

16. LUXEMBOURG

Contributing correspondent

Christiane RECKINGER, *Councilor at the Luxembourg Court of Appeal*

Author

Daniel CHABANOL, *Honorary State Councilor (French)*

Other administrative order

YES

Procedural Rules in calling for an expert opinion

I. 1) On the initiative of

It can be decided on the judge's own motion or organised "at the parties' request", provided they give substantiated cause for it. The judge may refuse to order an expert opinion (except otherwise provided for by law, such as Art. 1678 of the Civil Code), if he believes it would be complementing the parties' lack of proof. The parties are thus understood as having to establish the benefits and necessity of the expert examination.

I.2) Mandatory expert examinations

In certain cases, the law can impose on the judge to order an expert examination. For example, in matters pertaining to rescinding a sale for damages, Article 1678 of the Civil Code stipulates that evidence of the damage will be provided by means of an expert examination.

I. 3) Decision-maker

The judge

I.4) Is a pre-trial expert examination possible?

It is possible to call for an interim expert examination before the start of the trial if it is deemed necessary for the establishment or the safeguard of the evidence.

II. Choice and appointment of the expert(s)

II. 1) Register

Yes, the Ministry of Justice establishes registers of "accredited" and sworn experts in the various fields of expertise.

II. 2) Oath

Yes, before a Chamber of the Superior Court of Justice, when accreditation is issued.

II. 3) Choice of the Expert

The parties can discuss the choice of the expert and suggest one or several names, or jointly suggest an expert to be appointed by the judge.

II. 4) Participation by the parties in the appointment process

The parties can discuss the choice of the expert and suggest one or several names, but the judge remains free to make the decision (and, namely, is not bound by the registers).

II. 5) Nationality

Irrelevant

II. 6) Recusal by the litigant parties

On the same grounds as for judges:

- 1° if he is a relative or in-law of the parties or of one of the parties, including second cousins.
- 2° if the expert's wife is a relative or in-law of one of the parties, or if the expert is a relative or in-law of the wife of one of the parties to the above-mentioned degree when this wife is alive, or if she is deceased, if there are no children; if she is deceased and there are no children, the father-in-law, son-in-law, or brothers-in-law cannot be experts.
- 3° if the expert, his wife, their ascendants or descendants or in-laws in the same line, are involved in a dispute on a similar question as that between the parties;
- 4° if there is a trial in their name in a court where one of the parties will be a judge; if they are creditors or debtors of one of these parties;
- 5° if, in the five years prior to the recusal, there was a criminal trial between them and one of the parties, or the expert's spouse or direct relatives or in-laws;
- 6° if there is a civil lawsuit pending between the expert, his wife, their ascendants and descendants, or direct in-laws, and one of the parties, and if this lawsuit, if brought by said party, was brought before the trial in which recusal is suggested; if this trial is over and has been over only in the six months prior to the recusal;
- 7° if the expert is the guardian or deputy guardian or trustee, the heir apparent, the donator, master or guest of one of the parties; if he is the administrator of an establishment, company, or management that is a party in the case; if one of the parties is the expert's heir apparent;
- 8° if the expert has given counsel, argued or written about the dispute; if he has previous knowledge of it as expert or arbitrator; if he has requested, recommended, or taken part in the trial costs; if he has borne testimony as a witness; if since the start of the trial he has drunk or eaten with one or the other of the parties in their home, or received gifts from them;
- 9° if there is mortal enmity between him and one of the parties; if there has been assault, insults, or threats on his part, whether verbal or written, since the start of the proceedings or in the six months prior to the proposed recusal.

II. 7) Expert's withdrawal (refusal of a mission)

Not provided for

II. 8) Possibility of adding another expert

The expert is entitled to request the opinion of another technician but only in a specialist field that is distinct from his own.

II. 9) Possibility of being assisted by a colleague

Provided the latter is a specialist in a different field.

III. DEFINITION OF THE EXPERT'S MISSION

III. 1) Who determines the mission?

The judge determines the mission.

III. 2) Type of mission

Article 436 Civil Code of Procedure:

The judge who appointed the expert or the judge in charge of supervising expert examinations can expand or restrict the mission entrusted to the technician.

The parties may refer to the judge in order to increase the scope of the expert's mission and order an additional expert examination.

IV. PROGRESS OF THE EXPERT'S MISSION

IV. 1) Judge supervision

The expert examination is carried out under the supervision of a specially appointed judge who can attend the expert's meetings, ask him questions, set deadlines, and, if the need arises, replace him. The same judge rules on any difficulties that may arise during the examination, namely on matters relating to the refusal of disclosing documents.

IV. 2) Form of contradictory procedure

Yes - the expert must summon the parties to the meetings, disclose all the evidence on which he will base his report, collect the parties' remarks and give them the opportunity to debate and dispute his opinion. This means the expert has to make a preliminary report.

IV. 3) Participation in the hearing

The expert may be invited to the hearing in order to complete, clarify or explain his conclusions (this can also be done in writing).

V. Close of the expert examination

V. 1) Does conciliation put an end to the expert's mission?

The expert must try to reconcile the parties insofar as it is possible. Conciliation may put an end to the expert's mission; in this event, the expert notes that his assignment has become irrelevant and reports to the judge.

