Procedural tactics in Luxembourg corporate and financial disputes: initiating proceedings

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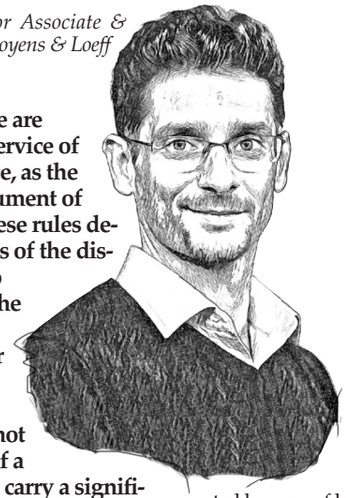

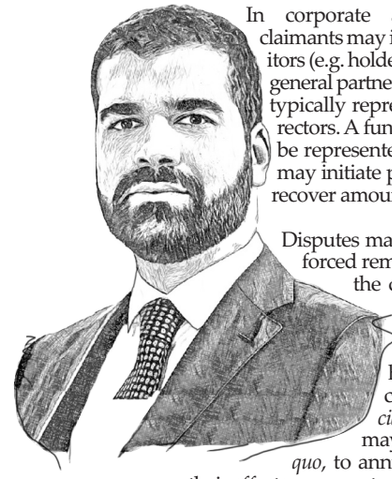

Rules of civil procedure are deemed to be at the service of the parties to a dispute, as the form is meant to be an instrument of the realization of justice. These rules define and structure the process of the dispute and allow the parties to advance to the stage where the merits of the case will be assessed to determine whether – and to what extent – the claims brought forward are justified. Although they do not directly concern the merits of a case, rules of civil procedure carry a significant strategic importance for all parties involved. It is essential to master them to reach the desired outcome.

The nature of corporate and financial disputes in Luxembourg, the complexity of the issues at stake, the high amounts involved and the difficulty to obtain evidence, give rise to a number of procedural issues, strategies and opportunities which may be used by all parties to the dispute, especially by defending parties which may want to avoid a review of the merits. Defending parties can be expected to avail themselves of procedural errors made by claimants and try to create incidents, and raise issues of jurisdiction of the court (*compétence*), nullity of the writ of summons (*nullité de l'acte*) and admissibility of the claim (*recevabilité*). They may strategically take all opportunities to create obstacles, increase the complexity of the case, and use dilatory tactics to discourage claimants or prevent the case from going forward.

Not all claims are worth pursuing

Cases of global fraud or financial scandals have given rise to an abondance of case law and judicial guidance on certain issues. Yet, many financial losses go unreported. It may not make financial sense for investors to take legal action if a possibly faulty loss of value of an investment is compensated by increases in the value of other investments. The loss may be sufficiently diluted and it may not be worth investing time, resources and energy investigating and taking action. Investors (in particular physical persons) may also lack information as to the management of their assets if these are invested through a service provider acting as a nominee. Investment fund managers and the fund's service providers (custodians, registrar and administrative agents, etc.) may only accept to communicate with the registered shareholder.

Should a party in breach of its obligations be identified, demands and responses are often communicated by way of lawyers' letters, under the form of formal notices (*mise en demeure*). All parties will start assessing the strength of their respective positions, consider financial exposure and commercial and reputational risks. It may come to light that taking the matter to court would amount to resources poorly spent. One may also face difficulties from an evidentiary standpoint when evaluating the amount of its prejudice or assessing the chances of success of its claims. Luxembourg procedural law provides solutions to tackle this issue, allowing to force the disclosure of documents under certain conditions.

Initial hurdles when initiating an action

Under Luxembourg law, there is no obligation to put a defending party on notice, or to engage in pre-contentious discussions or mediation before initiating proceedings, unless the parties have contractually agreed otherwise. Contractual arrangements may provide for mediation clauses and/or arbitration clauses, which will be enforced by the Luxembourg courts. Initiating litigation or arbitration in breach of a mediation clause (for example if the timeframe of the mediation is not complied with) may lead to the tribunal's lack of jurisdiction.

When choice of jurisdiction clauses provide for the Luxembourg courts, the claimant chooses the applicable procedure. Whether he chooses a written procedure (*procédure écrite*) or an oral procedure (*procédure commerciale*), if applicable, the proceedings always start with the filing of a writ of summons. In corporate and financial disputes, which are more complex, a written procedure (controlled by the pretrial judge (*juge de la mise en état*) and allowing the parties to respond to each other's brief) is often more appropriate.

