IN-DEPTH

# Dispute Resolution

## EDITION 17

Contributing editor
**Damian Taylor**
Slaughter and May

LEXOLOGY

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In-Depth: Dispute Resolution (formerly The Dispute Resolution Review) provides an indispensable overview of the civil court systems in major jurisdictions worldwide. It examines the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. It is also forward-looking, with astute analysis of likely future trends and developments.

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# Luxembourg

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## Summary

# Introduction

## Structure of the law

Luxembourg is a civil law country. Legislation is the primary source of law and, traditionally, legislation is codified, such as in the Civil Code and in the Commercial Code. Although each case is decided on an individual basis and judges are not allowed to establish general rules, case law, especially by the higher courts, is regularly relied upon. Academic writing is also widely used before the courts, in particular French and Belgian academic writing in relation to civil law questions. Finally, Luxembourg courts' respect the separation of power and therefore look to parliamentary documents for guidance on the intention of the legislator when interpreting legislation.

Luxembourg is a parliamentary democracy within the framework of a constitutional monarchy. The executive power, the legislative power and the judicial power are therefore separated from each other.

From a more technical point of view, Luxembourg law considers that international law (stemming from treaties or custom) and the written Constitution of 1868, which was fundamentally reformed in 2023, are at the summit of the hierarchy of norms. The legislator cannot derogate from these higher norms.

## Structure of the courts

The Justices of the Peace are the first level of the judicial hierarchy. A single judge handles minor civil and commercial cases (in principle up to a sum of €15,000). They also have exclusive jurisdiction over certain matters (irrespective of the amount at stake), such as leases.

The Labour Court, presided over by a justice of the peace and representatives for employers and employees, handles labour disputes.

The District Courts are the ordinary first instance courts who have jurisdiction in all matters not explicitly assigned to another court. A panel of three judges handles more significant civil and commercial cases (the amount at stake must exceed €15,000). The District Courts are also the appellate courts for the Justices of the Peace.

The Court of Appeal is the appellate court. A panel of three judges hears appeals against judgments of the District Court sitting in first instance and against orders of the Labour Court.

The Court of Cassation is the highest court of the ordinary judicial system. It has jurisdiction to hear appeals against any judgments rendered in last instance (not subject to appeal) by the Justices of the Peace, the District Court, the Court of Appeal or the social security jurisdictions on points of law. The panel of five judges will therefore not rule on the facts of the case.

Luxembourg has several specialist jurisdictions that include the Administrative Tribunal (first instance) and the Administrative Court (appeals), which handle disputes involving administrative decisions and regulatory acts.

The Arbitration Council for Social Security and the Higher Council for Social Security deal with social security disputes, respectively, in the first instance court and on appeal.

Finally, the Constitutional Court has jurisdiction for preliminary ruling requests on the constitutionality of laws from all Luxembourg courts. Indeed, if during a case it appears that a piece of legislation may be contrary to the Constitution, the court hearing the case shall refer it to the Constitutional Court, which will rule only on the question of whether the legislation is compatible or incompatible with the Constitution. In the latter case, the legislation in question will be disapplied.

### Framework for alternative dispute resolution procedures

The Luxembourg New Code of civil procedure contains precise rules on arbitration and mediation. Luxembourg may be considered as a jurisdiction that actively encourages alternative dispute resolution. In addition, the New Code of civil procedure explicitly states that judges have the power to mediate between parties.

Agreements reached in mediation will be declared enforceable by the courts (Article 1251-6 of the New Code of Civil Procedure), and both domestic and foreign arbitral awards can be recognised in *exequatur* proceedings, where the courts will not analyse the merits of the case again but only undertake a *de minimis* check to make sure that no important public order considerations are breached by the award. Luxembourg is a party to the ICSID Convention and to the 1958 New York Convention.

There are several institutions offering mediation, including the Centre for Civil and Commercial Mediation, which is run by the Chamber of Commerce, the Chamber of Crafts, the Luxembourg Bar and the Medical Chamber and whose offices are located within the premises of the District Court of Luxembourg-City.

