social proceedings, and generally for non-contentious remedies, the **assistance of a lawyer is not mandatory**. The form of the application is quite simple and mostly accessible to the public. The procedure is oral[5] and the parties may appear in person, or be represented by a lawyer. It is recommended to use a lawyer when the claim is challenged or when the merits of the case are complex.

**Civil proceedings** are formalistic and the procedure is all written. Before the District Court dealing with civil matters and the Court of Appeal, the parties must be represented by a lawyer, namely by an *Avocat à la Cour*. During the first stages of a civil proceeding,

there is usually an application form stating the claims of the claimant, which must be served on the defendant. This document is served by a bailiff or a clerk from the court, depending on whether the document is a writ of summons or a summons.[6]

The lawyer representing the defendant shall notify his appearance in court (*constitution d'avocat*) within 15 days from the date on which the writ of summons was served. This period can be extended if the defendant resides abroad (article 167 NCPC). The written procedure implies a written instruction phase in the trial. During this phase, a supervising judge is appointed to conduct the proceedings.

The supervising judge determines the time limits necessary for the parties to exchange submissions and supporting evidence, based on the nature, urgency and complexity of the case (generally but not necessarily on a monthly basis). Then, upon the parties' request or *ex officio*, the supervising judge orders the closure of the written instruction of the trial and sets a date for the pleadings. It is worth mentioning that, if a lawyer does not comply with the instructions of the supervising judge, injunctions may be delivered or the hearing may be held without further delay. The length of a civil proceeding is usually between 12 to 30 months.

**Commercial proceedings**: Before the District Court dealing with commercial matters, the commercial procedure is usually held orally but the parties can choose to apply rules on civil proceedings:

- during **oral proceedings**, the parties will exchange their justification and supporting documents before the pleadings, the arguments will be pleaded before the court, and a ruling will be rendered after the pleadings based on the court's agenda; or
- if the parties choose to apply rules on **civil proceedings**, depending on the complexity of the case, they will need to be represented by an *Avocat à la Cour*. A supervising judge will determine the time limits for the parties to exchange submissions and set a date for the pleadings (article 204 NCPC).

It is difficult to assess the average timing of proceedings as it depends on the number of parties involved, the complexity of the case, and whether proceedings are at the court of first instance or on appeal.

The duration would ordinarily be around a maximum of six to 18 months for the first instance, and around 12 months to two years for the appeal proceedings. When the parties choose oral proceedings in case of a commercial matter, the first instance is usually faster and takes between six and 12 months.

Before administrative courts, the proceeding is quite straightforward and the decision of the first instance shall, in principle, be handed down within seven months of the filing of the application initiating the proceedings.

### Efficiency and integrity of process

Luxembourg judiciary does not know the "**rule of the precedent**" applied in the common law systems. Judges are not generally bound by judicial decisions pronounced in other cases, even when quite comparable.

The courts are obliged to implement statutory law, and judges are considered to be "interpreters of law", restricted to implementing the solutions provided for by enacted law. They have a general power to ensure that the proceedings are performed in accordance with the law. Judges are also entitled to make any order that could be required for the instruction of the case. Judges have the power to reconcile the parties where possible.

It is forbidden for judges to rule by general disposition. Court decisions must therefore always be motivated and limited to the specific case on which a court is ruling. On the other hand, when laws or contracts are subject to interpretation, the power of a judge is undeniably more important because it is possible for him to interpret it.

Despite this, **courts often take guidance from previous decisions** of other courts and the lower courts tend to follow decisions of higher courts. The production or use of case law in comparable cases therefore has an undeniable impact on rulings issued by judges.

Over the last decades, a judge is increasingly required to act as a referent, and his role has also been considerably reinforced, because of and by establishing a series of general standards for today's legal landscape. Luxembourg law, which continues to evolve with an array of wider and more intricate challenges, such as cross-border transactions, new information and emerging communication technologies, also allows for broader discretion on the part of the judge.

In this context and since 2018, among the major changes envisaged is a reform of the judicial system, including the "**Paperless Justice**" project.

This project, which is initially a five-year project, aims at establishing digital justice, similar to that in neighbouring countries (e.g. France and Belgium). Despite the progress achieved with digitalisation of administrative procedures as well as the digital availability of case law and digital access to investigation files in criminal matters, the project is currently behind schedule.

