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Legal Guides

Practical cross-border insights into insurance and reinsurance law

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Luxembourg


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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Luxembourg supervisory authority of the insurance sector is the *Commissariat aux Assurances* (**CAA**).

The CAA is a public institution under the authority of the Minister of Finance. According to the law of 7 December 2015 on the insurance sector, as amended (the **Insurance Sector Act**), the principal objective assigned to the CAA consists of guarantying the protection of insurance policyholders and beneficiaries.

In this respect, the CAA is in charge of the regulatory approval and supervision of Luxembourg insurance and reinsurance undertakings, as well as of insurance intermediaries and so-called "professionals of the insurance sector" composed of various service providers in relation to the insurance industry.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The establishment of an insurance or reinsurance company in Luxembourg is subject to corporate and regulatory procedures.

From a corporate standpoint, the company must be set up and registered under one of the legal forms permitted by the Insurance Sector Act and according to the law of 10 August 1915 on commercial companies, as amended.

From a regulatory perspective, the operation of insurance or reinsurance activities, which was subject to the approval of the Luxembourg Minister of Finance until the entry into force on 30 July 2021 of the law of 21 July 2021, is now directly submitted to the approval of the CAA. The CAA now has the power to grant or withdraw the licence, which still requires the filing of an application evidencing at least the following conditions:

- The company's managers and directors possess the appropriate skills and good repute to ensure a sound and prudent management of the insurance or reinsurance undertaking.
- The qualifying shareholders' identity is satisfactory in view of the sound and prudent management of the undertaking.
- The company's accounts are certified annually by an external auditor whose status, skills and experience meet the requirements of the Insurance Sector Act.
- The company holds the eligible own funds, capital and solvency requirements set out in the Insurance Sector Act.
- The company's business plan includes the information required by the CAA Regulation 15/3 pertaining to insurance and reinsurance undertakings, as amended, and is viable.
- The company is able to abide by the legal and regulatory requirements relating to the governance system.
- The central administration of the undertaking is located in Luxembourg.

However, the law of 21 July 2021 has made an exception for existing authorised entities. Entities that, at the date of entry into force of this law, have an authorisation from the Minister having the CAA in its attributions, under the Insurance Sector Act, are still deemed to have an authorisation from the CAA.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

The operation of insurance business in and from Luxembourg is subject to the granting of a prior licence by the CAA (please refer to question 1.2 above).

With respect to foreign insurers, the three following categories of exceptions to the above principle are applicable:

- Insurance undertakings authorised in an European Economic Area (**EEA**) Member State can operate insurance business in Luxembourg under the principles of establishment or freedom to provide services (European passport).
- Insurance undertakings authorised in non-EEA countries are not considered as operating insurance activities in Luxembourg (and do not need to be authorised beforehand in such case) where the policyholder has taken the initiative of the subscription of the insurance contract. Pursuant to the Insurance Sector Act, the policyholder is regarded as having taken the initiative of the subscription of the contract where he has requested its conclusion without having been contacted beforehand by the insurance undertaking or by any other person, either mandated by the insurance undertaking or not. Please note that if such operation was, however, carried out through a local branch of the non-EEA insurer, then a prior authorisation would be required.
- Insurance undertakings authorised in non-EEA countries having acceded to the General Agreement on Trade in Services (**GATS**) do not need to be authorised for the operation of insurance covering the following risks:
  a) Risks linked to maritime trade, aviation, and space launching and loading of devices, including satellites. Such risks include those relating to the transported goods, the vehicles used for the transport and any liability arising therefrom.
  b) Risks linked to goods in international transit.

Please note, however, that if the above risks were covered through a branch established in Luxembourg, then a prior authorisation would be required.

Aside from the above exceptions, it is still possible for a foreign insurer to consider a fronting route with a local insurer.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

In so far as Luxembourg law governs the insurance contract, the mandatory provisions of the amended law of 27 July 1997 on the insurance contract (the **Insurance Contract Act**) are applicable. Furthermore, except where the Insurance Contract Act states otherwise, the provisions of the Consumer Code are also applicable to the insurance contract.