## Year in review

The year has been marked by the first cases pleaded under the new restructuring law of 7 August 2023, which entered into force in November 2023 and transposed the European Directive (EU) 2019/1023. The Luxembourg courts have applied the law in numerous cases during the past year. The law allows for debtor-in-possession restructuring proceedings. The debtor may choose between three restructuring options: an amicable settlement with all or at least two of its creditors, a restructuring plan on which the creditors will vote or a transfer of assets or activities.

The courts have been liberal on the conditions for the opening of restructuring proceedings, explicitly holding, in many cases, that the bad faith of a debtor was no cause to reject the application for a restructuring.

In the *Fürst* case,[1] involving a Luxembourg company owning German real estate that filed for a restructuring plan in the United Kingdom, high-profile litigation took place before the Luxembourg courts on the basis of the restructuring law.

The Luxembourg District Court, for instance, stayed proceedings aimed at a forced sale of the assets of the Luxembourg company due to the fact that the English courts were first

seized with a connected restructuring case. The District Court stressed, however, that the EU Insolvency Regulation did no longer cover shifts of the centre of main interest to the United Kingdom and that Luxembourg had jurisdiction to open restructuring proceedings regarding Luxembourg companies despite an alleged shift of the centre of main interest.

In another related case,[2] the Court of Appeal held that a forced transfer of assets under the restructuring law was in principle possible for assets (including real estate) located abroad.

## Court procedure

### Overview of court procedure

The New Code of Civil Procedure lays down the guiding principles for court procedure and specifies the rules governing litigation before Luxembourg courts.

The system rests on two main principles: the adversarial principle and the principle of free disposition.

The adversarial principle ensures each party must be heard by the court before a decision is taken. It is the very essence of judicial procedure as it constitutes a condition to a fair trial. Exceptions to this principle are only made in extraordinary circumstances. In such circumstances, namely when a particular degree of urgency exists or when an element of surprise is necessary, the Luxembourg courts may, however, issue *ex-parte* injunctions on the basis of a unilateral request.

The principle of free disposition means that parties are in principle free to control the course of the proceedings: initiating or terminating a lawsuit, defining the scope of the lawsuit, or presenting evidence. Modern legislation aimed at greater efficiency of court proceedings tends, however, to limit the powers of the parties and bestows additional powers to case-management judges, such as the power to force a party to file its briefs before a certain deadline.

### Procedures and time frames

In civil matters, cases are dealt with in written proceedings (i.e., the parties exchange written briefs setting out their arguments under the supervision of a case-management judge who may impose deadlines). Such proceedings typically last between one and three years in first instance, depending on the complexity of the case, the number of parties and their procedural attitude.

In commercial matters, the claimant may opt either for written proceedings (as described above) or for oral proceedings. In oral proceedings, the case is pleaded orally at a pleading hearing. In complex cases, the parties often submit pleading notes. Oral proceedings typically last between nine and 15 months in first instance.

Parties may request urgent or protective measures before the summary judge of the District Court (or the Justice of the Peace if the measure falls within its jurisdiction). The summary judge may order any measure they see fit to deal with the situation. Claimants

may, for instance, request injunctions, which can carry penalty payments, the suspension of certain acts (e.g., resolutions of a general meeting of a company), the placing of disputed assets under escrow or the appointment of judicial agents (e.g., to manage a company).

These interim relief cases are normally adversarial oral proceedings, and they typically last between three and six months. In complex cases or if the court's docket does not allow for swift hearings, such proceedings may also take longer.

In cases of necessity, notably when there is a particular degree of urgency or when the element of surprise is required for a measure to be efficient, applicants may submit a unilateral written request for an *ex-parte* order to the president of the District Court (Articles 932 and 933 New Code of Civil Procedure). The defendant is not heard. The president may order any measure they see fit. The president generally renders their decision within a week of the application.

The defendant may request the withdrawal of the *ex-parte* order in adversarial interim relief proceedings.