The rules of civil procedure require claimants to clearly identify the parties, the object (i.e. the subject matter) of the dispute and the causes of action. These are generally the first procedural hurdles to overcome.

In corporate and financial disputes, claimants may include shareholders, creditors (e.g. holders of debt instruments), the general partner of a fund, or the fund itself typically represented by its board of directors. A fund under liquidation would be represented by its liquidator, which may initiate proceedings with a view to recover amounts owed to the fund.

Disputes may for example concern the forced removal of directors of a fund, the dilution of one's minority shareholding, the abuse of majority rights to the benefit of the majority shareholder and the definition of corporate interest (*intérêt social*). The requests for relief may seek to maintain the *status quo*, to annul resolutions or suspend their effects, or monetary damages.

Choosing the defendants against which to turn is a matter of great strategic importance as this impacts the control and the duration of the proceedings. Turning against too many defendants may put pressure on a number of parties, but this may also backfire in terms of costs and timing as it may open the door to delay tactics. There is in any event no assurance that directing claims against a single defendant will necessarily shorten proceedings, as the defendant may seek to deflect liability (thereby increasing the duration and the costs) by filing summons against other entities with a view to join them to the initial proceedings. Requests for joinder may be granted if there is a risk of conflicting decisions between related proceedings.

The subject matter of the dispute is determined by the parties' respective claims, set forth in the writ of summons and the subsequent submissions. It relates to the relief sought by the claimant. In principle, the subject matter of the dispute does not change throughout the proceedings. A defendant would typically seek to have a new claim declared inadmissible, but the argument may fail if this new claim is sufficiently linked to the claimant's initial demands.

The cause of the action is the factual pattern that constitutes the direct and immediate basis of the claim. It is not the right to be asserted, but rather the underlying events giving rise to this right and justifying the start of the proceedings. It is linked to the principle that the parties bear the burden to prove the facts justifying their claims.

Before initiating proceedings, claimants will need to carefully assess the parties, the subject matter and the cause, for each claim raised in each proceeding, to ensure the jurisdiction of the court and the admissibility of the claim, and to avoid other unnecessary procedural hurdles. The greater the number of parties and the number of claims, the most important (and the most difficult) this analysis may become.

Anticipating technical arguments in defense

A defendant may raise the obscure wording (*libellé obscur*) of the writ of summons to request its nullity. Under Luxembourg law, the statement of the case may be brief, but it must be sufficiently precise to enable the judge to determine the legal basis of the claim, to avoid misleading the defendant as to its purpose and to enable him to choose the appropriate means of defense.

A defendant's typical argument may be that the facts are not presented in a sufficiently intelligible manner to justify the claims (i.e. that the link between the cause and the object of the dispute is not clear) and that as a result of the ambiguity the defendant may not organize its defense properly. The Luxembourg courts are more likely to accept this argument if the defendant is able to demonstrate a clear prejudice. A defendant may raise the alleged inadmissibility of the claims on the ground that the claimant would lack standing (*qualité à agir* and/or *intérêt à agir*). It is generally admitted that one has an interest to act when the result of the action is such as to modify or improve its legal position. It relates to the utility and benefit of the relief sought and must be legitimate (not contrary to the law) and personal. A claim based on one's hypothetical interest would generally be deemed inadmissible.

In a dispute concerning the legality of the removal of directors of a company, the former directors may initiate proceedings on the merits to contest their removal and seek to be reinstated. In parallel, they may also initiate summary proceedings (*référé*) to suspend the effects of resolutions taken further to their removal in which they did not get to participate. In the summary proceedings, the defending company may argue that the claimants suffer no prejudice as a result of the resolutions taken given their capacity as *former* directors, and thus that they lack standing.

The existence of a criminal action may also be used by defendants to try to stop progress in a civil suit. This rule aims to prevent a possible contradiction between the civil and criminal decisions, while granting precedence to the criminal action as a matter of public policy. Raising the existence of a criminal complaint is not sufficient – one generally needs to demonstrate that the criminal action is in motion and that its outcome is likely to impact the outcome of the civil proceedings.

In a directors' disputes, one may file a criminal complaint on the ground that a director would have made a use of its powers or votes in a way it knew was contrary to the corporate interest and for its own benefit, and then rely on this complaint in the civil proceedings to request their suspension (*surséance à statuer*) pending the final resolution of the criminal action. In summary proceedings, this rule is not applicable as the powers of the judge are in principal limited to provisional measures which are not likely to upset the precedence of the public action.