Please note, however, that derogations from mandatory provisions are permitted where specifically allowed by the Insurance Contract Act. For example, where the insurance contract qualifies as covering large risks in the meaning of Art. 43 (21) of the Insurance Sector Act (for instance, which fall within the following categories: railway, air, sea, lake and river vehicles), the parties can derogate from several requirements such as the mandatory information to policyholders, the policy period and conditions of termination, or the jurisdiction clause.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Companies are allowed – and not obliged – to indemnify their directors and officers for their civil liability arising out of the performance of their duties in accordance with the applicable provisions and on behalf of the company.

Such indemnity could take the form of indemnity letters or directors' and officers' (**D&O**) insurance policies, and is subject to the following limitations:

- No indemnity is allowed with respect to criminal liability on the grounds of public policy. It is, however, questionable under Luxembourg law whether administrative fines could be the subject of indemnification or insurance.
- Companies may not indemnify their directors and officers for civil liability resulting from acts committed outside the scope of their functions.

1.6 Are there any forms of compulsory insurance?

Forms of compulsory insurance do exist under Luxembourg law; some examples are listed below:

- Liability insurance in respect of motor vehicles (Act of 16 April 2003 relating to mandatory insurance of civil liability in relation to motor vehicles, as amended).
- Professional liability insurance of architects and consulting engineers (Art. 6 of the Act of 13 December 1989 on the organisation of the professions of architect and consulting engineer).
- Professional liability insurance of insurance brokers (Art. 283-1 of the Insurance Sector Act) and professionals of the insurance sector (Insurance Sector Act).

Professional liability insurance is also compulsory in Luxembourg for law firms.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

Luxembourg substantive provisions relating to insurance are contained in the Insurance Contract Act, which can overall be viewed as favourable to the insured. Such provisions include, among others:

- The application of the Consumer Code (the provisions of which are very favourable to consumers) to insurance contracts, except where specified otherwise in the Insurance Contract Act (Art. 3.1 of the Insurance Contract Act).
- The mandatory content of the insurance contract as well as the (pre-)contractual information required from the insurer in line with the Insurance Contract Act is in favour of the insured.
- Some specific provisions are clearly in favour of the insured, such as the prior notice of termination applicable to certain contracts, which is 30 days for the insured *versus* 60 days for the insurer or the cancellation right granted exclusively to the insured under certain conditions (Arts 38, 62–3 and 100 *et seq.* of the Insurance Contract Act).

Notwithstanding the above perspective, the Insurance Contract Act ensures a certain level of protection to the insurer, notably by imposing certain obligations on the insured, such as the notification of the risk increase (Art. 34 of the Insurance Contract Act) or the duty to take all reasonable measures to prevent and mitigate loss or damage once occurred (Art. 27 of the Insurance Contract Act). The insurer could even reserve the possibility to unilaterally terminate the contract (other than life insurance and health insurance) under certain conditions after payment of the insurance claim (Art. 41 of the Insurance Contract Act).

2.2 Can a third party bring a direct action against an insurer?

In liability insurance, the damaged or injured person has a direct claim against the insurer and can therefore bring a direct action against the latter (Art. 89 of the Insurance Contract Act).

Please note, however, that certain exceptions, nullities or disqualifications applicable to the insurance contract could be opposed by the insurer to the injured or damaged person (Art. 90 of the Insurance Contract Act).

2.3 Can an insured bring a direct action against a reinsurer?

Luxembourg law does not specifically provide for a direct action from the insured against a reinsurer. This is consistent with the principle of relative effect of contracts contained in Art. 1165 of the Civil Code, according to which contracts may only have effect amongst parties (i.e. with respect to a reinsurance contract, the insurer and the reinsurer).

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

The consequences of either misrepresentation or non-disclosure of material information by the insured depend on whether such non-disclosure or misrepresentation was intentional or not.