The COVID-19 pandemic has accelerated the development of digital communication with judicial institutions. Courts, in cooperation with the Bar Association, have developed the process of electronic communications and facilitated exchanges between lawyers and the courts.

According to communications from the Bar, it is planned to extend and expand the process to the filing of documents, pleadings and exhibits, in order to allow cases to be pleaded exclusively at a distance. It is anticipated that there will be separate rules for written proceedings (where lawyers appear alone for oral argument) and oral proceedings (where parties may plead in person). To date, there has been a significant advance in the recent COVID-19 laws passed on 22 June 2020.[7] The COVID-19 law includes the very controversial provision allowing forced hospitalisation of infected people who refuse to isolate, ordered by the President of the District Court upon applications (including in appeal) that may be filed by email.

### Privilege and disclosure

Under Luxembourg law, there is no disclosure procedure as such. In compliance with the **adversarial principle**, a party is obliged to disclose, in due time during the proceedings, the documents on which it wishes to rely and which therefore support and evidence its case. This communication will enable the parties to prepare their defence and legal arguments.

The disclosure must be submitted to all parties as well as to the judge and it should occur in a timely manner, meaning at least five days before the court hearing for oral proceedings and as soon as possible in case of written proceedings, but in any case before the closure of the written instruction of the case ordered by the supervising judge. If a justifying document is submitted after this deadline, such evidence may be excluded from the debates. Indeed, the judge will not take into account any document or evidence not submitted to the consideration of both parties. Following this adversarial principle, courts must ensure that the documents and evidence have been exchanged.

Any party may apply to the court for an order that additional documents may be disclosed. Such an order will only be granted if the document sought proves to be in the possession of the party – or even a third party – and if it is necessary to determine the case.

Depending on whether it is a commercial case or a civil case and whether it is a legal fact or a legal act, the proof will consist of a witness statement or a written document. The judge is empowered to make disclosure orders *ex officio* or upon request of one of the parties. Thus, the judge makes sure the adversarial principle is well applied and may order one of the parties to disclose a document, or a third party to disclose the required documents. Third parties also have a duty to comply with the court's order by disclosing documents in due time.

However, a **right to legal privilege** is expressly recognised in

- the Criminal Code (article 458 – professional secrecy);
- special laws;[8] and
- professional regulations (e.g. the Luxembourg Bar Association Regulation, as amended, and the Luxembourg Chartered Accountant Regulation, as amended).

Restrictions on the use of documents by disclosure are governed by the principle of professional secrecy, such right being implicitly acknowledged in the NCPC, or the defence rights (the EU Charter of Fundamental Rights principles, on which the Luxembourg jurisdiction relies, apply the parties' rights of defence and impose as such a general right to legal privilege).

However, in the context of anti-money laundering, the disclosure in good faith of any relevant information to the Luxembourg competent authorities does not constitute a breach of the duty to maintain professional secrecy and does not result in liability of any kind for the lawyer making the disclosure.

**Communication** between lawyers is privileged and its contents may not be divulged to the courts unless the correspondence is specifically marked to be official; otherwise, all correspondence between lawyers and their clients and all correspondence between lawyers is considered to be confidential by nature.

The protection extends to every type of communication between lawyers and their clients (letters, email, telephone conversations, tapes, photographs, electronic documents, etc.). The duty to maintain confidentiality extends to any information that the lawyer has obtained as a result of his being instructed on a matter, from the client or third party, whether the information concerns the client and/or a third party. Communication between Luxembourg lawyers and foreign lawyers is only privileged if specially marked as such.

There is no difference between civil and criminal matters, save that a lawyer may communicate freely with his client if the latter is in jail, without any possibility for the judicial authorities to listen in or to open the correspondence between the lawyer and his client. All documents communicated during the proceedings without prejudice are consequently covered by confidentiality.

If the documents are stored outside Luxembourg, mechanisms of evidence can be used by courts based on Council Regulation (EC) n° 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.

Some **documents** are **confidential by nature**, such as correspondence between the client and his doctor or bank. The client is entitled to waive the confidentiality covering the document and whether to disclose it. Based on such waiver, a lawyer is then entitled to disclose these documents with the consent of the client.

Regarding **conflicts of interest**, a lawyer cannot assist or represent parties with conflicting interests. Guidelines and recommendations in relation to conflicts of interest are provided

by the Luxembourg Bar Association. A lawyer shall refuse multiple mandates if there is a real risk of conflict at a later stage or if the lawyer has advised several parties at a preliminary stage.

