SECURITIES LITIGATION

Luxembourg

LEXOLOGY
Getting The Deal Through

Consulting editor
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Securities Litigation

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into the local framework and climate; claims and defences; remedies, pleading and evidence; liability; collective proceedings; funding and costs; special issues regarding investment funds and structured finance; cross-border issues; and recent trends.

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GENERAL FRAMEWORK

General climate

Describe the nature and extent of securities litigation in your jurisdiction.

With respect to the prospectus regime , the current Luxembourg framework is provided in:

- Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market and repealing EU Directive 2003/71; and
- the Luxembourg law dated 16 July 2019 relating to prospectuses for securities (the Prospectus Law), supplementing and implementing Regulation (EU) 2017/1129.

The Prospectus Law provides for a distinction between two situations.

First, for prospectuses for the public offering or the listing on a regulated market of securities covered by Regulation (EU) 2017/1129, they are covered by articles 4 to 15 of the Prospectus Law; in particular article 5, which provides that:

The responsibility for the information provided in a prospectus and in any supplement thereto lies with the issuer, the offeror, the person asking for admission to trading on a regulated market or the guarantor, as the case may be. The prospectus (…) shall contain a statement by [the persons responsible] that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and contains no omission likely to affect its import.

and that :

No civil liability shall attach to any person solely on the basis of the summary provided (…), except: 1° if its content is misleading, inaccurate or inconsistent, read in combination with other parts of the prospectus; or 2° if it does not provide, read in combination with the other parts of the prospectus, key information to assist investors when considering investing in the securities.

Second, for prospectuses for the public offering or the listing on a regulated market of securities not covered by EU Regulation 2017/1129, they are covered by article 16 et seq of the Prospectus Law, with an identical liability rule; in particular article 23, which provides that:

Responsibility for the information provided in a short form prospectus and any supplement thereto is the responsibility of the issuer or the offeror or guarantor, as the case may be. The short form prospectus (…) contains a statement by [the persons responsible] that, to the best of their knowledge, the information contained in the simplified prospectus are in accordance with reality and do not contain any omissions likely to alter its scope.

Third, sanctions can be pronounced by the Luxembourg financial sector authority the Financial Sector Supervisory Commission (CSSF). Under articles 12 and 35 of the Prospectus Law, in the case of publication of false information in a prospectus or a supplement to the prospectus (including a short-form prospectus), the CSSF may impose administrative sanctions and take administrative measures such as a public statement on the infringement, an

injunction or administrative fines on legal or natural persons – which can be of a considerable amount as calculated on the benefit from the false information.

This framework must be read together with the European Securities and Markets Authority Q&A (version 6 dated 21 January 2021), with the CSSF's Q&A (which is, however, not updated), and with the CSSF's latest instructions and procedures for the e-filing of prospectuses.

In addition to the liability related to prospectuses, issuers whose securities are listed on a regulated market may face liability in relation to the information that they publish for the purposes of the transparency regime , implemented in Luxembourg by the law dated 11 January 2008 on issuers' transparency obligations, as amended (the Transparency Law). Under this law, issuers are to publish three main series of periodic information, namely their annual and half-year financial reports and, as the case may be, sums paid to governments (articles 3, 4 and 5). The responsibility and liability in this respect are obviously on the issuer itself, as per article 6 of the Transparency Law. With respect to continuous information, the publication and declaration information being in all-but-one cases on holders of securities, the liability is not on the issuer. The obligation to declare the amendments of the rights attached to the securities issued (article 15) is, though, on the issuer (article 6). In these respects as well, the CSSF has the power to pronounce sanctions (article 22 of the Transparency Law).

Interestingly, this Transparency Law framework should be read in conjunction with the CSSF Circular 08/337, as amended , which clarifies that an issuer may either file its regulated information itself or appoint a third party to execute the filing in its name and on its behalf, but will nevertheless remain entirely and solely responsible under the obligations that the Transparency Law imposes on it.

