[LITIGATION ADR QUESTIONNAIRE –LUXEMBOURG]

CIVIL LITIGATION

1. **In what language(s) may court proceedings be conducted? What arrangements can be made for translation/interpreter services?**

Oral court proceedings may be conducted in French, German or Luxembourgish, which are the three official languages in the Grand Duchy of Luxembourg. However, French is the language used in the written court proceedings.

The documents submitted to the court have to be drafted in French or German or, if they are in another language, they have to be translated to French. As English is the language of business, most of the time, the courts accept the documents in English without a translation.

Although Luxembourg courts sometimes admit free translation (e.g. by the lawyer), the translators will be rather chosen among the sworn translators. A coordinated list of the sworn translators is kept by the Ministry of Justice.

If interpreter services are required, the interested party will have to arrange for it.

2. **What types of pre-action measures are available and what are their limitations? Must you send a warning letter before issuing any proceedings?**

Under Luxembourg law there is in general no particular formality to comply with before initiating proceedings (unless a provision of the law provides a specific pre-action procedure to be complied with in a specific area of law –e.g. labour law). However, in practice, a formal notice is usually sent.

In Luxembourg law there are a variety of forms of interim measures to preserve the rights of the parties pending the conclusion of a court action to finally settle their claims.

A distinction is made between:

- measures ordered by the court without an adversarial hearing. In such cases the court receives a unilateral application from one of the parties for an interim order and gives its decision on the basis of the information provided by that party; and
- measures ordered by the court following an adversarial hearing. In such cases the court gives its decision only after there has been a public hearing (or sometimes a hearing in chambers) at which the parties can make their views known. The hearing is convened on the basis of a writ of summons (served by a bailiff) or by the registrar, depending on the procedure required by the law.

The court can usually adopt interim measures only if there is a real need or urgency, as assessed by the court. There are very few interim measures that can be applied for without specified grounds (e.g. applications for premises to be sealed after a death).

Where a creditor applies for authorisation to seize assets, the court must check whether the claim looks potentially valid on the basis of the documents and explanations given to it.

Examples of interim measures:

- Attachment of the debtor's movable property or money assets;
- Seizure of goods subject to challenge, the condition of which must be preserved until a final judgment has been given;
- Charges on immovable property (mortgage), business goodwill and securities. There are requirements as to publicity;
- Designation of a receiver responsible for the sound management of a firm

whose management bodies are no longer able to operate.

In most cases, the court itself will determine the effects of the measure which it orders. It can confine the validity in time or confine its order to specific assets or acts.

Where a court authorises seizures on a unilateral application from one of the parties, the law prescribes time-limits within which an application for validation must be made to the court. If validation is not applied for in that time, the seizure is automatically void.

3. What are the costs of civil and commercial proceedings? Who bears the costs?

As a rule legal charges are payable when the action ends. The judge may also order a deposit or guarantee (= advance) to be paid by one or more of the parties to the proceedings (e.g. where the court calls for an expert opinion). The defendant may also request that the claimant which is not a natural or a legal person established in the European Union, in a member state of the Council of Europe or bound by an international convention, pays a *cautio judicatum solvi* in order to guarantee the enforcement of the expenses and damages to which she/he may be condemned (article 257 of NCPC).

The Luxembourg civil procedure Code distinguishes between two kinds of costs: the expenses of the proceedings (*"frais et dépens*") (article 238 of civil procedure Code (hereafter "NCPC")) and compensation of proceedings *("indemnité de procédure*") (article 240 of NCPC).

The expenses of proceedings include the bailiff fees (determined by law), the clerk fees, the tax rights and the fees resulting from the preliminary investigation. Unless otherwise decided by the judge, they are usually borne by the party who lost the case.

The compensation of proceedings covers the fees which are not included in the expenses of proceedings (e.g.: lawyer's fees). However, its allocation is not automatic. Indeed, the court will only order it if the party has requested it and if she proves that is unfair to refuse this request regarding the particular circumstances.

A party may also request the reimbursement of the lawyer fees as damages if she/he can prove that the damage about which she/he complains finds its cause in the fault of the other party and that the use of a lawyer to obtain compensation of this damage which is different from the initial damage is a necessary continuation of this fault and in causal link with this one.