The legal privilege does not extend to **in-house counsel**, since in Luxembourg a lawyer registered with the Luxembourg Bar Association shall work independently and is not permitted to work as an employee for a company. Being registered at the Luxembourg Bar Association, lawyers are covered by legal privileges.

However, in-house lawyers working within the financial or insurance sector are bound by a confidentiality duty regarding information obtained in the course of their professional activities. This privilege, however, aims at protecting clients. Lawyers working within the *Commission de Surveillance du Secteur Financier* are also under a duty of confidentiality.

## Costs and funding

In Luxembourg, each party should bear its own legal expenses, unless the court charges the other party to bear these costs at the end of the proceedings. Court fees are borne, most of the time, by the unsuccessful party further to the ruling.

Luxembourg judiciary provides for two kinds of costs:

The **proceedings' expenses** (*frais et dépens de l'instance*) (article 238 NCPC), which are the fees resulting from preliminary investigations, bailiff fees, clerk fees, expert fees and the costs and expenses pursuant to the *Règlement grand-ducal du 21 mars 1974 concernant les droits et émoluments alloués aux avoués*, as amended (costs for office supplies). These expenses do not include lawyers' fees.

The **compensation for proceedings** (*indemnité de procédure*) are covered by article 240 NCPC. Compensation includes, essentially, part of the lawyers' fees, excluding all the expenses of proceedings. They must be requested during the proceedings by the parties. The judge will allocate compensation for proceedings if a party proves that it is unfair to bear them. Courts do not necessarily allocate compensation for proceedings to one or another party if the party fails to prove unfairness. However, courts usually allocate compensation for proceedings on the defeated party, between EUR 250 and EUR 2,000.

Lawyers' fees are freely determined and agreed with the client. Fees are usually charged at an hourly rate, or may be task-based. An agreement on a flat fee is also possible. Regarding the rules of the Luxembourg Bar Association, success fees are prohibited if they entirely depend on the outcome of a case.

Similarly, the Code of Conduct for lawyers in the European Union prohibits agreements by virtue of which the client undertakes to pay the lawyer a share of the result, regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter. An agreement fixing one part of the fees referring to the service rendered, and another part by reference to the outcome of the case, is permitted.

Finally, individuals with low income may be granted judicial assistance (*assistance judiciaire*) by the State covering the main expenses of the proceedings. Various associations also finance the legal costs of court proceedings of their members. It is also possible to subscribe for a private insurance contract covering legal costs such as lawyer fees, bailiff fees or legal expenses (*protection juridique*).

Albeit not prohibited, Luxembourg does not have local companies specialised in litigation funding.

### Interim relief

**Ordinary courts** (including lower ones), dealing as Summary Judge (*Juge des référés*) may pronounce several interim measures[9] to prevent a prejudice, to preserve establishment of evidence, and/or to preserve the rights of the requesting party. Administrative courts may also be sitting as Summary Judge. Though criminal courts do not deal as such with summary proceedings, they may sit in chambers (*Chambre du Conseil*) as investigating courts and have jurisdiction on requests for interim relief.[10]

Depending on the legal matter, **provisional and precautionary measures** may be sought before the action on the merits is brought, in conjunction with it or after it has been brought. Courts dealing in summary proceedings can also restrict the period of validity of an interim measure or limit its effect to specific assets or acts.

In principle, the **requisites** for obtaining interim measures are:

- based on specific grounds and specific legal basis;
- the claiming party can provide evidence reasonably with a sufficient degree of certainty that there is either a genuine need or urgency, or a risk of further deterioration of the situation; and
- taking into account the specific circumstances of the case, the claimant's rights must be observed, cannot be seriously disputed, and must appear to be due.

Summary proceedings may be launched through a petition or writ of summons stating the claims of the claimant, which must be served on the defendant by a bailiff or the court's secretary.

Interim relief is principally granted if the claim is **not seriously disputed or challengeable** (e.g. request for payment), but also sometimes because the right is challenged (e.g. interim administrator in shareholder disputes or judicial expertise for alleged construction defects and shortcomings).

In cases of extreme urgency, interim measures (e.g. bank account attachment, authorisation for reducing time limits for procedures) may be granted on an *ex parte* basis, based on the evidence and on the information contained in the application, as a first step to a procedure that is subjected to the adversarial principle in a second step.