## Class actions

Under Luxembourg law, there is currently no framework allowing for class actions. Such actions are also not admissible under the general rules of civil procedure as claimants may only sue in respect of a prejudice they have suffered personally.

Bill of Law 7650 submitted on 14 August 2020 to the Luxembourg parliament, and still under review, intends to introduce limited class action options in consumer law.

## Representation in proceedings

In Luxembourg, litigants can represent themselves in oral proceedings, particularly in cases before the Justice of the Peace before the interim relief judge of the District Court and before the District Court sitting in commercial matters.

Legal entities, such as companies or associations, may appear in court through their legal representative (manager or director).

## Service out of the jurisdiction

Under Luxembourg procedural rules, the claimant is in principle responsible for the service of court documents abroad, including such documents which initiate the proceedings (writs of summons).

The claimant does not need to obtain leave from the Luxembourg court to serve documents abroad.

For service within the European Union, Regulation (EU) 2020/1784 of the European Parliament and of the Council (the Service Regulation) applies as of 1 July 2022. Rules do not distinguish between defendants who are natural or legal persons.

Luxembourg is a signatory to the Hague Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters of 1965 (the Hague Service

Convention), which facilitates the service of legal documents in civil and commercial matters between signatory states. The Hague Service Convention does not distinguish between defendants who are natural or legal persons.

For the service of documents to countries that are not signatories of the Hague Service Convention or any other international treaty by which Luxembourg and such country is bound, the service is in principle done via diplomatic channels (i.e., the Luxembourg Ministry of Foreign Affairs will send the documents that are to be served to the Luxembourg embassy in the country where service needs to happen). The embassy will then reach out to the Ministry of Foreign Affairs of its host state, which in turn will contact the relevant authorities.

In all of the above cases, Luxembourg bailiffs are normally used for the service. The bailiff will contact the relevant foreign authorities. In many cases, namely under the Service Regulation and for many signatory states of the Hague Service Convention, service may also be done directly via mail. In some cases, claimants may also directly retain a servicing agent in the country where they intend to serve.

There is no distinction to be made between documents that initiate proceedings and other documents (e.g., court orders, judgments).

## Enforcement of foreign judgments

The applicable procedure for the enforcement of foreign judgments depends only on the state of origin of the foreign judgment, thus there are no options for applicants as they must follow the procedure applicable for the state of origin of the judgment in question.

Judgments rendered in civil and commercial matters by a court of a Member State of the European Union are directly recognised and enforceable in Luxembourg under the Brussels I recast Regulation. The defendant must act if they wish to oppose the recognition or enforcement.

Judgments rendered by courts outside of the European Union require an *exequatur* to be enforced. The applicant needs to initiate written proceedings against the defendant. The current criteria for the *exequatur* are as follows:[3]

1. the foreign judgment must be enforceable in its state of origin;
2. there must be a clear link between the foreign forum and the case;
3. the foreign court proceedings must respect the principles of the right to a fair trial;
4. the foreign judgment must not be in conflict with a mandatory public policy provision of Luxembourg law (*ordre public*); and
5. there must not be any fraud.

Please note that for certain treaties, for instance the Hague 2005 Choice of Court Convention, the Lugano Convention and others, the *exequatur* proceedings are simplified in the sense that the first instance *exequatur* order is requested by an *ex-parte* application before the District Court. The *exequatur* granted by an *ex-parte* order is subject to appeal, which would be adversarial.

### Assistance to foreign courts

Under Regulation (EU) 2020/1783 of 25 November 2020, any court of a Member State of the European Union may request to take evidence directly in Luxembourg or that a Luxembourg court takes that evidence.

The 1970 Hague Evidence Convention may also facilitate the taking of evidence for civil or commercial proceedings abroad if the court requesting evidence is located in a signatory state.

Letters of request should be sent to the civil service for international mutual judicial assistance of the Public Prosecutor's Office. Luxembourg accepts letters of request drawn up in French, English or German or accompanied by a translation into one of these languages.