V. 2) Form imposed on the report

NO

V. 3) Does the report put an end to the expert's mission?

The expert's mission ends when he submits his report to the court registry and notifies the parties.

V. 4) Is there an imposed structure for the report?

NO

V. 5) Is a preliminary report mandatory?

There is no mandatory preliminary report and there is only one report even if there are several experts involved.

V. 6) Is the judge bound by the expert's conclusions?

The judge is not bound by the expert's findings and conclusions.

V. 7) Possibility of a second opinion

The parties always have the possibility of asking for a second expert opinion.

VI. Funding for the expert examination

VI. 1) Security-Payment

According to Article 467 of the New Code of Civil Procedure, the judge ordering an expert examination determines the amount of a down payment on the expert's fees. He determines the party or parties that will, within the deadline he has set, deposit the security-payment at the "Caisse des Consignations" or another agreed upon credit institution.

VI. 2) Determining the amount of payment due

The judge

VI. 3) Possibility of additional payment

It is possible to refer to the judge to have him order the deposit of additional payment as an adversarial measure.

VI. 4) Determining fees and costs

Control and tax by the judge if the parties dispute the amount the expert has claimed (with a possible appeal against the order at the Civil Chamber of the Court of Appeal). In the event of a tax, the judge bases his calculations on a system of hourly rate provided for by law.

The parties pay for the expert opinion, except in criminal cases.

VI. 5) Possibility of contesting the fees

When the parties contest the amount of the costs and expenses claimed by the technician, it is taxed by the judge, who can issue an enforcement order.

The taxation of costs and expenses can be appealed against before the Civil Chamber of the Court of Appeal acting in the Council Chamber.

VII. Expert liability within proceedings

VII. 1) Are there any laws governing expert examinations?

Article 432 and following in the New Code of Civil Procedure govern the investigative measures carried out by a technician.

Articles 87 and 88 of the Code of Criminal Procedure govern the expert examination ordered by the investigating judge.

The Law of 7 July 1971 on repressive and administrative matters, providing for certified experts, translators, and interpreters, and completing the provisions on the certification of experts, translators, and interpreters, governs the appointment of legal experts and their certification.

Article 14 of the Law of 21 June 1997 contains a provision for proceedings before the administrative courts which gives the court the mission to regulate the form and deadlines within which the expert must proceed on his assignment and commits a member of the court to supervise the investigative measure.

Grand-Ducal Regulation of 23 December 1972 establishing new compensation rates to be allocated in all matters to witnesses, experts, and interpreters, defines the methods for calculating the various categories of experts.

Grand-Ducal Regulation of 14 October 2005 establishing medical rates in cases of requisition by the justice system.

VII. 2) Expert liability

Yes (Article 1382 and 1383 of the Civil Code): Liability for gross negligence, negligence, or recklessness in carrying out his mission.

VII. 3) Mandatory insurance for the expert

There are no legal texts obliging the expert to take out particular insurance.

VIII. The expert's status

VIII. 1) Existence of selection criteria (accreditation)

Yes: degrees, curriculum vitae, as well as the recommendations of the Public Prosecutor and of the Ministry of Higher Education and Research.

VIII. 2) Classification of skills

Yes, register established by the Minister of Justice

VIII. 3) Required qualifications

YES

VIII. 4) Grant of accreditation

By the Ministry of Justice

VIII. 5) Possibility of accrediting a legal person

A legal person can be appointed as an expert

VIII. 6) Validity period for the accreditation

If the expert is a legal person, its legal representative submits to the judge's approval the name of the natural person or persons who will be in charge of carrying out the assignment.

VIII. 7) Regular assessment tests

NO

VIII. 8) Supervision of the expert's mission

There is no supervision of the work of legal experts who are referenced on the Ministry of Justice's register.

VIII. 9) Expert's activity report

NO

VIII. 10) Code of ethics

Code of conduct established by the Chamber of Experts.

VIII. 11) Good practice

The appointed expert must accomplish his mission with due care, objectivity and impartiality. He must fulfil his mission personally within the deadlines set by the judge.

In civil matters he must observe the contradictory nature of the expert examination throughout the proceedings, and namely, summon the parties or their representatives in good time for expert analyses, transmit to them all the elements he is basing his report on, allow the parties to make their own observations and claims, and give them the possibility to dispute and contest his opinion.

Experts appointed by the investigating judge must inform the judge in good time of the date, place, and time of their operations; the investigating magistrate in turn informs the expert appointed by the accused, in order to allow him to attend all the expert proceedings.

VIII. 12) Possibility of penalties

By the disciplinary commission of the National Chamber of Experts.

In the event that a technician fails to comply with his obligations, the judge can replace him or cancel his report.

If he fails to comply with his legal obligations or in the case of non-observance of professional ethics, or based on other serious grounds, a registered expert can be revoked by the Ministry of Justice on the recommendation of the General State Prosecutor.

VIII. 13) Laws governing the expert's status

Aside from the Law of 7 July 1971 on repressive and administrative matters, providing for certified experts, translators, and interpreters, and completing the provisions on the certification of experts, translators, and interpreters, there is no specific text governing the status of the expert.

IX. Bibliography

There are no recent books, nor specialised journals that specifically deal with legal expertise in Luxembourg law.