***Ex parte* orders** are granted if the request is not seriously disputed and is confirmed only after a debate has taken place during a court hearing.

Luxembourg law recognises several kinds of interim injunctions, from the order for payment to prohibitory injunctions (cease and desist or demolition orders), and including the placement under receivership.

A summary proceedings order **does not have the authority of *res judicata*** (*autorité de la chose jugée*) on the merits of the case. In case of proceedings on the merits, the judge handling the case is therefore not bound by the order. The order is, however, not without effect. It is temporarily fully enforceable, and can be immediately enforced, despite the suspensive effect ordinarily attached to the appeal, which is available in front of the Court of Appeal.

### Enforcement of judgments

**Domestic rulings** become enforceable after having been served upon the unsuccessful party by the opposing party and can be enforced only when having the authority of *res judicata*, namely when no further remedies are available.

The enforcement of a **foreign decision** differs according to the State of origin of the judgment. Decisions rendered in the EU, or subject to an international treaty, are generally recognised from one country to another and the conditions for enforcement are significantly simplified.

**For EU judgments**, the main legal instrument is Regulation n° 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Brussels Ibis Regulation**").[11] The Brussels Ibis Regulation provides that, for decisions rendered from 10 January 2015 onwards, based on the principle of international cooperation, a judgment given in a EU Member State which is enforceable in that State shall be enforced in another Member State **without any declaration of enforceability being required**. It provides for two forms, namely: the certificate concerning a judgment; and the certificate concerning an authentic instrument/court settlement.

For **third-country decisions** (which do not originate from an EU country and are not subject to an international treaty), the **ordinary *exequatur* proceeding** applies, meaning that the defendant must first be properly summoned before the District Court dealing with the *exequatur*. However, the court will not rule on the case, but is confined to verifying whether:

- the decision is enforceable in the country of origin;
- the original judge had jurisdiction to make a decision according to Luxembourg international private law;
- the original judge had jurisdiction to make a decision according to its own procedural law;
- the foreign court has applied the law as designated by Luxembourg's conflicts of law;
- the foreign procedure rules have been respected; and
- the decision does not contravene any Luxembourg public policy rules.

With respect to **judgments rendered** in a jurisdiction **outside the EU** with which Luxembourg has concluded a **bilateral or multilateral treaty** for the reciprocal recognition and enforcement of foreign judgments, article 679 NCPC lists, non-exhaustively, several conventions, such as the convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed in Lugano on 30 October 2007 and published in the Official Journal on 21 December 2007 (the "**Lugano Convention**").

The judge verifies whether the conditions imposed by the treaty are respected. The procedure is also *ex parte*, meaning that the defendant will only intervene if he lodges an appeal against the *exequatur* order.

Other regulations abolished the enforcement procedure, such as Regulation (EC) n° 805/2004 of the European Parliament and of the Council of 21 April 2004, creating a European enforcement order for uncontested claims. The EU Member State of origin certifies its judgment as a European enforcement order which will then be enforced in Luxembourg as if it originated from a Luxembourg court.

### National and international arbitration

**Domestic arbitration** is governed by articles 1224 to 1251 NCPC. In addition, Luxembourg ratified several international agreements governing arbitration.[12]

Pursuant to the NCPC, parties are permitted to enter into an arbitration agreement relating to rights that they are free to dispose of. In any case, the parties shall agree to submit their dispute to arbitration proceedings.

A large number of matters can be subject to arbitration. However, **some disputes may not be subject to arbitration**, in particular those concerning the status and legal capacity of persons, marital relations, requests for divorce, separation and disputes concerning persons who are missing or presumed missing, and employment matters.

The parties can use arbitration without submitting the proceedings to the rules of an institution and will therefore have to use deadlines and forms required before ordinary

courts. Alternatively, the parties can agree to submit their dispute to the rules of an institutional arbitration, such as the rules of the International Chamber of Commerce or the Arbitration Centre of the Luxembourg Chamber of Commerce, which has put its secretariat at the service of parties interested in submitting their dispute to arbitration.

In the event that the parties disagree on the appointment of the arbitrators, the NCPC sets forth a default procedure. The dispute shall be settled by three arbitrators. Each party appoints its own arbitrator and informs the other party thereof. If a party fails to appoint its arbitrator, that party shall be required to do so within eight days following the receipt of the registered letter from the other party.

