The prerequisites for THE IMPLEMENTATION OF A COMPULSORY EXECUTION MEASURE

• What conditions must be met to implement an enforcement measure against my debtor?

1. BE IN POSSESSION OF AN ENFORCEMENT ORDER ESTABLISHING A CLAIM THAT IS CERTAIN, OF A FIXED AMOUNT AND DUE

WHAT IS AN ENFORCEMENT ORDER?

An enforcement order is a title allowing recourse to the enforcement of the claim to which it refers. Even though a private document signed by two persons renders what they have mutually agreed official, this private instrument is not in itself sufficient to constitute an enforcement order. The power to make a document enforceable at the national level in Luxembourg is held only by a court, a notary and certain public authorities (the Administration des Contributions Directes [Direct Taxation Authority], the Administration de l'Enregistrement et des Domaines [Authority for Registration and Domains], the Centre Commun de la Sécurité Sociale [Common Social Security Centre], the local authorities, etc.), each within its own sphere of competence.

In the Grand Duchy, enforcement orders can be listed as follows:

- court decisions (together with authority to execute);
- notarised deeds (together with authority to execute);
- orders to pay – enforcement orders issued by the authorities.

In addition, the following exist within the European Union:

- enforcement order originating from a European Union Member State together with a European enforcement order certificate;
- European order for payment.

WHAT IS A CLAIM THAT IS CERTAIN, OF A FIXED AMOUNT AND DUE?

A claim is certain if the principle of its existence is no longer open to challenge.

A claim of a fixed amount is one that it is determined or determinable in money.

A claim that is due is one that has matured or that no longer depends on the fulfilment of a condition.

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WHAT IS THE AUTHORITY TO EXECUTE?

The appending of authority to execute is a procedure conferring enforceability on a title; in other words only after this procedure has been carried out may a title be executed, if necessary by the law enforcement authorities.

Depending on the nature of the title, whether judicial (such as a court judgment) or notarial (such as a deed executed before a notary), the authority to execute will be delivered by the Court registry or by the notary who has issued the title in question.

Certain titles are dispensed from the need to carry out this procedure: at the present time, they only consist in foreign enforcement orders issuing in a European Union Member State and supporting by an European enforcement order and in European orders for payment.

Once the authority to execute is appended to the title in question, the latter is called the execution copy.

In Luxembourg, judicial officers may assume responsibility for carrying out this formality.

Authority to execute is worded as follows:

> WE, HENRI,
> Grand-Duke of Luxembourg, Duke of Nassau;
>
> Hereby proclaim
> [...]
>
> WE ORDER
> all judicial officers, on request, to execute this judgment (decree, order, decision or writ);
> Our Attorney General and Our State Prosecutors attached to the District Courts to afford them assistance,
> and all law enforcement commanders and officers to lend assistance when they are legally required to do so.
>
> IN WITNESS WHEREOF,
> the present judgment (decree, order, decision, writ) has been signed and sealed with the seal of the magistrate of the First Instance Court (Supreme Court, District Court, Administrative Court, notary, etc.)..

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2. ADDITIONAL CONDITIONS TO BE MET IF THE TITLE IS A JUDGMENT

A JUDGMENT MUST NO LONGER BE OPEN TO APPEAL OR MUST BENEFIT FROM PROVISIONAL ENFORCEMENT

To use legal jargon, one might say that a judgment has become *res judicata*. More simply it could be said that the judgment must be final, in the sense that it must no longer be open to challenge by ordinary modes of recourse, such as an appeal.

Provisional enforcement, on the other hand, is a way of scheduling the time between the pronouncement of the judgment (or more precisely the service of that judgment) and the time at which this judgment becomes *res judicata*. Although in principle one should have waited until this period of time had elapsed before being able to initiate the enforcement of the decision, the benefit of provisional enforcement will enable us to start on this phase as soon as the notice of the judgment is served. Provisional enforcement is determined by the judgment itself. The court will grant the benefit of such enforcement only if it has been prescribed by law or if the judge feels that the case merits it, but in the latter case the plaintiff still needs to have applied for it.

Calculating the period elapsing between service of the judgment and the time at which it has become final is a separate matter. Without wishing to go into the details, it can be said that in Luxembourg almost all judgments that may need to be enforced by a judicial officer may be executed after the lapse of a maximum period of 55 days, which start to run from the day after the service of the judgment. This is, however, merely a general indication for the purposes of this explanation. Many judgments may already be enforced earlier than this. The judicial officer of your choice in Luxembourg will be pleased to help you on this subject.

A JUDGMENT IS TO BE SERVED

▶ If the debtor lives in the Grand Duchy of Luxembourg

In the Grand Duchy of Luxembourg, a distinction is made in civil matters between two methods of serving notice.

On the one hand, notice may be served by the court registry (called *notification* in French) and, on the other hand, service may be effected by a judicial officer, in which case it is called *signification*.

