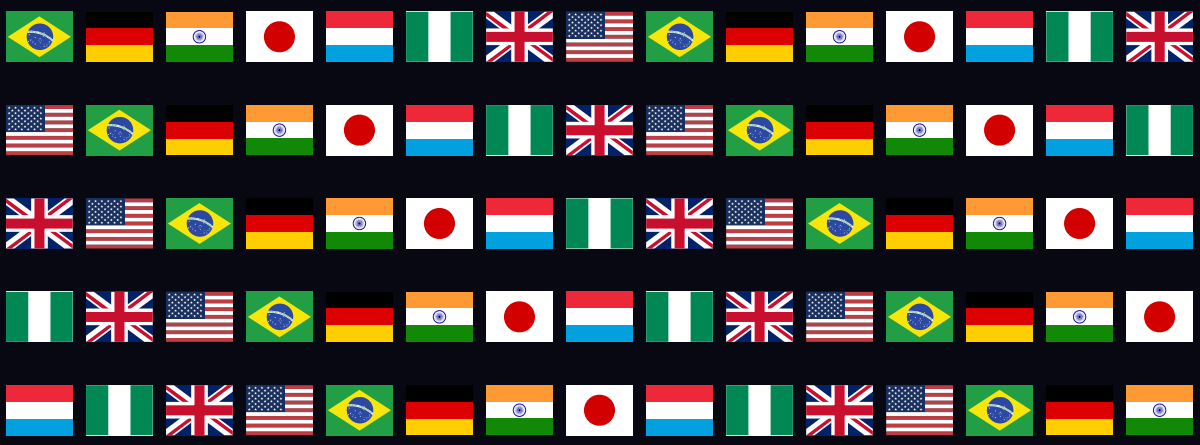
SECURITIES LITIGATION

Luxembourg



LEXOLOGY
Getting The Deal Through

Consulting editor
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Securities Litigation

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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 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market and repealing Directive 2003/71/EC, as amended; 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 distinguishes between two situations.

First, prospectuses related to the public offering or the listing on a regulated market of securities covered by Regulation (EU) 2017/1129 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 responsible persons or persons] 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.'*

It also provides 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, prospectuses related to the public offering or the listing on a regulated market of securities not covered by Regulation (EU) 2017/1129 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 responsible person or persons] 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.'*

In respect of the above, sanctions can be pronounced by the Financial Sector Supervisory Commission (CSSF), the Luxembourg financial regulator. 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 calculated on the benefit extracted from publishing false information.

This framework must be read together with the European Securities and Markets Authority Q&A (version 12 dated 3 February 2023) on Regulation (EU) 2017/1129, the CSSF's FAQs on the prospectus regime (last updated on 12 March 2013), and the CSSF's user guide for the submission of prospectuses (last updated on 12 January 2022).

In addition to 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 locally by the Luxembourg 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). Responsibility and liability in this respect obviously fall on the issuer itself (article 6). With respect to continuous information, the publication and declaration of information obligation falls (in all cases but one) on the holders of securities and liability does not fall on the issuer. The obligation to declare the amendments of the rights attached to the securities issued (article 15), however, falls on the issuer (article 6). In these respects, the CSSF has the power to pronounce sanctions (article 22).

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 imposed on it by the Transparency Law.

Finally, in addition to this non-exhaustive list of the main pieces of legislation and regulation, other regimes are relevant to Luxembourg securities litigation for listed and non-listed securities.

The 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.

Regulation (EU) 2017/2402, laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation is relevant here. 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 is no longer – accurate (article 18 et seq).

On a related topic, the Luxembourg law dated 22 March 2004 on securitisation, as amended , is relevant, although it does not contain any provisions with respect to liability. It must be read together with the CSSF Q&A on securitisation.

The Luxembourg law dated 27 July 2003 on fiduciary arrangements is also relevant, insofar as it has been heavily used in the past to issue ABS under the form of fiduciary notes (characterised as instruments issued by a securitisation vehicle, and by limited recourse and non-petition rights), which the Luxembourg courts strongly enforce.

The rules and regulations of the Luxembourg Stock Exchange provide, for the issuance of securities on the Luxembourg Stock Exchange's non-regulated market (ie, the Euro MTF market), for a disclosure and ongoing liability regime that is comparable, in its principles, to the prospectus and transparency regimes (although it is 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 shareholder information and a (rare) express statement of the principle of equality between shareholders of the same category.