Finally, in addition to these main pieces of legislation and regulation, and without being exhaustive, other regimes will be relevant to Luxembourg securities litigation, whether for listed securities or non-listed securities:

- the EU Regulation 2017/2402, laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation is relevant here although it is not specifically a Luxembourg legislation. It contains an important number of obligations and liabilities for the issuers of asset-backed securities (ABS) falling within its limited scope, but also on originators and sponsors. In particular, a risk of liability exists in relation to the use of the designation 'simple, transparent and standardised securitisation' where it is not – or no longer – accurate (article 18 et seq).
- On a related topic, the Luxembourg law dated 22 March 2004 on securitisation, as amended, is of relevance, although it does not contain any provisions with respect to liability. It must be read together with the Q&A of the CCSF on securitisation.
- The Luxembourg law dated 27 July 2003 on fiduciary arrangements is also of relevance, insofar as it has been heavily used in the past to issue ABS under the form of fiduciary notes, characterised, exactly as instruments issued by a securitisation vehicle, by limited recourse and non-petition rights, which the Luxembourg courts strongly enforce.
- The rules and regulations of the Luxembourg Stock Exchange (LSE) provide, for the issue of securities on the non-regulated market of the LSE (called the Euro MTF market), for a disclosure and ongoing liability regime, which is comparable, in its principles, to the prospectus and transparency regimes, though less stringent.
- The Luxembourg law dated 24 May 2011 on the exercise of their rights by shareholders of listed companies, is relevant as it includes requirements for shareholders information and a (rare) express statement of the principle of equality between shareholders of the same category.
- The absolutely central Luxembourg law dated 10 August 1915 on commercial companies, as amended, is the keystone of any and all securities litigation in Luxembourg. It contains the rules under which Luxembourg issuers can issue securities, be they equity securities (shares) or debt securities (bonds, notes or certificates). It also contains the principles relating to the political (information, participation) and financial rights of the holders of these securities.

- The Luxembourg law dated 1 August 2001 on the circulation of securities does not contain any rules with respect to issuers' liability, but it does provide principles regulating the practical and technical aspects of the holding on securities, including as book entries, as dematerialised securities, and since recently as blockchain tokens. It provides for cases where a holder of securities can be liable as acquirer towards another legitimate holder (article 12).
- For financial services providers involved in the issue, marketing or holding of securities, the law dated 5 April 1993 on the financial sector, as amended, contains their status.
- Due to the presence in Luxembourg of central securities depository Clearstream, claims and disputes relating to securities held through the clearing system, which will trigger the application of the Clearstream rules, are often also covered by Luxembourg law in furtherance of the lex rei sitae principle.
- Lastly, the Luxembourg Civil Code is an important element in securities litigation, for three reasons. First, it contains the principles of extra contractual liability (articles 1382 et seq). Second, it contains the principles of contractual liability (article 1134 et seq). Third, it is on the basis of its general principles that Luxembourg case law has created an exhaustive set of duties, obligations and good faith requirements, which are key to assess any claims based on reliance, misrepresentation, loss of chance, management liability and of the prejudice related thereto.

Law stated - 05 March 2021

Courts and time frames

What experience do the courts in your jurisdiction have with securities litigation? Are there specialist courts for securities disputes? What is the typical time frame for securities litigation in your jurisdiction?

Luxembourg courts are often the forum of securities disputes; as a financial centre, an important number of securities are governed by Luxembourg law and under the jurisdiction of Luxembourg courts. This is true for listed and non-listed securities, but with a major focus on debt rather than equity securities. Luxembourg courts are also experienced with ABS. There is no specialist court for securities in Luxembourg. The commercial formation of the ordinary district court is hence competent by default, with the exception of summary cases (référés , before the court's president), and justices of the peace for disputes on amounts lower than €10k. For a regular oral procedure, a delay of three to six months can be expected between the filing and the pleading, while for more technical cases a written, longer procedure is available. The covid pandemic has made these delays less predictable.