The number of cases in which service of notice is effected by the registry is strictly limited. The rule is that a judgment is served through the judicial officer, and only in exceptional instances, and where the law favours the creditor, is notice served by the registry, particularly when it is a first instance judgment in matters of property leases and employment.

There is a significant distinction between these two methods of service: whereas the service of notice by the registry is carried out by post, in principle service by a judicial officer entails that officer visiting the premises himself. In theory, the value of notice being served by a judicial officer is that there is a better guarantee of the delivery of the document to be served. The judicial officer actively seeks out the person to whom the document in question is to addressed and must make every reasonable effort to deliver it into the addressee's own hands. Another advantage lies in the fact that the judicial officer may provide information on the nature of the document delivered and, where appropriate, on the steps to be taken, such as consulting a lawyer or a bank.

Before a judgment can be enforced, there must be certainty that it has been served. This is in fact an essential formality. To ensure that the debtor knows whether and what he must pay, he must first know what he has been ordered to do (it hardly needs saying that many debtors do not present themselves at the court hearing...). To this end, the registry issues a certificate of notice and the judicial officer issues a certificate of service, called in French an *acte de signification*.

▸ If the debtor lives in another Member State

If the debtor lives in a Member State of the European Union, the judgment must be served in that Member State. Based on the same distinctions as described above, this will be done by the registry or alternatively the Luxembourg judicial officer concerned with this formality in Luxembourg in connection with the parties to proceedings. The service of court decisions in the European Union is a formality that has been facilitated by the formulation of specific legislation on this level.

▸ If the debtor lives in a non-Member State

If the debtor lives in a third State, the judgment must nonetheless be served. Within Luxembourg, once again this responsibility lies with the registry or a judicial officer.

3. CARRYING OUT THE ENFORCEMENT MEASURE WITHIN A CERTAIN TIME-FRAME

A distinction should be made between various situations:

- Actio judicata, in other words an action to enforce a judgment by execution on the defendant's property – must be implemented within a period of 30 years. It is, then, on a par with the customary time-limit, after personal civil actions may no longer be enforced. In practice, it is fairly rare to encounter this mechanism, as most judgments are enforced in a far shorter period, although they may in some cases take several years.

- Notice of a default judgment must be served within six months of it having been delivered by the court. Since the service of the judgment is an essential prior step before enforcement, care should be taken to ensure that this formality is carried out within the prescribed period.

- Although this is not generally the case, other time limits have to be observed to avoid a partial or even complete breakdown of enforcement. For instance, the enforcement of court orders to make periodic payments by way of a penalty must be initiated within six months or, in the case of preventive attachments of a tenant's goods for the payment of rent (a protective measure in its first phase), the judges often specify in their authorising judgments that the application for validation of the attachment should, on penalty of nullity, be filed within a certain period following the initial decision.

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• What can I do while awaiting an enforcement order? Do protective measures exist?

When it comes to enforcement, there are various weapons in Luxembourg's legislative armoury that can be used to deal with a reluctant debtor even before an enforcement order is obtained. These instruments are seen as - to some extent -enabling the creditor to retain intact his security in the form of the debtor's goods. In other words, certain parts of the debtor's assets will no longer be available to him.

Here a distinction should be made between purely protective measures and hybrid measures, i.e. measures that protect the creditor's position only in the starting phase.

1. DISTINCTION

PURELY PROTECTIVE MEASURES

There is only one purely protective measure in Luxembourg, the protective attachment in commercial matters. The claim to be recovered must be of a commercial nature. In principle, therefore, this measure has no role to play in the case of an individual creditor who is not a trader.

HYBRID MEASURES

These measures are generally backed up by a second phase, which in turn may lead to an enforcement measure based on an enforcement order. The first step is always to try to choose and attach an item in the debtor's assets, which at this stage is equivalent to arranging for a protective measure to be carried out before converting the whole into an enforcement instrument in the second phase. Between these two phases, the creditor needs to back his claims either by the production of an enforcement order or by embarking on first obtaining such a title.

In reality, these measures may be relatively complex for an inexperienced person, but even for a more seasoned creditor it is still a fairly technical matter to master the whole process.

2. PREREQUISITES FOR INTRODUCING A PROTECTIVE MEASURE

THE COMMERCIAL PROTECTIVE ATTACHMENT

The first step towards carrying out this measure is to obtain authorisation from the President of the District Court. This is done by filing an application, which implies that the other party is not involved in this process. The advantage is of course that the debtor party is theoretically un aware of the imminent attachment of his assets, so that he does not have the time to make them to disappear.

HYBRID MEASURES

Some of the measures automatically require court authorisation, while for others this authorisation may be replaced by a prior formal notice to pay; yet others raise the question of the existence of a public or private title as well as that of the possible need for authorisation.