In Grand Duchy of Luxembourg, lawyers are free to determine their fees, which will depend on the importance of the matter, the degree of difficulty, the obtained result and the financial situation of the client (article 38 of Law of 10 August 1991 on the profession of attorney).

4. What are the basic rules of disclosure of documents in civil and commercial proceedings? Which documents do not require disclosure? Is electronic disclosure of documents normal?

Article 64 of NCPC provides that the parties are required to communicate to their opposing party in due time all documents and evidence which they intend to use during the proceedings (= contradictory principle).

As a consequence, the court will not take into account any document or evidence not

submitted to the consideration of all the parties.

Article 52 of NCPC gives also the judge a general power to ensure that the proceedings are conducted lawfully. As a consequence, the judge can for example order one of the parties or a third party to disclose a document (article 59 and 60 of NCPC).

It should be noted that some documents such as all correspondence between the lawyers and their clients, all correspondence between opposing lawyers and all documents communicated confidentially are confidential.

Some documents such as the legal sources, case law extract or doctrine extract do not require disclosure.

In practice, the disclosure of documents between lawyers and the communication with the courts are usually made by fax and/or post.

5. **What is the process for witness evidence (namely, is it deposition based in advance, or witness statement, or examination or cross-examination)? Can a witness be compelled to attend to give evidence?**

Proof by testimony can be done in writing or orally.

If it is made by writing, the declaration should contain the relation of the facts which her/his author attended or which he personally noticed.

It shall mention name, first names, date and place of birth, house and profession of her/his author as well as, if necessary, her/his relationship or alliance with the parties, subordination towards them, collaboration or community of interests with them.

It shall indicate besides that it is established with the aim of its production in justice and that her/his author has knowledge that a false certificate of her/his part exposes her/him to penalties.

The declaration shall be handwritten, dated and signed by the hand of her/his author. It has to annex her/him, in original or in photocopy, any justifying official document of its identity and containing its signature (article 402 of NCPC).

If the party intends to submit evidence by means of witnesses, she/he should prepare an evidence offer in writing describing precisely the facts she/he wishes to establish, as well as the name and address of the witness.

In Luxembourg, anyone can be called as a witness except the parties directly involved in the case and persons who are judged unfit to do so because of for example their mental state.

People who are unable to testify may nevertheless be heard under the same conditions but without taking an oath. However, descendants may never give evidence on the complaints lodged by spouses in an application for divorce or separation.

The law requires witnesses to cooperate in legal proceedings with a view to discovering the truth.

However, people who can prove that they have a legitimate reason may be exempted from giving evidence. Parents or other relatives in direct line of one of the parties may refuse to give evidence, as may a party's spouse, even if they are divorced.

Defaulting witnesses may be summoned to appear at their own expense if their testimony

is felt to be required. Defaulting witnesses and persons who, without good cause, refuse to give evidence or to take an oath may be subject a civil penalty of between € 50 and € 2500.

The judge hears evidence from witnesses separately, in the order decided by him and when the parties are present or have been called. Witnesses may not read from a script.

The judge may hear evidence from or question the witnesses on any matter on which evidence may be taken by law, even if these matters are not mentioned in the decision ordering the investigation. He may recall witnesses, confront them with each other or the parties, and, if necessary, hear their evidence in the presence of a technical expert.

The parties may not interrupt, question or attempt to influence witnesses who are giving evidence, or address them directly, under pain of exclusion. If he deems it necessary, the judge may ask the witness questions submitted to him by the parties following cross-examination.

6. **How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties/counsel privileged (i.e: may not be disclosed to the court)?**

There is no specific rule under Luxembourg law regarding how to conduct settlement discussions. Direct negotiations both by correspondence and/or orally can take place. If an agreement is reached by the parties a contract ("*convention transactionnelle*") may be signed.

Settlement discussions are not privileged except, if they take place between lawyers, as all correspondence between opposing lawyers are confidential by nature.

7. **How can foreign judgments be enforced?**

With regard to judgment originating from a EU country, council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters allows the direct enforcement of EU judgment 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 said judgment.