Law stated - 05 March 2021

Government regulation and enforcement

What is the relationship between private securities litigation and government regulation and enforcement in your jurisdiction?

In principle, the enforcement of rules and the sanctioning of issuers or other actors is entrusted to the public authorities (ie, the CSSF), while questions of liability and compensation are entrusted to the commercial court system. It is worth noting that at the crossroad thereof, there is the LSE, which is a private company and has a regulating role on the market on which it operates. One important element in relation to the interoperation of public and private enforcements is that private enforcement of liability is generally based on concepts of faults, which are easier to evidence before courts in situations where the public authorities have sanctioned a market player or issuer. In particular, the liability of company management (towards the company or towards third parties) is partially built on the

concept of legal breach.

Law stated - 05 March 2021

CLAIMS AND DEFENCES

Available claims

What types of securities claim are available to investors?

The majority of private claims are compensation claims based on the rules of civil or contractual liability under the Luxembourg Civil Code. In addition, a number of cases, often summary cases, are initiated by investors who ask for further information. This is notably the case for asset-backed securities and securitisations, where investors try to obtain more information on the underlying portfolio and its performance. Also, more generally, private litigation will revolve around requests for enforcement measures (forced payment, specific performance or delivery in kind, provision of information or documents, termination of agreements, injunctions, seizing orders or forced convening of meetings), including for a large part summary proceedings.

There are no separate sets of state and federal laws in Luxembourg.

In theory, the liability of the management of a securities issuer could be raised by third parties. This is, however, more a theoretical possibility given that the liability of the management towards third parties would require either a legal breach (the violation of specific corporate laws or of the articles of association of the company) or a fault that would be separate from the functions of the managers.

Law stated - 05 March 2021

Offerings versus secondary-market purchases

How do claims (or defences to claims) arising out of securities offerings differ from those based on secondary-market purchases of securities?

Luxembourg law does not address these differently.

Law stated - 05 March 2021

Public versus private securities

Are there differences in the claims or defences available for publicly traded securities and for privately issued securities?

There are no separate sets of principles with respect to liability or compensation in this respect. However, two elements are important to note.

First, the fact that a number of laws and regulations on disclosure and transparency apply to listed securities only (including the rules and regulations of the Luxembourg Stock Exchange for the non-regulated market known as Euro MTF) necessarily increases the number of faults that can be reproached to issuers or other actors in this respect.

Second, the Luxembourg Prospectus Law does provide a specific ground for liability in relation to the content of a prospectus drawn for the listing of securities on a regulated market or their offer to the public.

Law stated - 05 March 2021

Primary elements of claim

What are the elements of the main types of securities claim?

The main elements of liability are a fault, a prejudice and a causation link between them.

Law stated - 05 March 2021

Primary defences

What are the most commonly asserted defences? Which are typically successful?

The main defences will be based on the absence of fault, the absence of prejudice or the absence of causation.

Law stated - 05 March 2021

Materiality

What is the standard for determining whether the misstated or omitted information is of sufficient importance to be actionable?

There is no such materiality threshold with respect to the importance of the information under Luxembourg law.

Law stated - 05 March 2021

Scienter

What is the standard for determining whether a defendant has a culpable state of mind to support liability? What types of allegation or evidence are typically advanced to support or defeat state-of-mind requirements?

Luxembourg law does not provide for a level of culpability or mens rea or intent in this respect. Negligence is itself enough to trigger liability under civil law. The degree of seriousness of a fault can, however, have an impact on the level of compensation, as well as the effect of potential limitations or exclusions of liability. Luxembourg case law provides distinctions between simple fault, serious fault and intentional fault.

Law stated - 05 March 2021

Reliance

Is proof of reliance required, and are there any presumptions of reliance available to assist plaintiffs?

Luxembourg law does not place any emphasis on reliance: rather, the general requirements for a prejudice and causation cater for the same legal need.

Law stated - 05 March 2021

Causation

Is proof of causation required? How is causation established? How is causation rebutted?