Requests are executed unless they are irregular or would interfere with Luxembourg's sovereignty and/or policy laws.

### Access to court files

Hearings of Luxembourg courts are in principle public (in exceptional cases they may not be public). Any member of the public may attend the hearings.

However, the docket of pending cases is in principle not accessible to the public, nor are written submissions filed by the parties and the evidence.

Judgments are regularly published on the website of the Luxembourg judiciary (justice.public.lu), but they are anonymised.

### Litigation funding

Litigation funding is generally allowed in Luxembourg under the principle of contractual freedom. Except in cases where the amount at stake is very important, it remains, however, uncommon.

## Legal practice

### Conflicts of interest and Chinese walls

As per the Luxembourg Bar Rules, a lawyer is not allowed to advise, represent or defend multiple clients in the same matter if there is a conflict of interest between the clients or a serious risk of such a conflict.

There are three situations where a conflict of interest exists:

1. if the lawyer has previously advised parties in the same matter and now has to advise, represent or defend another and opposing party involved in the matter;
2.

if the lawyer has to assume separate obligations in order to represent multiple clients in the same or related matters, and these obligations conflict or are likely to conflict; or

3. if the lawyer's duty to act in the best interests of one client creates a conflict with their personal interests regarding the matter or a related matter.

In addition, a Luxembourg lawyer must not accept a mandate against a client that they regularly represent or assist.

Finally, a Luxembourg lawyer must not accept a client if the lawyer was at risk of breaching a confidentiality obligation to a former client or if the confidential information provided by a former client could be used against the interests of the former client.

The Chairperson of the Bar has jurisdiction regarding conflicts of interest; however, any lawyer has the obligation to refrain from accepting files that would lead to a situation of conflict of interest.

A law firm with multiple lawyers is considered as a single entity for the purposes of the analysis of conflicts, meaning that Chinese walls are in principle not permitted. Chinese walls are nonetheless sometimes used in transactional files such as in non-litigious scenarios. In such cases, different teams within a law firm may advise different clients. To our knowledge, the concept of Chinese walls has never been tested before the Chairperson of the Bar.

## Money laundering, proceeds of crime and funds related to terrorism

In Luxembourg, lawyers have significant obligations under the anti-money laundering (AML) and counter-terrorism financing (CTF) framework, primarily governed by the Law of 12 November 2004, as amended.

Lawyers must implement a risk-based approach in order to allocate the appropriate means and resources to the fight against money laundering and financing of terrorism.

Lawyers must conduct thorough due diligence, which involves identifying and verifying the identity of their clients and beneficial owners, understanding the nature and purpose of the business relationship, and conducting ongoing monitoring of transactions. Lawyers must maintain proper records of their costumer due diligence measures and ensure that their staff are adequately trained to recognise and report potential money laundering and terrorism financing activities.

Lawyers are also required to report any suspicious activities to the Chairperson of the Bar who will in turn inform the Financial Intelligence Unit.

It should be noted that certain activities conducted by lawyers are, however, considered to be out of scope of the AML/CTF framework, notably the representation of clients in legal proceedings and advice relating to litigious files. The focus of the AML/CTF framework is on the setting up of structures, tax structuring, financial and any other sort of transactions, including M&A and real estate.

## Data protection

In Luxembourg, the processing of personal data is primarily governed by the General Data Protection Regulation (GDPR), which has been directly applicable in all European Union Member States since 25 May 2018.

The GDPR sets out comprehensive rules for data protection, including principles of lawfulness, fairness, transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity, and confidentiality. In addition to the GDPR, Luxembourg has enacted the Law of 1 August 2018, which complements the GDPR and establishes the National Commission for Data Protection (CNPD) as the supervisory authority responsible for overseeing compliance.

Lawyers must ensure they handle personal data in compliance with the GDPR. This includes identifying legal basis for processing of personal data for the purposes of locating relevant documents or evidence, implementing appropriate security measures, ensuring data minimisation and that appropriate retention periods are applied. Lawyers must also be aware of their obligations regarding data subject rights, such as the right to access, rectification and erasure of personal data. Furthermore, they must report any data breaches to the CNPD within 72 hours.

