

# Between adaptation and evolution



**Manuel Fernandez - 05/12/2022 ([CDR](#))**

**Manuel Fernandez of GSK Stockmann looks at recent events affecting Luxembourg's procedural law.**

Luxembourg's legal system was originally influenced by neighbouring Belgium and France, but is now evolving in a unique direction to match the specific needs and opportunities of the Grand Duchy's economy. In this context, procedural law is constantly developing to be as quick and efficient as possible. There are two primary reasons for this evolution. The first is a consequence of recent challenges which have boosted the judicial system, while the other is the ambition to have an attractive and efficient judicial system for investors, financial institutions and companies.

Luxembourg's judicial system has faced two major challenges in recent years. The first was a game-changer and came from abroad: the withdrawal of the United Kingdom from the European Union. This announcement led to a long period of legal uncertainty, followed by a transition period where EU regulations remained applicable. Since Brexit, we have seen a clear regression from a procedural-law perspective, especially in respect of the recognition and enforcement of UK court decisions in Luxembourg (and vice-versa). The second game-changing challenge was the Covid-19 pandemic which abruptly caused a profound disruption to all judicial systems.

The impact of these two unexpected challenges, with which all legal practitioners in the EU were confronted, led to many uncertainties, abrupt changes and improvements in procedural law.

For the purpose of this article, only procedural law for commercial disputes will be analysed.

## **REINSTATEMENT OF A BURDENSOME REGIME FOR THE RECOGNITION AND ENFORCEMENT OF UK JUDGMENTS**

The effects of Brexit on Luxembourg were mixed. While Luxembourg lost an important trading partner, it also benefited to a certain degree through the relocation of some financial institutions and the shifting of activity.

An important consequence of Brexit has also been the renewed interest in Luxembourg as a chosen forum and law to handle issues related to international securities and related contractual documentation – including

for some public players and institutions – in lieu of UK law and jurisdiction. The Luxembourg forum is and will keep getting busier in the aftermath of Brexit. The number of commercial judgements in Luxembourg is increasing, and did so even during the pandemic in 2020 and 2021 (see *Rapport d'activité, Ministère de la justice 2021* p. 107).

Another side effect of it relates to procedural law. Indeed, in Luxembourg and across the EU, Brexit has, to an extent, eliminated a legal certainty regarding the recognition of decisions and awards that had been built up over the years.

## **PRE-BREXIT REGIME**

Prior to Brexit, recognition and enforcement of UK judgments in Luxembourg were governed by the Regulation (EC) No 44/2001 (Brussels I) if they were rendered before 10 January 2015 and by the Regulation (EU) No 1215/2012 if they were rendered between 10 January 2015 and 31 December 2020. (Brussels I Recast).

According to the framework provided by these regulations, a judgment handed down in a Member State shall be recognised and can be enforced in other member states without any special procedure being required.

Brexit has slowed down and complicated the procedure for the recognition and enforcement of these judgments in Luxembourg insofar as, after the Brexit transition period expired on 31 December 2020, the regulations were no longer applicable in respect of decisions made in UK courts.

## **POST-BREXIT REGIME**

Judgements rendered after the transition period are typically governed by the Hague Convention, an international instrument covering choice-of-court agreements, which came into force on 30 June 2005; Luxembourg, as member of the EU, is also a member of the Hague Convention.

Initially, the UK took advantage of its membership of the European Union, which had previously signed the Hague Convention, so that the UK did not have to sign and ratify it. In the context of Brexit however, the UK needed to ensure a smooth transition and thus ratified it on 28 September 2020 applicable as of 1 January 2021.

The Hague Convention does not cover judgments arising from contracts without exclusive jurisdiction clauses, non-contractual disputes, or when the dispute is related to a matter excluded by the Convention. The domestic law of the receiving EU Member State (in this case Luxembourg) will be applicable when the very limited scope of the Hague Convention does not apply, and there will consequently be no automatic recognition and enforcement of UK judgments.

The Luxembourg law (such as Article 678 of the new Civil Procedure Code of Luxembourg) is applicable if a claimant is seeking recognition and enforcement of judgments in Luxembourg. According to the code, a Luxembourg judge must verify that all the conditions of the exequatur are fulfilled before to recognising and enforcing any decision. If the judge considers that the conditions are not met, he will deny enforcement. Therefore, after a long period of uncertainty, the post-Brexit world represents a backward step for anyone looking for the recognition and enforcement of UK judgements in Luxembourg.

This is likely to help make Luxembourg a more attractive forum. The same reasoning applies for arbitral awards.

## **A GROWING NUMBER OF INTERNATIONAL INSTRUMENTS ARE GOVERNED BY LUXEMBOURG LAW**

Since Brexit was confirmed, the attractiveness and predictability of UK law became less attractive, and consequently Luxembourg became the law and the forum of choice for some securities issues. In particular, EU institutions including the European Investment Fund, the European Investment Bank and the European Stability Mechanism have recently begun to insert Luxembourg law and jurisdiction clauses in their debt instruments or guarantees.