After this period, in case the party did not appoint its arbitrator, the President of the Luxembourg District Court shall order the appointment of an arbitrator. There is no appeal available against such appointment. The two appointed arbitrators shall then elect the third arbitrator. Again, if they fail to do so, each party has the right to request the President of the District Court to proceed with the appointment with both parties present or duly summoned.

Regarding **interim measures** during arbitration proceedings, arbitrators can order interim measures if the parties have agreed that interim measures are covered by the arbitration clause or the arbitration agreement. The intervention of the national courts during an arbitration is exceptional but it may occur for interim remedies. In addition, if a document submitted to the arbitrators is challenged by another party as being a forged document, or if a criminal offence is raised in the course of arbitration, the arbitrators shall suspend the arbitration until those issues are ruled on by the Luxembourg courts (article 1236 NCPC).

**Arbitration awards are binding** on the parties and the award is final. According to case law, the nationality of arbitration depends on the award. An arbitration award is deemed to be domestic if the award is issued in Luxembourg. The main consequence of the nationality of arbitration is the enforcement proceedings.

Domestic awards are enforced by an enforcement order granted by the President of the District Court and cannot be appealed before the Luxembourg courts, although they can be declared void by the Luxembourg District Court in limited cases (such as invalidity of the arbitration clause, violation of the rights of the defence, etc.). This action is introduced by means of the objection procedure filed against the enforcement order rendered by the President of the District Court.

With respect to the enforcement of foreign arbitral awards, in 1983, Luxembourg ratified the New York Convention on the recognition and enforcement of foreign awards. According to article 1250 NCPC, foreign awards are enforced in Luxembourg by an *exequatur* order granted by the President of the District Court, knowing that the *exequatur* procedure provided under article 1250 NCPC is identical to the simplified *exequatur* procedure of a foreign judgment.

The opposite party may appeal the order issued by the President of the District Court before the Court of Appeal, within one month after the notice of the order if he resides in Luxembourg, or within two months if he resides outside Luxembourg.

However, the Court shall limit its review of the award on the grounds set forth in article V of the New York Convention and has no authority to review the merits of a foreign arbitral award.

Luxembourg arbitration is generally quicker than litigation before the courts as a means of dispute resolution. The confidentiality of arbitration proceedings is one of the main advantages of resolving disputes.

## Mediation and alternative dispute resolution ("ADR")

In Luxembourg, dispute resolutions may be sought through either public or private means.

Since ordinary courts have jurisdiction over disputes between individuals and/or legal entities, rulings are issued under the judicial system procedures, which also determines their enforcement conditions. Parties are free to have **recourse to ADR**, which is **not a compulsory preliminary to legal proceedings**. However, the parties may be obliged to have recourse to ADR, depending on the provisions of the agreement or contract which defines the legal relationship between them. Besides, parties may settle a dispute resolution by contracting a private agreement, which will specify and lay down the different aspects of the resolution.

This agreement will be governed by the general contract laws (Civil Code) and is broadly referred to as a "**settlement**".

In terms of content, the agreement should identify the parties, cover the merits and position of the parties (e.g. relationship between the parties, dates and periods, termination of the contract and execution processes, etc.), as well as the financial claims (i.e. outstanding, alleged and/or challenged claims, etc.), compensation granted or agreed (legal and/or contractual), and waivers and/or withdrawals and any mutual concessions granted by the parties. The contract may also include post-contract covenants. **The assistance of a lawyer is not mandatory** but highly recommended for the sake of confidentiality, since the negotiations and discussions will then be privileged and without prejudice. These out-of-court agreements can happen during the course of a trial.

In Luxembourg, **settlement agreements have the authority of *res judicata***. The enforcement of a settlement is governed by the parties to the agreement, private and legal persons to whom the agreement is binding. Any infringement to the settlement may be referred to a judge within the judiciary system's procedures for its enforcement.

ADRs, such as arbitration, are applicable to civil and commercial disputes.

**In criminal matters**, a law of 24 February 2015 amending the CCP introduced the plea bargaining procedure called "**judgment upon consent**" (*jugement sur accord*). This procedure allows the shortening of the duration of criminal proceedings by giving both the Public Prosecution and the prosecuted person the opportunity to propose to the other party an agreement at any stage of the proceedings, for criminal offences that are, on the basis of extenuating circumstances, subject to a fine of less than five years' imprisonment, as long as a criminal chamber of the District Court has not ruled on the public proceedings.