In the first, second and also in the third case, the assistance of a legal professional - and perhaps a judicial officer as well - may not be necessary to set up the procedure, but can be strongly recommended. An individual who is not accustomed to legal disputes may very quickly become discouraged and feel that matters are over his head. A judicial officer will be truly willing to help him and may certainly surprise him, exceeding his expectations.

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3. THE DIFFERENT TYPES OF PROTECTIVE MEASURE

ATTACHMENTS

▶ commercial protective attachment (article 550, New Code of Civil Procedure – NCPC)

The purpose of this attachment is not to make the seized assets permanently unavailable but to initiate the proceedings on the merits, in other words to take steps towards obtaining an enforcement order against the debtor. On the same occasion, the attachment may be converted into an execution order, which will lead to obtaining the court's permission for the goods initially seized to be sold at auction, thus obtaining satisfaction of the debt from the proceeds of this enforced sale. The level to which the debt is satisfied naturally depends on the amount that will be fetched on realising this part of the debtor's assets that has been seized.

▶ attachment of real property as security (article 956(1) and (2), NCPC)

This 'distress for rent' is the seizure of goods furnishing the premises leased by a landlord/creditor to a tenant/debtor. This means that only a lessor acting to obtain unpaid rent can avail itself of this form of attachment.

▶ garnishment under ordinary law (articles 693 et seq., NCPC)

This is an attachment for the purpose of freezing property held for the debtor by a third party. Although it may be used to oppose the third party's return of tangible objects to the debtor, it is more often used to prevent the third party from disposing of funds that he is holding on the debtor's behalf. This is the measure that can be used to carry out attachments of assets held in a bank. The aim, therefore, is to obtain possession of the debtor's claims against third parties.

▶ the special garnishment

A special garnishment is a measure whereby a debtor's earnings, annuities and pensions can be seized. Under the relevant statutory measures, the identity of a third party owing the debtor a periodical income payment may be sought by effective means.

GUARANTEES

▶ Preliminaries

In Luxembourg, since the law of 21 December 1994 amending certain statutory measures relating to the transfer of claims and to collateral, the key provisions of the Civil Code, the Commercial Code and the Grand-Ducal Order of 27 May 1937 regulating the pledging of business assets as security have been substantially amended as regards the intervention of judicial officers. A law on financial guarantee contracts of 5 August 2005 establishes the legal framework for the pledging of financial instruments, transfers of ownership as collateral and netting agreements.

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As a result, it is now not compulsory to call on the services of the judicial officer in such matters. In practice, the Luxembourg judicial officer no longer acts in the transfer of claims or of pledges.

Without wishing to dwell on a subject that will go beyond the purposes of this information sheet, the law on financial guarantee contracts is aimed more specifically at professionals in the financial sector, and the Grand-Ducal Order on the pledging of business assets should normally be of concern only to traders, as should the commercial pledge. We shall not discuss these special forms of collateral, nor the pledge under ordinary law or the 'antichresis', a pledge on real property given by the debtor as security for a debt or mortgage.

The judicial officer, on the other hand, is still the partner of choice as regards the registration of mortgages or charges by order of the court as an execution measure, a subject which will be discussed below after touching on a few general considerations.

▸ The value of security

The aim with all forms of security is generally the same: to provide a guarantee in trade that is seen as a protection against the incidents that may occur over the course of the transaction, such as the debtor becoming insolvent.
This aim is achieved by the creditor being attributed two types of entitlement:

The right of preference

The right of preference implies that a creditor having the benefit of security may call upon the asset pledged for payment of its debt by preference over the debtor's other creditors. The higher the creditor's ranking the better, though, since there may already be a charge in favour of another creditor on the asset to which the security refers. When the asset is real property, this latter point is clarified by the fact that in principle the charges on the property are made public by registration. This means that a creditor may check whether the property offered as a guarantee is in fact a sound collateral.

The "droit de suite" – the 'right to follow property'

The consequence of this right is that the creditor may trace or follow property given as security, whatever the hands into which it may pass. This mechanism may come into play, for example, if the debtor divests himself of the encumbered property. The law does not in principle regard this as a reason for not allowing the debtor to exercise his right over the property.

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▶ The forms of guarantee that a judicial officer may arrange

A judicial officer may, by means of an enforcement order, arrange for the competent Mortgage Registrar to enter the following mortgages into the appropriate registers:

- mortgages of real property
- ship mortgages
- aircraft mortgages

The importance of the mortgage will become apparent at a later date, in the event that the property used as security for the mortgage has to be realised. This liquidation of real property will be implemented by its sale by auction, a process that would have been initiated by the attachment of the property or by taking advantage of a *clause de voie parée* contained in the mortgage loan agreement.

The "*clause de voie parée*" is a clause allowing a mortgagee creditor to arrange for the property in question to be sold by a notary without having to go through the courts. In Luxembourg, the inclusion of such a clause in a loan agreement is permitted. The auction may take place only if the creditor enjoys the first-ranking mortgage.

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