There is no definition of causation that is specific to securities litigation. Under civil law, causation is defined by case law, for both contractual and extra contractual liability. Among various possible concepts of causation, Luxembourg case law mainly operates with the concept of adequate cause: in a chain of events that ended in a prejudice, the prejudice is legally caused by the preceding fact that was normally such as to (normalement de nature à) cause this prejudice, unlike other preceding facts that only led to the prejudice as a result of exceptional circumstances. Another concept sometimes used by Luxembourg courts is the equivalence of conditions: in this conception of causation, a prejudice is legally caused by all the facts that led to it, hence each fact without which the prejudice would not have occurred is a legal cause. This last concept is of a lesser relevance for securities litigation. It is also worth mentioning that under contractual liability, only the prejudice that was foreseeable can be compensated.

Law stated - 05 March 2021

Other elements of claim

What elements or defences present special issues in the securities litigation context?

There are no specific elements in this respect.

Law stated - 05 March 2021

Limitation period

What is the relevant period of limitation or repose? When does it begin to run? Can it be extended or shortened?

In commercial matters, the statute of limitation provided by article 189 of the Luxembourg Commercial Code is 10 years. The limitation period for a contractual liability action only runs from the time when the damage or loss is realised, or from the date on which it was revealed to the victim if the victim establishes that he or she had not previously had knowledge of it. One important exception to this is that under article 2277 of the Luxembourg Civil Code, actions for the payment of interest under a loan (read here: under debt securities) are subject to a limitation of five years only.

There is no specific rule that applies to securities litigation. In practice, securitisation vehicles sometimes provide for limited recourse under their securities to become applicable only after a certain delay (eg, one year).

As a principle, the parties cannot extend the legal statute of limitation delays.

Law stated - 05 March 2021

REMEDIES, PLEADING AND EVIDENCE

Remedies

What remedies are available? Do any defences present special issues in the context of securities litigation? What is the measure of damages and how are damages proven?

Luxembourg civil liability legal principles, as supplemented by case law, provide for integral compensation of damages,

as this is the principle under the Luxembourg Civil Code. Compensation can be ordered for losses but also for prejudice such as unmade profit and loss of opportunity. The liability of directors or managers of Luxembourg entities is difficult to obtain. In addition to private enforcement for compensation, there is a public enforcement of disclosure rules (Prospectus Law or Transparency Law) by the Financial Sector Supervisory Commission (CSSF), which can also lead to sanctions on the management. Also, the removal of managers or directors is not a sanction provided by Luxembourg law in relation to investor compensation. However, as the management of a regulated entity is appointed subject to its suitability assessment by the CSSF, their liability can have the consequence that the managers of a regulated issuer or market payer (eg, a financial services provider) will be dismissed from office.

Law stated - 05 March 2021

Pleading requirements

What is required to plead the claim adequately and proceed past the initial pleading?

There are no such principles or requirements under Luxembourg law.

Law stated - 05 March 2021

Procedural defence mechanisms

What are the procedural mechanisms available to defendants to defeat, dispose of or narrow claims at an early stage of proceedings? What requirements must be satisfied to obtain each form of pretrial resolution?

There are no pre-trial resolutions under Luxembourg civil procedure, except for:

- summary procedures;
- requests for junction of related cases;
- the appointment of an expert by the court; and
- the possibility for a party to raise a defect in the writ or initiation of the claim in limine litis.

Parties always have the possibility to reach a settlement between them and to terminate the judicial procedure, in principle at any stage before the pleadings.

Law stated - 05 March 2021

Evidence

How is evidence collected and submitted to the court to support securities claims and defences in your jurisdiction? What rules and common practices apply to the introduction of expert evidence and how receptive are courts to such evidence?

There is no disclosure period in the Luxembourg trial procedure before the commercial court. The plaintiff must provide the evidence supporting his or her claims and the defendant is responsible for bringing the evidence supporting his or her counter arguments. These are the ordinary principles of evidence under the Luxembourg Civil Code, consistent with the adversarial nature of Luxembourg commercial trials.