Sharing personal data with other law firms or legal processing outsourcers is allowed; however, the controller shall determine whether the receiving party will act as data controller or data processor and ensure that the processors provide sufficient guarantees regarding compliance with the GDPR. Transfer of personal data internationally requires determining the country in which the recipient resides. Within the European Union there is free flow of personal data. Data transfers outside of the European Union may also freely take place towards third countries recognised by the European Commission as ensuring an adequate level of protection of personal data ('adequate countries'). If the transfer is to any other third country, the data controller will have to ensure adequate level of protection of personal data, notably by concluding a specific agreement with the service provider obliging that service provider to ensure an adequate level of protection of personal data ('standard contractual clauses'). Finally, specific rules will apply to transfers of personal data to the US entities certified under the Data Protection Framework and special attention should also be given to the transfers to the UK, as the adequacy decision contains a 'sunset clause'.

## Documents and the protection of privilege

### Privilege

In Luxembourg, legal privilege is enshrined in Article 35 of the law of 10 August 1991 on the profession of lawyer and Article 458 of the Criminal Code. It covers all information related to the client and their affairs that the lawyer becomes aware of through their professional activities. This includes legal advice, correspondence and any documents prepared while providing legal services.

Attorney–client privilege is a matter of public policy. It is general, absolute and unlimited in time, unless otherwise provided by law.

Privilege extends to communications (oral and written) between Luxembourg lawyers, unless the communication is labelled 'official'. Privileged communications may not be filed as evidence in proceedings, whereas official communications may be filed.

Privilege applies strictly to lawyers registered with the Luxembourg Bar and does not extend to in-house counsel. Communications between lawyers are also protected unless explicitly marked as 'official' or non-confidential.

Limited exceptions exist where disclosure is necessary to prevent a crime or when required by law, such as under anti-money laundering regulations. However, even in those cases, the general principle is still that the privilege must be protected, which is why, for instance, lawyers who have a suspicion of money laundering must not report it directly to the authorities, but only to the Chairperson of the Bar who will communicate the suspicion to the authorities.

A lawyer is authorised to disclose information covered by their professional secrecy obligation, provided that they have ascertained that the disclosure of such information is made in the interests of the client, and that the client has authorised the disclosure after having been informed by the lawyer of the nature of the information disclosed, as well as of the recipients of the information.

Lawyers also have the right to disclose information covered by professional secrecy when such disclosure is necessary to ensure their own defence, before the courts and in administrative, ordinal or disciplinary proceedings, including against their clients (e.g., to recover unpaid fees).

A lawyer will ensure that the persons they employ and any other person with whom they cooperate or collaborates in their professional activity, comply with professional secrecy. When a lawyer is a member of an association or partnership of lawyers, secrecy extends to all associated lawyers practising with them.

Privilege might apply to foreign lawyers, depending on their jurisdiction and the nature of their activities. For lawyers from EU Member States, privilege is generally recognised if they are admitted to a bar association within the EU. Communications between a Luxembourg attorney and an EU lawyer are privileged if the Luxembourg attorney has obtained the foreign lawyer’s agreement to be bound by Luxembourg’s professional secrecy rules.

For non-EU lawyers, the situation is more complex. If a non-EU lawyer is working in Luxembourg as in-house counsel, privilege does not extend to their communications, even if they are admitted to a foreign bar where privilege is recognised. However, if the non-EU lawyer is working abroad, Luxembourg’s ethical rules do not specifically address the application of privilege to their communications with clients in Luxembourg.

In Luxembourg, legal privilege ensures the confidentiality of communications between lawyers and their clients. In a regulatory context, privilege means that lawyers are not required to disclose privileged information to regulatory authorities, except in specific circumstances such as anti-money laundering (AML) obligations. Even in that case, the disclosure is owed to the Chairperson of the Bar and not directly to the authorities.