The Luxembourg law dated 1 August 2001 on the circulation of securities does not contain any rules with respect to issuers' liability, but does provide principles regulating the practical and technical aspects of the holding of securities,

including as book entries, dematerialised securities and, recently, blockchain tokens. It provides for cases where a holder of securities can be liable as an acquirer towards another legitimate holder (article 12).

The Luxembourg law dated 5 April 1993 on the financial sector, as amended , contains the status of financial services providers involved in the issuance, marketing or holding of securities.

Due to the presence in Luxembourg of the 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.

Finally, 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 that are key in assessing any claims based on reliance, misrepresentation, loss of chance and management liability, and of the prejudice related thereto.

Law stated - 04 April 2023

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. Due to the country's status as a financial centre, an important number of securities are governed by Luxembourg law and fall 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 in ABS.

There is no specialist court for securities in Luxembourg. The commercial chamber of the ordinary district court is competent by default, with the exception of summary cases before the court's president and small claims courts for disputes regarding amounts lower than €15,000. For a regular oral procedure, a delay of three to six months can be expected between the filing and the pleading, while a written, longer procedure is available for more technical cases.

Law stated - 04 April 2023

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 deferred to the commercial court system. It is worth noting that the Luxembourg Stock Exchange, which is a private company and has a regulating role in the market in which it operates, sits at the crossroads of the regulatory authorities. One important element in relation to the interoperation of public and private enforcement 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 - 04 April 2023

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 summary proceedings.

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

In theory, liability for the management of a securities issuer could be raised by third parties. This is, however, more of a theoretical possibility given that the liability of 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 - 04 April 2023

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 separately.

Law stated - 04 April 2023

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, Euro MTF) necessarily increases the number of faults that can be reproached to issuers or other actors in this respect.

Second, the Luxembourg law dated 16 July 2019 relating to prospectuses for securities provides specific grounds for liability in relation to the content of a prospectus drawn for the listing of securities on a regulated market or the offer thereof to the public.

Law stated - 04 April 2023

Primary elements of claim

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

The main elements of liability, governed by civil law principles, are fault and prejudice, and a causal link between them.

Law stated - 04 April 2023

Primary defences

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

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

Law stated - 04 April 2023

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 - 04 April 2023

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 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 - 04 April 2023

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. The general requirements for prejudice and causation cater to this legal need.

Law stated - 04 April 2023

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; that is, in a chain of events that ended in prejudice, the prejudice is legally caused by the preceding fact that would normally cause such a 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, prejudice is legally caused by all the facts that led to it; each fact without which prejudice would not have occurred is a legal cause. This concept is less relevant to securities litigation than the former.

It is also worth mentioning that, under contractual liability, only prejudice that was foreseeable can be compensated.

Law stated - 04 April 2023

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 - 04 April 2023

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 limitation period provided by article 189 of the Luxembourg Commercial Code is 10 years. The limitation period for a contractual liability action runs from 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 no previous 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 (ie, under debt securities) are subject to a limitation period 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).

In principle, the parties cannot extend the legal limitation period delays.

Law stated - 04 April 2023

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?

The Luxembourg Civil Code, as supplemented by case law, provides for the principle of integral compensation of

damages. 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 public enforcement of disclosure (the Luxembourg law dated 16 July 2019 relating to prospectuses for securities or the Luxembourg law dated 11 January 2008 on issuers' transparency obligations, as amended) ruled by the Financial Sector Supervisory Commission (CSSF), which can also lead to sanctions on management.

Also, the removal of managers or directors is not a sanction provided by Luxembourg law in relation to investor compensation. However, as members of management of a regulated entity are appointed subject to the results of a suitability assessment carried out by the CSSF, their liability could result in the managers of a regulated issuer or market payer (eg, a financial services provider) being dismissed from office.

Law stated - 04 April 2023

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 - 04 April 2023

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 pretrial resolutions under Luxembourg civil procedure except for:

- summary proceedings;
- requests for the 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 ability to reach a settlement between them and to terminate the judicial procedure, in principle at any stage before the pleadings.

Law stated - 04 April 2023

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 evidence supporting his or her claims and the defendant is responsible for bringing the evidence supporting his or her counterarguments. 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 methods through which one party can try to obtain evidence from the other party. Before a trial, this will be by way of summary proceedings, which can be initiated before the initiation of a substantial procedure under article 350 of the Luxembourg New Civil Procedure Code. Article 350 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, 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 that applies to securities litigation in this respect. In practice, when subscribing debt securities or asset-backed securities, investors are well advised to look into the information rights that they have under the Luxembourg law dated 10 August 1915 on commercial companies, as amended, and under the terms and conditions of the subscribed securities.