There exist several procedural means for a party to try and obtain evidence from the other party. Before a trial, this will

be by way of summary proceeding. A summary proceeding can be initiated before the initiation of a substantial procedure under article 350 of the Luxembourg New Civil Procedure Code, which provides that if there is a legitimate reason to preserve or establish before any trial evidence of facts on which the solution of a dispute may depend, the legally admissible investigative measures may be ordered.

During the trial, under articles 348 and 359 of the Luxembourg New Civil Procedure Code investigative measures may be ordered in any event, if the court does not have sufficient evidence to rule. The facts on which the solution of a dispute depends may, at the request of the parties or ex officio, be the subject of any legally admissible investigative measure.

However, in both cases, an investigative measure may not be ordered to make up for the party's failure to provide evidence.

Further, there is no specific legal framework applying to securities litigation in this respect. In practice, when subscribing debt securities or asset-backed securities, investors will be well advised to look into the information rights that they have under the Luxembourg Company Law and under the terms and conditions of the securities subscribed.

Law stated - 05 March 2021

LIABILITY

Primary liability

Who may be primarily liable for securities law violations in your jurisdiction?

Where it comes to private litigation aiming at compensation, there is in principle no limitation to the persons from whom an investor may claim compensation for the consequences of its faults, either under a contract or tort. It is worth noting that here the Prospectus Law provides for the liability of various persons, although it does not set specific principles for the assessment of their liability.

Law stated - 05 March 2021

Secondary liability

Are the principles of secondary, vicarious or 'controlling person' liability recognised in your jurisdiction?

A general vicarious liability principle exists under Luxembourg civil law as under article 1384 of the Civil Code. It is based on the concept of a person for whom one is accountable.

Law stated - 05 March 2021

Claims against directors

What are the special issues in your jurisdiction with respect to securities claims against directors?

There is a specific framework, under Luxembourg law, for the liability of company directors or managers towards third parties, or towards shareholders. However, company directors or managers will only be liable personally towards third parties in the case of a specific legal breach or of a fault that is separate from their functions.

Law stated - 05 March 2021

Claims against underwriters

What are the special issues in your jurisdiction with respect to securities claims against underwriters?

There is no specific principle for liability of underwriters. Their liability may arise, as for any person intervening in the issuance or marketing process, as extra-contractual liability (tort), or under the obligations and undertakings that they subscribed by contract.

Law stated - 05 March 2021

Claims against auditors

What are the special issues in your jurisdiction with respect to securities claims against auditors?

Auditors will be liable along the regimes of article 443-2 of the 1915 law on commercial companies or civil liability – with the same result. Being only bound by a best efforts duty, their fault is generally based on the standard of professional scepticism that they should display. Their liability towards third parties or shareholders can also be raised more easily in the case of breach of company law, articles of association, or of the professional rules applying to their profession. Though, their liability to a shareholder will only appear if such shareholder can prove a prejudice that is separate and above the pro rata prejudice suffered through the company via the shares.

Law stated - 05 March 2021

COLLECTIVE PROCEEDINGS

Availability

In what circumstances does your jurisdiction allow collective proceedings?

Collective actions or 'class actions' are not possible under applicable Luxembourg law. However, a bill was introduced before the Luxembourg parliament on 14 August 2020, which purports to introduce into Luxembourg law a framework for collective actions by consumers. This bill has been in discussion since then. Under this bill, consumers could group their action against a professional, asking for the cessation of an unlawful course of action, or compensation for the prejudice that this course of action caused to them. It would be possible where the consumers are in a similar or identical situation and the unlawfulness undermines their individual interests. Among the notable exclusions, a collective action would only be possible in case of breach of contract or of a legal obligation, while competition law breaches would not be covered. Also, no collective action would be possible against professionals who are supervised by the Financial Sector Supervisory Commission (CSSF) or by the Luxembourg insurance authority, which would exclude all financial services providers. These exclusions together with the limited scope of the bill would potentially place some securities litigation outside the scope of collective actions, especially where the securities are listed securities if the action is directed against the issuer itself.