Legal privilege has increasingly come under attack over the past decade, particularly concerning tax files, since the 'Luxleaks'.

On 26 September 2024, the European Court of Justice handed down a ruling in a case involving a Luxembourg law firm that had been ordered by the Luxembourg tax authorities to disclose all documentation relating to advice given to a client in the context of an exchange of information request from the tax authorities of another EU Member State.

The European Court of Justice (ECJ) ruled that legal advice given by a lawyer, even in company law matters, is protected by the confidentiality between lawyer and client under Article 7 of the Charter of Fundamental Rights of the European Union. Therefore, any decision mandating a lawyer to provide a Member State's administration with documentation and information about their client relationship, as part of an information exchange, interferes with the right to legal privilege.

Finally, under Luxembourg national law, lawyers must disclose information in tax cases unless it risks exposing the client to criminal prosecution. The ECJ ruled that the national law essentially removes the protection guaranteed in tax matters, infringing on the right to confidentiality guaranteed by the EU Charter. As a result, this interference cannot be justified according to the ECJ, as it violates the essence of the right guaranteed by the EU charter. The EU charter precludes the application of national law to that extent.

The European Court of Justice has thus upheld the primacy of privilege even for files that are not strictly litigation files, meaning that the trend of the past decade is likely going to end.

## Production of documents

Parties are in principle at liberty to produce or not produce documents in litigation, it being noted that the burden of proof rests with the party making a certain claim under Article 1315 of the Civil Code (unless legal presumptions apply). Parties are not obliged to produce documents that contradict their position.

If the courts deem that an essential document to establish a right or a claim is missing, the court will routinely dismiss the claim rather than asking the relevant party to disclose the document.

A party may request the forced disclosure of documents from any other party to the proceedings and even from third parties under Article 284 and seq. of the New Code of Civil Procedure. The applicant must show that the document exists, that it is (likely) in the possession of the defendant, that it is relevant and there must not be obstacles to the disclosure of the document. Professional secrecy obligations (from banks, lawyers, etc.) may be an obstacle to the forced disclosure of a document.

A claimant may also request the disclosure of documents before any litigation is initiated, by a claim before the summary judge, who will apply the same criteria.

Evidence is generally filed as a copy of the original document. In exceptional circumstances, notably if there are doubts regarding the authenticity of the document, parties may, however, request to obtain the original document. In that case, the document may potentially need to be brought to Luxembourg.

There are no obligations for litigants to produce all documents held by subsidiaries, parent companies or third-party advisers. The courts may, however, order third parties to disclose certain documents, on the application of a party to the proceedings and where

the above-mentioned criteria of Article 284 seq. of the New Code of Civil Procedure are met. The courts tend to view third parties' potential secrecy obligations more favourably.

An obligation to review electronic records or reconstruct back-up tapes would only exist if the court were to order the disclosure of documents, which may only be obtained in such a way. However, it may be a defence under Article 284 seq. of the New Code of Civil Procedure to state that the documents are in fact not readily accessible to the defendant.

Luxembourg courts are attached to the principle of proportionality and only order the forced disclosure of documents in rare cases. Therefore, Luxembourg law does not impose oppressive or disproportionate obligations in relation to the disclosure of evidence.

## Alternatives to litigation

### Arbitration

The Luxembourg New Code of Civil Procedure contains precise rules on arbitration. The rules on arbitration were profoundly reformed in 2023 and are influenced by French law and the UNCITRAL Model Law of 1985.

The Luxembourg Arbitration Center (LAC) has been offering arbitration services since 1987. It was created by the Chamber of Commerce and has published new arbitration rules in 2020.

Arbitration is not very common in Luxembourg, although the 2023 reform of arbitration rules aims at making Luxembourg more attractive to parties wishing to use arbitration for dispute resolution.

The new arbitration law aligns Luxembourg's arbitration law with the UNCITRAL model on international commercial arbitration to highlight Luxembourg arbitration law's advantages as regards to flexibility, length of proceedings and confidentiality while providing appropriate safeguards for public order, the rights of parties to arbitration and rights of third parties.