Law stated - 04 April 2023

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 contract or tort. It is worth noting that here the Luxembourg law dated 16 July 2019 relating to prospectuses for securities provides for the liability of various persons, although it does not set specific principles for the assessment of their liability.

Law stated - 04 April 2023

Secondary liability

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

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

Law stated - 04 April 2023

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 and shareholders. However, company directors or managers will only be liable personally towards third parties in the case of a specific legal breach or a fault that is separate from their functions.

Law stated - 04 April 2023

Claims against underwriters

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

There is no specific principle for the 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 - 04 April 2023

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 Luxembourg law dated 10 August 1915 on commercial companies, as amended, or civil liability, with the same result. 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 the professional rules that apply to their profession. However, their liability to a shareholder will only appear if such a shareholder can prove prejudice that is separate and above pro rata prejudice suffered by the company through shares.

Law stated - 04 April 2023

COLLECTIVE PROCEEDINGS

Availability

In what circumstances does your jurisdiction allow collective proceedings?

Collective actions are not possible under applicable Luxembourg law. However, Bill No. 7650 was introduced before the Chamber of Deputies on 14 August 2020, which purports to introduce into Luxembourg law a framework for collective actions by consumers. This Bill is still under review and being debated by the Chamber of Deputies.

Under Bill No. 7650, consumers would be able to group their actions against a professional to ask for the cessation of an unlawful course of action or compensation for the prejudice that this course of action caused them. This would be possible if the consumers were in similar or identical situations and the unlawfulness undermines their individual interests. Among the notable exclusions, collective action would only be possible in the case of a breach of contract or 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 if the action is directed against the issuer itself.

Law stated - 04 April 2023

Reliance, causation and damages

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

Bill No. 7650 does not contain any provisions in this respect but provides for a first stage (decisions on the admissibility of the claim and liability) for either:

- an ordinary procedure, where the prejudice would be determined 'with regard to the exemplary individual cases' (ie, test cases); or
- a simplified procedure, where prejudice would be determined globally.

Law stated - 04 April 2023

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 Bill No. 7650, the relevant court would render an initial 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 liability and open a phase of implementation for this decision by appointing a liquidator in charge of carrying out the group exclusion or inclusion process.

Law stated - 04 April 2023

Opt-in/opt-out

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

Under Bill No. 7650, 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 (ie, it would apply only where all the consumers who suffered the prejudice in question were known in advance).

Law stated - 04 April 2023

Regulator and third-party involvement

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

Under Bill No. 7650, a claim can be initiated by:

- an approved association under the Luxembourg Consumer Code;
- any sector-regulating authority (which includes the CSSF, as listed by the parliamentary works);

- any non-lucrative association whose purview covers interests affected by unlawfulness; and
- any entity so designated by a member state of the European Union or the European Economic Area.

Law stated - 04 April 2023

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 through a securitisation vehicle, although this occurs rarely and is not specifically for securities litigation.

Contingency fees exist in Luxembourg for the remuneration of lawyers, although they are limited by the Internal Regulations of the Luxembourg Bar. Article 2.4.5.3 of the Internal Regulations prohibits an agreement whereby the remuneration of the lawyer is exclusively based on a success fee, but expressly allows the setting of 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, although they are legal and enforceable.

Law stated - 04 April 2023

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; the ordinary principles of the Luxembourg 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, 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 an amount determined by the court. Article 240 is generally used by parties when trying to recover at least a portion of their lawyers' fees However, Luxembourg courts are notorious for often being reluctant to grant substantial amounts in this respect. The parties may also try to claim the reimbursement of their lawyers' fees by inserting it as a part of their prejudice. This is expressly allowed by Court of Cassation case law, but it involves producing the details of lawyers' invoices for the judge and the other parties.

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

Law stated - 04 April 2023

Privilege

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

There is no such privilege.

Law stated - 04 April 2023

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 collective investment in transferable securities; and
- regulated or unregulated alternative investment funds.

Regulated or unregulated alternative investment funds can take most company forms (private or public limited liability company, partnership limited by shares, special partnership). Their alternative investment fund manager (AIFM) or undertakings for collective investment in transferable securities 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, as amended. 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 law applicable to AIFMs and cannot discharge itself from the liability even in the case of delegation of functions.