The District Court may refuse to recognize a foreign judgment if recognition would be contrary to public policy or irreconcilable with an earlier judgment, or where the document initiating the proceedings has not been served in good time or the other party does not appear.

With regard to judgment originating form a country outside EU, articles 677 and following of NCPC, a foreign judgment, *i.e.* a judgment which has not been rendered by a Luxembourg court or an EU court, may be enforced in Luxembourg only if it has been submitted to an *exequatur* procedure which declared it enforceable in Luxembourg.

In this respect, Luxembourg case-law (see Cour d'appel, 4 février 2010), specifies that "In accordance with article 678 of NCPC, judgments rendered by foreign courts are submitted to the formality of *exequatur* in order to have a legal effect in Luxembourg. In the absence of such *exequatur*, they are authentic, until refuting evidence, and have all their effects, to the exception of material acts of enforcement, and

they benefit from a sort of *prima facie* acknowledgment"

Therefore, in accordance with these legal texts and case-laws, it is generally considered in Luxembourg that a judgment rendered by a foreign court will be recognized in Luxembourg without any specific formalities, unless one party wants to enforce this foreign judgment on the assets of another party located in Luxembourg. In the latter case, it will be necessary to obtain the *exequatur* of the relevant judgment in order to enforce it.

In this respect, the said judgment will have to meet the following conditions:

- the judgment must be legally enforceable (*exécutoire*) in the originating country ;
- the originating courts must have had jurisdiction over the original proceedings (which have led to the judgment) pursuant to the laws of the country and to the Luxembourg rules of conflict of jurisdiction;
- the proceedings leading to the judgment must be valid under the laws of the originating country ;
- the judgment must comply with the rights of defence;
- the originating courts must have applied with regard to the merits of the case the competent law (the "Law") in accordance with the Luxembourg rules of conflict of laws or at least, the judgment must not be inconsistent with the principles resulting from the Law;
- the judgment has not been obtained by fraud to any provisions of Luxembourg law;
- the judgment must not violate Luxembourg international public order (*ordre public international*).

Some judgments such as a judgment declaring one entity bankrupt rendered by a foreign court shall have, with regard to the capacity and the assets of the bankrupt entity located in Luxembourg, the authority of *res judicata* and shall have the same effects that it has outside Luxembourg, even without any judgment of exequatur.

ARBITRATION

1. **Are mediation clauses in commercial contracts binding and enforceable?**

   In Luxembourg, a mediation clause inserted into a contract is binding and enforceable, unless the clause is not valid or came to an end.

   In this respect, article 1251-5 of Luxembourg civil procedure Code (hereafter "NCPC") provides that the judge or the arbitrator seized with a dispute where a clause of mediation exists suspends the examination of the case at the request of a party. The exception must be raised before other means of defense and exception.

2. What is the procedure for mediation? Is it a popular method for resolving commercial disputes?

In Luxembourg, mediation in civil and commercial matters has been regulated under articles 1251-1 and following, by a law dated 24 February 2012.

The procedure for mediation is governed by article 1251-9 and 1251-10 of NCPC.

The parties appoint the mediator by common consent or ask a third party to designate him. The parties define in writing the modalities of organization of the mediation and the duration of the process.

If an agreement is reached by the parties, a mediation agreement is drafted and signed by the parties.

This mediation agreement can be submitted for ratification to the competent judge who made it enforceable and binding.

As mentioned above, the procedure of mediation has only been recently regulated.

As a consequence, mediation is not widely used as a method of dispute resolution.

3. Are arbitration clauses in commercial contracts binding and enforceable?

The arbitration award is binding on the parties and if the award is definitive, it is enforceable.

Under article 1241 of NCPC, Luxembourg arbitration awards are rendered enforceable by the president of the District Court of the district in which the arbitration award was handed down.

A foreign arbitration award is only enforceable after proceedings before the District Court, rendering the foreign arbitration award enforceable (*exequatur*).

Article 1244 of NCPC defined the limited cases under which the arbitration award can be challenged before the District Court for annulment.