The agreement must contain a summary of the proceedings, a statement of the facts on which they are based, the criminal charges, any extenuating circumstances, the proposed penalty(ies) and the decision on restitutions and costs, as well as any claims for compensation. It shall be sent to the other party by a registered letter with acknowledgment of receipt. The **assistance of a lawyer is mandatory** throughout the agreement procedure and the file can be communicated.

The proposed agreement may be refused at the discretion of both the prosecuted person and the State Prosecutor. It shall lapse in the event of a complete refusal, sent by registered letter with acknowledgment of receipt, or at the end of a period of one month following its receipt, in which case all the relevant documents shall be destroyed.

If the agreement is signed, the State Prosecutor shall summon the person prosecuted to the correctional chamber of the District Court for a decision on the agreement. The President of the Chamber shall question the prosecuted party on the facts that he admits to have committed. The lawyer, the prosecuted person and the State Prosecutor are also heard.

After having reviewed the legality and adequacy of the sentences, the District Court rules on the guilt of the prosecuted person and sentences him to the sentences set out in the agreement by a reasoned judgment. If, in particular, it considers that guilt has not been established or that the penalties are not adequate, the agreement is null and void. The ordinary remedies are applicable. The judgment upon consent ends the public proceedings against the person prosecuted in respect of the facts referred to in the agreement, but does not affect the civil proceedings brought by a person whose claims have not been settled by the agreement.

Alongside the ordinary courts, where the judge's first role is that of conciliation, **individual conciliation services** also exist, such as the Standing Committee on Labour and Employment ("**CPTE**") at the level of the Inspectorate of Labour and Mines ("**ITM**"). Additionally, the ITM has an informal mediation role.

The law of 24 February 2012 on the introduction of **mediation in civil and commercial matters** (the "**Law of 2012**")[13] also offers the possibility of open mediation in the area of civil and commercial law. The Law of 2012 excludes from its scope inalienable rights and liabilities, public policy provisions and acts and omissions for which the State is liable in the course of the exercise of public authority.

The parties sign a mediation convention at the beginning of the process in which they undertake to settle the conflict using the mediation proceedings. The parties appoint a mediator by common consent. However, the mediator does not have the power to make a binding decision on the parties. The main mission of the mediator is to create a dialogue between the parties and help them resolve their dispute. If an agreement is reached during the mediation process, it must be ratified by the judge in order to be enforceable. The mediation process is confidential.

Regarding the mediator's costs, they vary significantly. The Civil and Commercial Mediation Centre of the Luxembourg Bar (*Centre de Médiation Civile et Commerciale*, or "**CMCC**"), one of the main mediation bodies, was set up on 13 March 2003. The CMCC deals with civil, commercial and social matters.

Mediators are chosen from a list approved by the CMCC regarding the nature of the dispute. The importance of mediation in civil and commercial proceedings has been proven since its introduction in the Luxembourg legal system.

In addition, the law of 22 August 2003 has created the possibility to call an ombudsman regarding claims against public administrations. In that case, the ombudsman analyses the claim against the public administration and decides whether the claim is grounded. The **ombudsman** issues a recommendation to the concerned public administration. The recommendation may be published if the public administration does not follow the recommendation.

It is worth stressing that:

- conciliation decisions will not be legally binding, and if they are not executed, the parties will have to submit the case to court;
- mediation agreements lack legal force. If such agreements are not executed by one of the parties, the other party must take the matter to court; and
- when the parties have opted for arbitration, in principle the dispute cannot be taken to court, i.e. the arbitration sentence is binding and enforceable.

Courts may invite the parties to use ADR. The judge may attempt to reconcile the parties. As long as no final court decision has been handed down, any party may propose the approach to the other one. However, in principle, agreement from both parties is always required.