## **JUDICIAL REFORMS**

Luxembourg has interesting cards to play in the international legal market, and the political will backing such ambitions. The state recently decided to amend its procedural law in order to increase the efficiency of commercial court proceedings, and also to modernise internal and international arbitration law. Both aspects could contribute to reducing the workload of courts and help create an arbitration hub in Luxembourg.

When Covid-19 hit, the Luxembourg judicial system, like every other judicial system, had to deal with the situation quickly and without preparation in order to allow justice to continue to function as much as possible. Luxembourg put in place several temporary rules and procedural adaptations meant to be applicable only during the emergency, but some of which could remain because they were found to create a more modern and flexible judicial system.

## **THE RECENT MODERNISATION OF CIVIL AND COMMERCIAL PROCEDURE**

The bill on strengthening the efficiency of civil and commercial justice (*Projet de loi sur le renforcement de l'efficacité de la Justice civile et commerciale*) was introduced on 14 May 2018 and became law on 15 July 2021. The core purpose of this law was to create faster and more efficient procedures. For instance, it created a simplified written procedure for cases with a value of less than EUR 100,000. It simplified and made safer the procedure for obtaining conditional payment orders from courts. Interestingly, it also facilitated the automatic replacement by courts of court-appointed expert witnesses not answering on time to the court's requests. Among the various amendments, the reform also allowed the use of e-mails for sending legal documents between lawyers. Prior to this, this communication was exclusively via fax or hard-copy letters.

Similarly, a pre-trial judge (*juge de la mise en état*) will now notify their intermediary decisions by fax and email instead of via hard copies.

A third and very important point is the introduction of specific procedures to ask a court that has made an objective factual error or omission, in the calculation of damages for example, to rectify it without having to go through an actual appeal procedure.

Prior to this law, courts had already started to modernise Luxembourg procedural law by deciding, for example, that evidence in the English language is admissible without a court translation. Consequently, Luxembourg courts now accept evidence in French, German, Luxembourgish and English without translation – a unique and convenient feature of the Grand Duchy's legal system.

## **THE GLOBAL PANDEMIC AS A NEGATIVE STARTING POINT FOR THE POSITIVE EVOLUTION OF THE JUDICIAL SYSTEM**

Following the Covid-19 pandemic, several measures were taken in order to limit the physical presence of personnel in court. The unexpected result of the implementation of these temporary rules is the speed and simplicity of communication between the court with the parties concerned. In fact, Luxembourg has a long tradition of paper communication (letters, delivery by hand against receipt, or faxes for certain types of documents), which is in practice quite burdensome.

More than two years after the start of the pandemic, some of the rules which were intended to be temporary

remain applicable today and contribute to more efficient court proceedings. While it is reasonable to assume that some practical rules, such as the deliberations of the Supreme Court, which could be undertaken without a physical presence will disappear, other rules might remain in force within the Luxembourg procedural sphere.

Among the changes is the removal of the paper calendar regarding the schedule of hearings, which is now sent to all parties in an Excel table attached to an email.

Additionally, the use of email and fax to communicate between a tribunal and the parties concerned has become the customary way of sharing evidence, something which was not permitted before the pandemic.

## **THE DEVELOPMENT OF ARBITRATION AND THE EXPECTED UPGRADING OF THE LUXEMBOURG LEGAL FRAMEWORK FOR ARBITRATION**

Luxembourg is already an arbitration venue. The Chamber of Commerce of the Grand-Duchy of Luxembourg has its own arbitration centre, which applies Article 1224 *et seq* of the Luxembourg New Civil Procedure Code and specific arbitration rules issued by the Chamber of Commerce. In the context of Brexit and on the background above, Luxembourg has decided to seize this opportunity to upgrade its legal framework and, with that in mind, a bill was introduced before the Luxembourg parliament on 15 September 2020.

This would maintain the Luxembourg tradition of having a unique framework applicable to both national and international arbitration, but it would modernise the current regime. In particular, it would set aside Article 1243 of the Luxembourg New Civil Procedure Code, under which arbitral awards are in no case opposable to third parties and would clarify that the arbitration agreement is not submitted to any specific formalism. Despite private initiatives to develop the local arbitration landscape, the law is still in its draft stage. As of May 2022, the Council of State is making technical remarks which aim to reduce the obstacles to the enforcement in Luxembourg of foreign awards and making it clear that the absence of specific drafting formalism does not mean that no written agreement is needed.

It is clear that the strength and experience of Luxembourg and the ecosystem of lawyers, auditors and experts that it has built around financial services and investor protection, could make Luxembourg a partial substitute for the UK as a financial arbitration venue.

Luxembourg is well aware of its strengths as one of the main and most international financial centres in the world. It is the second largest hub for investment funds and the global leader in corporate and green bonds and, as such, needs a highly efficient procedural law in line with its status. As a consequence, its judicial system is striving to modernise, especially in the fields of communication and alternative dispute resolution.

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