In the event of an intentional misrepresentation or non-disclosure, the contract is void if the intentional misrepresentation or non-disclosure misled the insurer on the elements of risk appreciation. In such case, the insurer is entitled to the premiums due until the date upon which he became aware of the intentional misrepresentation or non-disclosure. Please note that the above regime is without prejudice to any misrepresentation with respect to the age of the insured in life insurance. In such case, according

to Art. 102 of the Insurance Contract Act, the parties' performances are increased or decreased depending on the insured's actual age, which should have been taken into consideration.

If the misrepresentation or non-disclosure was not intentional, the contract is not void. The insurer shall propose to the insured an amendment to the contract effective from the date on which he had knowledge of the misrepresentation or omission, or, if the insurer can evidence that he would not have insured the risk, he is allowed to terminate the contract. If the insured refuses the insurer's proposal, the latter can terminate the contract. The above regime is subject to a specific timeframe and further conditions as detailed in Art. 13 of the Insurance Contract Act.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Luxembourg insurance contract law does actually contain such an obligation from the insured to make a declaration in respect of the risk at the contract's inception and during the policy period, irrespective of whether the insurer has specifically asked about them or not.

Pursuant to Art. 11 of the Insurance Contract Act, when entering into the contract, the insured is required to declare precisely all circumstances known to him and that should reasonably be considered by him as an element of risk appreciation by the insurer.

However, the circumstances already known or expected to be reasonably known by the insurer do not need to be declared by the insured.

Please note that with respect to life insurance, genetic data may not be communicated under Luxembourg law.

During the policy period, the insured must declare all new circumstances or amendments of circumstances which may cause a significant and lasting worsening of the insured risk. In such case, the contract may be amended or terminated by either party subject to the conditions set out in Art. 34 of the Insurance Contract Act.

Likewise, a decrease of the risk of occurrence of the insured event could lead to an amendment of the policy terms or its termination in the conditions set out in Art. 33 of the Insurance Contract Act.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Art. 52 of the Insurance Contract Act provides for a subrogation right in favour of the insurer upon payment of the indemnity.

The insurer is subrogated into the rights and actions of the insured or the beneficiary against the third party responsible for the damage, for the amount thereof. If the insurer's subrogation can no longer produce its effects because of the insured or the beneficiary, the insurer can claim from them the compensation paid.

Notwithstanding the principle of subrogation, the insured or beneficiary, having been partially compensated for their damage by the insurer, is still allowed to claim for compensation of the remaining indemnity from the party responsible for the damage.

Except in case of malicious acts, the insurer has no recourse against the insured's direct descendants, ascendants, spouse and associates, as well as the persons living in his home, his guests and domestic workers. Nonetheless, the insurer can take an action against the above persons in so far as their liability is actually covered by an insurance contract.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

A commercial insurance dispute shall be brought before ordinary jurisdictions, which may vary depending on the *rationne valoris* of the dispute.

Jurisdiction lies before the *Justice de Paix* for disputes below EUR 15,000, and before the *Tribunal d'arrondissement* for disputes above that amount.

There are no hearings before a jury in Luxembourg.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

There are no court fees in Luxembourg.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

The average duration of a case is between nine and 12 months from the service of the writ of summons and the judgment (first instance).

3.4 Does COVID-19 have, or continue to have, a significant effect on the operation of the courts, or litigation in general?

In order to respect the fundamental right of access to a judge, the implementation of the CovidCheck regime before the courts is not feasible. However, given the uncertain evolution of the pandemic and with a view to maintaining the activities of the courts in compliance with the health measures, the temporary maintenance of certain measures of the amended law of 19 December 2020 beyond 31 December 2021 has been considered necessary and useful.

The law of 17 December 2021 (Bill 7918) has amended the amended Act of 19 December 2020 temporarily adapting certain procedural rules in civil and commercial matters and extending the measures until 15 July 2022. For example:

- Cases pending before the Court of Cassation and the civil and commercial courts, and others subject to the rules of written procedure and ready for trial, may be taken under advisement (*en délibéré*) without the appearance of the representatives, with the latter's agreement.
- Certain documents and statements referred to in the amended Act of 18 February 1885 on appeals and cassation may be filed with the court registry by any written means, including electronic means, at the address determined by the Court of Cassation.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

There are no disclosure/discovery proceedings in Luxembourg as known in common law jurisdictions. However, the parties

must provide their evidence enough time in advance before the hearing date.