**Endnotes**

1. They deal with offences punishable by imprisonment from eight days to a maximum of five years, or by a fine exceeding EUR 251.
2. Law of 27 June 2018 establishing the Family Court, reforming divorce and parental authority.
3. Articles 547 *et seq*. NCPC and articles 642 *et seq*. Commercial Code.
4. Law of 1 December 1978 regulating non-contentious administrative procedures and its implementing regulations of 8 June 1979 on the procedure to be followed by State and municipal administrations, commonly known as "PANC", and the Law of 21 June 1999 laying down the rules of procedure before the administrative courts.
5. Oral proceedings do not require the parties to be represented by a lawyer registered on List 1 of the Luxembourg Bar Association (*Avocat à la Cour*); they may be represented by any lawyer, or by one of the persons referred to in the NCPC holding a special proxy. The parties are also entitled to defend themselves if they choose to do so.
6. Articles 153 and 154 NCPC.
7. Law of 22 June 2020 (COVID-19 law) introducing a series of measures concerning individuals as part of the fight against the COVID-19 pandemic.
8. E.g. the Law of 8 August 1991 on the legal profession, as amended (article 35), the Law of 5 April 1993 on the financial sector, as amended (article 44), the Law of 23 December 1998 creating the financial sector supervisory commission (*Commission de Surveillance du Secteur Financier* – article 16), the Law of 20 December 2002 relating to undertakings for collective investments, as amended (article 98), the Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended, the Law of 7 December 2015 on the insurance sector, as amended (article 7), the internal regulation of 9 January 2013 of the Luxembourg Bar (*Règlement intérieur de l'Ordre des Avocats du Barreau de Luxembourg*) (the "**2013 Regulation**"), and the internal regulation of 22 April 2005 of the Diekirch Bar (the "**2005 Regulation**").
9. According to article 932 NCPC (*référé urgence*), in urgent cases, or if the interim measure precludes no serious dispute, the Summary Court can order all measures necessary to avoid imminent danger or to stop disturbances that are manifestly illicit, including an injunction to pay. Urgency is an implied condition of imminent danger. The Summary Court will make its decision after having heard the parties during a hearing.
   Articles 933 *et seq*. NCPC (*référé voie de fait*) provide for a preservation order. To prevent unlawful nuisance or any imminent damage, the Summary Court can order protective measures, if they are not seriously challenged by the opposite party. The claimant must prove imminent danger of damage (*voie de fait*) of the defendant.
   According to article 350 NCPC (*référé dit préventif ou probatoire*), a measure of inquiry could be rendered by the court. Before any lawsuit, if there is a legitimate reason to retain or establish proof of facts on which the case depends, the Summary Court can order any legally permissible measures of inquiry.
   According to articles 919 *et seq.* NCPC (*provision sur requête*), if the defendant (the debtor) lives in Luxembourg, the claimant (the creditor) can ask for a court order instructing the debtor to pay the debt if the debtor's obligation is not seriously subject to dispute, which must be proven by the claimant beyond a reasonable doubt. If the creditor supplies the documents needed to justify his claim, the Summary Court will take this order. Such order will be made without an adversarial hearing.
   According to article 938 NCPC, in urgent matters, the Summary Court can order that the enforcement of the order will be possible based on the first authentic copy

of the order bearing the executory formula. According to the case law, however, the Summary Court has no jurisdiction to order the execution of a duty of affirmative action (*obligation de faire*).

10. E.g. requests for provisional release during pre-trial detention, applications for the release of a temporary driving prohibition, and requests for the release/return of seized objects, funds and documents.
11. The Brussels Ibis Regulation replaces Regulation n° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Brussels I Regulation**"), which continues to apply to proceedings instituted before the Brussels Ibis Regulation came into application on 10 January 2015.
12. Among them are: the European Convention on International Commercial Arbitration, signed in Geneva on 21 April 1961; the Arrangement regarding the European Convention on International Commercial Arbitration, ratified in Paris on 17 December 1982; the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958; and the Convention on Conciliation and Arbitration within the OSCE, ratified in Stockholm on 15 December 1992.
13. The Law of 2012 implements Directive 2008/52/CE on mediation in civil and commercial matters in Luxembourg. These provisions are introduced into the NCPC under a new section (articles 1251-1 to 1251-24 NCPC).

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Jackye, LEGALIS Dispute Resolution Partner, is an award-winning social and legal litigator, ranked amongst Luxembourg's top 500 legal experts. Over the past 15 years, she has distinguished herself by helping clients rethink their dispute cases and providing responsive, cost-effective and efficient solutions, allowing them to implement the right measures and avoid disruptive, large-scale litigation. Jackye also has broad commercial litigation experience (including shareholder disputes, breach of contracts and non-compete disputes) and acts as legal advisor in a number of ongoing, high-value restructuring cases, in particular on employment issues. Her ability to anticipate risks and prioritise relevant issues and problems logically has greatly contributed to her success and reputation. She brings to LEGALIS her precious know-how and unique capabilities in resolving complex and sensitive litigation challenges.

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