Law stated - 05 March 2021

Reliance, causation and damages

Can reliance, causation and damages be determined on a class-wide basis, or must they be assessed individually?

The bill does not contain any provision in this respect but provides first for a first stage (decisions on the admissibility of the claim and on liability) for either an ordinary procedure where the prejudice would be determined 'with regard to the exemplary individual cases' being test cases, or a simplified procedure where the prejudice would be determined globally.

Law stated - 05 March 2021

Court involvement and procedure

What is the involvement of the court in collective proceedings and what procedures must be followed to achieve collective treatment of claims? What is the procedure for settling collective proceedings and what is the extent of the court's involvement in settlement?

Under the bill, the relevant court would render a first judgment on the admissibility of the collective claim and would set adequate publicity measures and conditions to adhere to the group of claimants. If the claimants decide not to opt for a settlement procedure, the court would then render a second judgment on the liability and would then open a phase of implementation of this decision by appointing a liquidator, in charge of carrying out the group exclusion or the group inclusion process.

Law stated - 05 March 2021

Opt-in/opt-out

In collective proceedings, are claims opt-in or opt-out?

Under the bill, the opt-in (group inclusion) or opt-out (group exclusion) type of procedure would be determined by the court when rendering its second judgment appointing the liquidator. Under the opt-out procedure, all consumers affected by the unlawfulness are by default covered by the compensation unless they opt out; hence it would apply only where all the consumers who suffered the prejudice were known in advance.

Law stated - 05 March 2021

Regulator and third-party involvement

What role do regulators, professional bodies and other third parties play in collective proceedings?

Under the bill, the claim can be initiated by an approved association under the Consumer Code, any sector regulating authority (which includes the Financial Sector Supervisory Commission, as listed by the parliamentary works), any non-lucrative association whose objects include interests affected by the unlawfulness, or even any entity so designated by an EU or EEA member state.

Law stated - 05 March 2021

FUNDING AND COSTS

Claim funding

What options are available for plaintiffs to obtain funding for their claims? What are the pros and cons of each option, including any ethical issues relating to litigation funding?

There is no framework in Luxembourg for the financing of litigation by third parties; despite the availability in the

Luxembourg toolbox of several adapted forms of investment funds, this is not a specially developed class of assets. It is sometimes feasible to restructure the funding of claims via a securitisation vehicle, though rarely and not specifically for securities litigation. Contingency fees exist in Luxembourg for the remuneration of lawyers; they are, however, limited by the Internal Regulations of the Luxembourg Bar: its article 2.4.5.3 prohibits the agreement whereby the remuneration of the lawyer is 'exclusively' based on a success fee, but expressly allows to set a complement of remuneration for the lawyer based on the result of the lawyer's intervention. Contractual reimbursement provisions are not particularly developed in the Luxembourg practice, though legal and enforceable.

Law stated - 05 March 2021

Costs

Who is liable to pay costs in securities litigation? How are they calculated? Are there other procedural issues relevant to costs?

There is no specific rule under Luxembourg law for securities litigation. Hence, the ordinary principles of the new Civil Procedure Code will apply. Under article 238 of this code, procedural expenses such as stamps or bailiff costs and expert costs are in principle borne by the losing party, unless the court decides otherwise. In addition, under article 240 of that same code, where it appears unfair to leave a party responsible for the sums incurred by it and not included in the procedure expenses, the court may order the other party to pay the amount it determines. Article 240 is generally used by parties to try and recover at least a portion of their lawyers' fees; notoriously, though, Luxembourg courts are often reluctant to grant substantial amounts in this respect. The parties may also try to claim the reimbursement of their lawyer's fees by inserting it as a part or their prejudice. This is expressly allowed by the case law of the Cour de cassation, but it involves producing to the judge and to the other parties the details of lawyers' invoices.