The 2023 law thus introduces a right to confidentiality for parties, creates the role of a supporting judge (who can order interim measures or assist parties in the constitution of the arbitral tribunal) and reorganises remedies for the annulment of a Luxembourg award and the *exequatur* of foreign awards before Luxembourg courts.

Unless provided otherwise in the agreement between the parties, an arbitral award rendered in Luxembourg cannot be appealed by the parties.

Articles 1236 and seq. of the New Code of civil procedure allow for an action to set aside an arbitral award. According to Article 1238, such action is only available if:

1. the arbitral tribunal lacked jurisdiction;
2. the arbitral tribunal was improperly constituted;
3. the arbitral tribunal ruled without complying with its mission;

4. the award is contrary to public policy;
5. the award is not reasoned, unless the parties have dispensed the arbitrators from giving reasons; or
6. there has been a violation of the rights of the defence.

A review of an arbitral award is possible under Article 1243 in limited cases, notably fraud. In such cases, the same arbitral tribunal will issue a new award.

Finally, a third-party objection is possible from any party who was not a party to the arbitration and to whose rights the arbitral award is prejudicial. Such objection is made before the state court that would have had jurisdiction in the absence of the arbitration clause.

Article 1245 and seq. of the New Code of Civil Procedure deal with the enforcement of foreign arbitral awards in Luxembourg. Such awards require an *exequatur* order from the Luxembourg courts. The *exequatur* is requested in an *ex-parte* application before the District Court. If granted, the *exequatur* may be appealed in adversarial proceedings before the Court of Appeal. The appeal has no suspensive effect, meaning that the foreign award that has received the *exequatur* can be enforced.

Article 1246 contains a list of all grounds that would prevent an *exequatur* from being granted. It is currently unclear whether the Luxembourg courts will interpret the list in Article 1246 is being more liberal than the New York Convention, in which case, they would apply only Article 1246 in accordance with Article VII of the New York Convention.

The *exequatur* may thus only be rejected on limited grounds, such as if the arbitration agreement was not valid under the law to which the parties have subjected it, or if the award is contrary to Luxembourg public policy.

The New York Convention is applicable in Luxembourg. Since the 2023 reform there have been no notable cases in Luxembourg.

In 2017,[4] the Court of Appeal held that the grounds to refuse the *exequatur* under the New York Convention must be analysed when the appeal judgment is rendered. Therefore, even if an arbitral award was not enforceable in its state of origin when an *ex-parte exequatur* application was made and became enforceable after such *ex-parte exequatur* was granted, there was no ground to overturn the *exequatur*. This was confirmed by the Court of Cassation in 2018.

In 2017,[5] the Court of Appeal held in the *Pemex* case that an arbitral award which had been set aside by the Mexican courts could not benefit from the *exequatur*, even though the New Code of Civil Procedure, which was applicable at that time, did not mention the annulment of the award in its state of origin as a ground to refuse the *exequatur*. Indeed, the Court of Appeal held that the New Code of Civil Procedure was, at that time, not to be considered as more favourable in the sense of Article VII of the New York Convention.

It is unclear whether this is still good law under the new rules after the 2023 reform. It may indeed be argued that the new rules in the New Code of Civil Procedure should now

be considered more favourable than the grounds to refuse the recognition of an arbitral award under the New York Convention.

In 2020,[6] the Luxembourg Court of Appeal denied a request to stay enforcement proceedings despite a pending criminal investigation following a complaint filed by a manager of the appellant for acts of intimidation. The court emphasised that such an investigation was not a valid ground for refusal under the New York Convention.

As previously mentioned, Luxembourg arbitration law was fundamentally reformed in 2023. This reform is inspired by the UNCITRAL Model Law on International Commercial Arbitration, as well as French and Belgian law.

Luxembourg is also committed to promoting arbitration as an alternative dispute resolution method, highlighting its advantages in terms of flexibility, speed and confidentiality. These developments are designed to enhance the efficiency and reliability of arbitration in Luxembourg, while keeping pace with international trends.