Law stated - 04 April 2023

Structured finance vehicles

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

Currently, in Luxembourg, the most often-used structured finance vehicles are securitisation vehicles. Pursuant to the Luxembourg law dated 22 March 2004 on securitisation, as amended, such vehicles may be set up in the form of a company (in practice, mainly public and private limited companies) or 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 provide yields or a financial profile that reflects the risk of the underlying assets. In practice, debt securities are generally preferred because the issuance of equity securities by securitisation entities generally requires an analysis to avoid any risk that the regulated or unregulated alternative investment funds regime may apply (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 to securities litigation, is that they can limit their exposure through limited recourse and non-petition clauses. Such provisions, the validity of which is expressly provided for in the Luxembourg law dated 22 March 2004 on securitisation, as amended, make them insolvency remote

in the case of a shortfall.

Law stated - 04 April 2023

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 on a foreign entity or person lodging a claim with a Luxembourg court, provided that the court is competent. In 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 law dated 10 August 1915 on commercial companies, as amended, allows Luxembourg companies to submit their debt securities to a foreign law and validates that foreign entities can submit their debt securities to Luxembourg law, opting in or opting out of the holders' representation principles under the aforementioned Luxembourg law.

Law stated - 04 April 2023

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 courts. 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 - 04 April 2023

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 this respect. The ordinary principles of civil procedure would apply.

The Luxembourg Civil Procedure Code provides for three express legal cases for the 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 (after a case-by-case, in concreto assessment). Finally, although this is not a question of Luxembourg's internal law, the initiation of concurrent proceedings in more than one jurisdiction in which Regulation (EU) No. 1215/2012 or the convention on jurisdiction signed in Lugano on 30 October 2007 is applicable may be precluded by these regimes.

Law stated - 04 April 2023

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, but a distinction needs to be made on the basis of the relevant forum. A judgment entered by an EU or European Free Trade Association member state's courts would be enforced by the Luxembourg courts in accordance with applicable enforcement proceedings as provided for in Regulation (EU) No. 1215/2012 or the convention on jurisdiction signed in Lugano on 30 October 2007, without a retrial or re-examination save for an examination of 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 - 04 April 2023

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.

Bill No. 7671 was voted into law by the Chamber of Deputies on 23 March 2023 and will extensively modernise arbitration law in Luxembourg by amending the arbitration provisions of articles 1224 to 1251 of the Luxembourg New Code of Civil Procedure.

Bill No. 7671 proposes to redefine the legal basis of arbitration, and is largely built on French arbitration law and the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration. It aims to create a liberal regime to facilitate arbitration while rejecting the distinction between domestic and international arbitration.

Bill No. 7671 will certainly increase the level of interest in alternative dispute resolution methods from all stakeholders supportive of arbitration, especially those familiar with French arbitration law and its various advantages.

Luxembourg's multiculturalism, polyglottism and familiarity with foreign laws could make it an attractive location for the arbitration of securities disputes. Additionally, Luxembourg's Chamber of Commerce has its own arbitration centre with its own arbitration rules, which could support the development of arbitration proceedings in Luxembourg.

Law stated - 04 April 2023

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?

The most significant recent legal development is the voting into law of Bill No. 7671 by the Chamber of Deputies on 23

March 2023, which modernised the arbitration provisions contained in the Luxembourg New Code of Civil Procedure.

Bill No. 7650 on collective or class actions, which is expected to be voted on later in 2023, will also be a significant development in securities litigation.

A recent and growing trend in Luxembourg is the rise in litigation funding by third parties, including the securitisation of litigation. This involves the bundling of legal claims into a single security, which can then be sold to investors. While litigation funding is still a relatively new concept in Luxembourg, it has the potential to become an increasingly important tool available to consumers and professionals alike.

It is worth noting that, on 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 the Luxembourg Stock Exchange with a view to align the structure of the documentation on the building blocks approach.

Finally, in a groundbreaking move, the Chamber of Deputies voted in a Luxembourg law dated 1 March 2019 to amend the Luxembourg law dated 1 August 2001 on the circulation of securities, allowing the use of a blockchain in the issuance and circulation of securities. Even further, the Chamber of Deputies voted in a Luxembourg law dated 21 January 2021 to allow:

- dematerialised securities to be made on a blockchain;
- the issue account held by a central account keeper to be held; and
- registrations to be held in such an issue account within, or by means of, secured electronic recording devices, including distributed electronic registers or databases.

Law stated - 04 April 2023

Jurisdictions

Brazil	Araújo e Policastro Advogados
Germany	Clifford Chance
India	Khaitan & Co
Japan	Tokyo International Law Office
Luxembourg	GSK Stockmann
Nigeria	Punuka Attorneys & Solicitors
United Kingdom	Stewarts
USA	Cadwalader Wickersham & Taft LLP