4. What type of arbitration is commonly used for resolving commercial disputes: ad hoc arbitration or institutional arbitration?

In Luxembourg, the arbitration proceedings are governed by articles 1224 to 1251 of NCPC.

Luxembourg has also ratified international agreements regarding arbitration such as the New York Convention of 10 June 1958, European Convention on International Commercial Arbitration.

Institutional arbitration is commonly used for resolving commercial disputes.

5. Which arbitration institutes are most popular?

The Chamber of Commerce of Luxembourg set up its arbitration centre in 1987 and made its secretariat available to the parties interested in using arbitration.

The Center for mediation and arbitration of Paris is also popular.

6. What influence can the parties have on the identity of the arbitrator(s)?

In Luxembourg, parties are free to choose their arbitrators, subject to the fact that they are independent from the parties.

In case the parties did not agree on the arbitrators, article 1277 of NCPC provides a default procedure. In that case, the arbitral tribunal will have three arbitrators whereby each party (if they are two parties only) has the right to appoint one arbitrator and the two arbitrators so appointed select the third one. If a party fails to appoint an arbitrator or if the arbitrators selected by the parties fail to appoint a third one, the appointment will be carried out by the President of the district court.

If there are more than two parties which have a distinct interest in the case, all parties need to agree on the names of the three arbitrators. If the parties failed to reach an agreement, the appointment will be made by the President of the district court following a hearing, where all parties will be summoned to appear.

7. In what language is an arbitration proceedings conducted?

Arbitration proceedings are conducted in the language agreed between the parties. It is usually French or English.

8. What types of pre-arbitration measures are available and what are their limitations?

Unless otherwise agreed by the parties, the arbitral tribunal is empowered to grant preliminary awards as it may deem necessary (e.g. provisional relief). The enforcement thereof against one of the parties may, if necessary, require an enforcement order by the president of the District Court (article 1242 of NCPC).

Moreover, preliminary or interim relief may always be granted by the referee judge in the course of summary proceedings (see point 2 on civil litigation).

9. What are the costs of arbitration proceedings and who bears these costs?

The costs of arbitration proceedings mainly consist of the fees of the arbitrators and of the lawyers of each party.

The parties usually agreed in the arbitration agreement on who should bear these costs. There is no specific provision on the NCPC regarding the cost of arbitral proceedings. However, in an absence of an agreement between the parties, the arbitral tribunal may settle this question.

10. What are the basic rules of document disclosure in arbitration? Which documents do not require disclosure?

Unless the parties agreed upon a specific procedure, the rules applicable will be the general provisions set out in the NCPC (see point 4 on civil litigation).

However, the arbitrators have the power to order disclosure of documents held by the parties but cannot order documents held by third parties.

Documents that are kept by persons who are subject to an obligation of secrecy are privileged.

11. What is the procedure for witness evidence in arbitration (namely, is it deposition based or witness examination or cross-examination)?

Unless the parties have specifically agreed about the rules which apply to written and/or oral witness testimony, the rules of examination of witnesses before a court are applicable.

In practice, the witness will be subject to a cross-examination by the parties and questions from the arbitral tribunal.

12. How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties and/or counsel privileged (i.e., may not be disclosed to the Arbitrator)?

There is no specific rule under Luxembourg law regarding how to conduct settlement discussions. Direct negotiations both by correspondence and/or orally can take place. If an agreement is reached by the parties a contract ("*convention transactionnelle*") may be signed.

Settlement discussions are not privileged except, if they are between lawyers, as all correspondence between opposing lawyers are confidential by nature.

13. Under what circumstances can an Arbitration Award be enforced, challenged or annulled?

Application for an enforcement order shall be filed with the District Court of the domicile of the person against whom the enforcement is sought or the place where the award should be enforced. The application shall be accompanied

by the original or a certified copy of the arbitral award (article 1250 of NCPC).

Subject to the conventional provisions, the recognition and enforcement of an arbitration award can be refused only if one of the causes of annulment set out by article 1244 of NCPC exists or if the validity of the arbitral award can still be challenged before the arbitral tribunal and the tribunal has not ordered the provisional enforcement (article 1251 of NCPC).