Luxembourg has an active and growing arbitration scene with experienced lawyers and arbitrators. In 2024, the Spanish and Ibero-American Arbitration Club (CEIA) opened its Luxembourg chapter.

There are regular conferences and panel discussions on arbitration in Luxembourg, notably organised by the University of Luxembourg.

## Mediation

The rules governing mediation in Luxembourg are under Articles 1251-1 to 1251-24 of the New Code of Civil Procedure, since the adoption of a law of 24 February 2012, which transposed Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters.

Parties can agree to mediate at any stage of their dispute, whether before or during court proceedings. There are two types of mediation under Luxembourg law: conventional and judicial. The former is initiated by the parties themselves, who agree on the terms and select a mediator; the latter is ordered by a judge during ongoing court proceedings and must be completed usually within three months (Articles 1251-1 to 1251-3 of the New Code of Civil Procedure). All communications exchanged during mediation are confidential and cannot be used in subsequent proceedings. An agreement reached through mediation can be made enforceable by a court (Articles 1251-4 to 1251-5 of the New Code of Civil Procedure).

Mediation is not exceedingly common in Luxembourg, except for family law disputes. In civil and commercial matters, mediation clauses are often combined with arbitration clauses. In such cases, contrary to other jurisdictions, the failure to initiate mediation will not lead to an inadmissibility of a 'premature' arbitration request. Article 1251-5 of the New Code of Civil Procedure states that failure to comply with a mediation clause will lead the court or the arbitrators to suspend the case until the mediation has taken place, if a party requests such stay before any other defence on the merits.

There are no significant developments regarding mediation in Luxembourg.

## Other forms of alternative dispute resolution

Given their clear framework and legal certainty, mediation and arbitration are by far the preferred alternative dispute resolution mechanisms.

Luxembourg law provides for expert determinations, namely in Article 1592 of the Civil Code which states that for a sale, the sales price may be left to the determination of a third-party expert. It is generally considered that this mechanism may be applied to other contracts and is not limited to sales.

## Outlook and conclusions

The law of 7 August 2023 on business preservation and modernisation of bankruptcy law, transposed EU Directive 2019/1023 of 20 June 2019.

This piece of legislation is widely considered as a major change in the Luxembourg insolvency and restructuring market.

Indeed, prior to the 2023 law, insolvency rules were in their majority inherited from the nineteenth century and had a rather punitive and inflexible approach regarding distressed businesses. Notably, there was no satisfactory framework for the restructuring of the debts of a distressed debtor.

This explains why a lot of Luxembourg companies preferred to initiate restructurings in the United Kingdom (under English law) or in the United States. While such cases still exist, there is now a competitive Luxembourg framework allowing for debtor-in-possession proceedings, which over the course of the last year has been widely used.

This law, alongside the 2023 arbitration law confirms the trend of further modernisation of Luxembourg law. It should also be noted that there is a committee of academics and professionals working on a reform of the Luxembourg Civil Code, which remains largely in the state of 1804, while France and Belgium who shared the same Civil Code have significantly overhauled their legislation.

### Endnotes

1 Luxembourg District Court, 18 December 2023, 2023TALCH02/01570, TAL-2023-09113, RJ-2023/0005. ^ Back to section

2 Court of Appeal, 27 February 2024, 33/24 IV-COM, CAL-2024-00014. ^ Back to section

3 Court of Cassation, 5 July 2012, No. 46/2012; Court of Appeal, 15 May 2024, Arrêt No. 109/24- I-CIV- Exequatur, number CAL-2022-01098 of the docket. ^ Back to section

4 Court of Appeal, 27 April 2017, No. 55/17, – VIII – Exequatur, number 37955 of the docket. ^ Back to section

5 Court of Appeal, 27 April 2017, No. 59/17, – VIII – Exequatur, number 40105 of the docket. ^ Back to section

**6** Court of Appeal, 27 February 2020, No. 25/20 – VIII – Exequatur. ^ Back to section

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