Plaintiffs do not have to provide security for the cost of defending claims, except that under article 257 of the new Civil Procedure Code, the defendant can ask for it where the plaintiff is a foreign person (with the exceptions of plaintiffs from EU member states or from states having a convention with Luxembourg).

Law stated - 05 March 2021

Privilege

What types of legal privilege exist between litigation funders and litigants?

There is no such privilege.

Law stated - 05 March 2021

INVESTMENT FUNDS AND STRUCTURED FINANCE

Interests in investment funds

Are there special issues in your jurisdiction with respect to interests in investment funds? What claims are available to investors in a fund against the fund and its directors, and against an investment manager or adviser?

The main types of funds are Undertakings for the Collective Investment in Transferable Securities (UCITS) and regulated or unregulated alternative investment funds (AIFs). AIFs can take most company forms: private or public limited liability company, partnership limited by shares or special partnership. Their alternative investment fund manager (AIFM) or UCITS management company distributes or markets the shares (or as applicable the limited

partnership interests or units) of the funds to different types of investors. The claims available to investors against the fund or its directors are generally governed by the Luxembourg law dated 10 August 1915 on commercial companies. If an AIFM is appointed by the fund, the AIFM is responsible for the fund and its investors for the performance of its functions based on the AIFM law and cannot discharge itself from the liability even in the case of delegation of functions.

Law stated - 05 March 2021

Structured finance vehicles

Are there special issues in your country in the structured finance context?

In Luxembourg, the most currently used structured finance vehicles are securitisation vehicles. Pursuant to the applicable law of 22 March 2004 on securitisation, they may be set up in the form of a company (in practice, mainly public and private limited companies) or of a fund managed by a management company. Securitisation funds do not have legal personality; they can be organised as a co-ownership or on the basis of a trust relationship. Securitisation vehicles (regulated or non-regulated) can issue either debt or equity securities that yield or financial profile that reflects the risk of underlying assets. In practice, debt securities are generally preferred because the issue of equity securities by securitisation entities generally require an analysis to avoid any risk of application of the AIF regime, mainly for securitisation funds. The main asset classes are loan receivables, generally not originated by the securitisation company, and fund units. The main characteristic of these vehicles, which is of particular relevance for securities litigation, is that they can limit their exposure through limited recourse and non-petition clauses. Such provisions, whose validity is expressly provided for in the 2004 Securitisation Law, make them insolvency-remote in the case of a shortfall.

Law stated - 05 March 2021

CROSS-BORDER ISSUES

Foreign claimants and securities

What are the requirements for foreign residents or for holders of securities purchased in other jurisdictions to bring a successful claim in your jurisdiction?

There are no limits to the possibility for a foreign entity or person to lodge a claim with a Luxembourg court, provided the court is competent. As a principle, the circumstance that securities were purchased abroad should not have any impact thereon, provided that the securities or the issuer are governed by Luxembourg law. Luxembourg law does not have any extraterritorial application.

It is relevant here, however, to note that article 470-20 of the Luxembourg 1915 Companies Law allows Luxembourg companies to submit their debt securities to a foreign law, and validates that foreign entities submit their debt securities to Luxembourg law, opting in or opting out of the holders' representation principles under the 1915 Companies Law.

Law stated - 05 March 2021

Foreign defendants and issuers

What are the requirements for investors to bring a successful claim in your jurisdiction against foreign defendants or issuers of securities traded on a foreign exchange?

The jurisdiction of Luxembourg courts and, as the case may be, the choice of Luxembourg law, are sufficient factors. The circumstance that the securities are listed abroad will not have any impact on, nor add further conditions to, the competence of Luxembourg courts or the capacity for investors to initiate claims before Luxembourg court. The capacity for a foreign issuer to validly submit its securities to the jurisdiction of Luxembourg courts and to Luxembourg law is, however, a question to be assessed under the law applicable to the issuer itself.

Law stated - 05 March 2021

Multiple cross-border claims

How do courts in your jurisdiction deal with multiple securities claims in different jurisdictions?