Remedies do exist to request a court order aiming at the disclosure of a specific document retained by a party or by a third party to the dispute.

The requested document must be crucial for the resolution of the dispute and the claimant should evidence that the document does actually exist.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

There are no disclosure/discovery proceedings in Luxembourg, so this question is not applicable.

Legal privilege applies by default to communication between lawyers.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Although it is not frequent, courts have the power to require witnesses to give evidence in the course of the proceedings.

4.4 Is evidence from witnesses allowed even if they are not present?

Written testimonies are admissible and commonly used in Luxembourg proceedings.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Before a dispute arises, or in the course of the proceedings on the merits, each party has the ability to request to the court the appointment of an expert who will be requested to provide a report on specific matters defined by the court.

Party (unilateral) expert reports are treated as ordinary written evidence.

4.6 What sort of interim remedies are available from the courts?

A wide range of remedies are available from the courts to, *inter alia*, preserve evidence, request urgent measures to prevent an imminent damage or resolve an obvious illegal situation, obtain payment of unchallenged claims, and obtain a prohibition order.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

A decision from a court of first instance can be appealed, and the term to appeal is 40 days (which can be extended for non-Luxembourg-domiciled claimants).

There is only one layer of appeal, and further, a (non-suspensive) Supreme Court (*Cour de cassation*) remedy is available for matters limited to law.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Before Luxembourg courts, late interest (legal or contractual) is generally recoverable.

The current rate (2022) of legal interest is 2% pursuant to the Luxembourg Regulation of 15 December 2020.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

Costs are usually borne by the unsuccessful party (which do not include lawyers' fees).

There is no legal scheme available aimed at favouring settlement prior to trial.

In practice, the court may take into account the offer to settle prior to trial because this effort proves the party had tried to avoid them.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Courts are obliged to stay the dispute in case of a valid mediation clause that has not been exhausted. There are no other legal incentives obliging the courts to direct parties to alternative dispute resolution.

4.11 If a party refuses a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

Please refer to question 4.10.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

Courts may intervene at any stage of arbitration proceedings seated in Luxembourg in support of the arbitration proceedings (appointment of the arbitrators, revocation of arbitrations, etc). Summary proceedings are also available in parallel to an arbitration on the merits of a dispute.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Under the Insurance Contract Act, arbitration clauses are, in principle, prohibited in insurance contracts.

Post-dispute arbitration agreements are allowed under Luxembourg insurance contract law.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

Arbitration clauses in insurance are, in principle, not enforceable (see above) and hence courts may refuse to enforce such clauses on request of a party.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Most forms of interim relief available under Luxembourg law can generally be obtained in parallel to arbitration proceedings (unless agreed otherwise by the parties).

These forms of interim relief can be, *inter alia*, measures aiming at freezing assets or a situation pending the resolution of a dispute, the appointment of a judicial expert (which is usual in insurance matters), urgent measures to prevent an imminent damage, or evidence disclosure requests made to third parties.

Aside from forms of interim relief aiming at supporting the arbitration process (e.g. solving issues regarding the appointment of an arbitrator), urgent or provisory measures can be requested to Luxembourg courts.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Unless the parties have expressly agreed otherwise, the arbitral tribunal is bound to provide the motivation for its award.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

An award given by an arbitral tribunal cannot be appealed before Luxembourg courts (unless provided otherwise in the arbitration clause).

If the arbitration takes place in Luxembourg, a court review is possible on limited grounds through annulment proceedings, and for non-Luxembourg-seated arbitrations through the *exequatur* proceedings required prior to enforcement.

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Antoine studied private and criminal law at the University of Toulouse and holds a Master's degree in European law from the University of Bourgogne – Franche-Comté. He also holds an LL.M. (DESS) in European litigation from the Universities of Nancy, Strasbourg and Luxembourg (2005). Antoine has over 15 years' experience as a lawyer in Luxembourg. He was admitted to the Luxembourg Bar in 2006.

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