In Luxembourg, there is no specific regime in that respect. The ordinary principles of civil procedure would apply: the Luxembourg Civil Procedure Code provides for three express legal cases of suspension of decision-making. In addition, Luxembourg case law has developed a right for courts to decide to suspend their decision-making even outside the three express legal cases (on a case-by-case, in concreto assessment). Finally, though this is not a question of Luxembourg internal law, the taking of concurrent proceedings in more than one jurisdiction in which the Brussels Regulation or the Lugano Convention is applicable, may be precluded by these regimes.

Law stated - 05 March 2021

Enforcement of foreign judgments

What are the requirements in your jurisdiction to enforce foreign court judgments relating to securities transactions?

The requirements are the same as for any other foreign decision, while a distinction needs to be made on the basis of the relevant forum. A judgment entered by an EU member state court or a European Free Trade Association member state court would be enforced by the Luxembourg courts in accordance with applicable enforcement proceedings as provided for respectively in Regulation (EU) No. 1215/2012 (the Brussels Regulation) or in the convention on jurisdiction signed in Lugano on 30 October 2007 (the Lugano Convention) without a retrial or re-examination, save for the examination of the compliance with Luxembourg public order. A judgment obtained in the courts of another state would be subject to the applicable exequatur procedure as set out in article 678 of the Luxembourg New Civil Procedure Code.

Law stated - 05 March 2021

ALTERNATIVE DISPUTE RESOLUTION

Options, advantages and disadvantages

What alternatives to litigation are available in your jurisdiction to redress losses on securities transactions? What are the advantages and disadvantages of arbitration as compared with litigation in your jurisdiction in securities disputes?

In Luxembourg, the main alternative to litigation is arbitration. The applicable provisions, which apply to both international and national cases submitted to arbitration, are provided in article 1224 et seq of the Luxembourg New Civil Procedure Code. In addition to these rules, the Chamber of Commerce of the Grand-Duchy of Luxembourg has its own arbitration centre, with its own arbitration rules. In a publicly expressed and supported effort to increase the importance of Luxembourg as an arbitration centre, a bill was introduced before the Luxembourg parliament on 15

September 2020. While this very important project is built partly on French law, it would maintain the Luxembourg option for a single regime applicable to national and international arbitration. In the current applicable law, the main disadvantage with respect to arbitration is the rule of article 1243 of the Luxembourg New Civil Procedure Code, under which arbitral awards are in no case opposable to third parties.

Law stated - 05 March 2021

UPDATE AND TRENDS

Key developments of the past year

What are the most significant recent legal developments in securities litigation in your jurisdiction? What are the current issues of note and trends relating to securities litigation in your jurisdiction? What issues do you foresee arising in the next few years?

From a legal standpoint, the main recent legal developments are the draft bills on collective or class actions and the draft bill on arbitration. In a separate area, it is certainly worth noting that as of 1 January 2020, the Luxembourg Stock Exchange completely re-enacted its Rules and Regulations, which contain important principles as to the prospectuses to be prepared for listing on the non-regulated market held by this stock exchange, with a view to align the structure of the documentation on a 'building blocks' approach. Also, in a groundbreaking move, the Luxembourg parliament voted in a law of 1 March 2019 amending the law on the circulation of securities, and which allows the use of blockchain in the issuance and circulation of securities. Even further, the Luxembourg parliament voted a law of 21 January 2021, allowing dematerialised securities to also be made via blockchain and the issue account held with a central account keeper can be held, and registrations made therein, within or by means of secured electronic recording devices, including distributed electronic registers or databases.

Law stated - 05 March 2021

Jurisdictions

Brazil	Araújo e Policastro Advogados
China	Fangda Partners
Germany	Clifford Chance
India	Khaitan & Co
Japan	Tokyo International Law Office
Luxembourg	GSK Stockmann
Netherlands	Pels Rijcken
USA	Cadwalader Wickersham & Taft LLP