

# FUND FINANCE FRIDAY

## Fund Finance Transactions and Enforcement of Foreign Judgments in Luxembourg

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**By Michael Mbayi**  
Director | Wildgen

Luxembourg is a centre of excellence for investment funds and the second-largest fund domicile in the world after the U.S. As such, it is a great place to observe the evolution of fund finance globally, since Luxembourg funds are commonly involved in fund finance transactions.

One of the typical questions asked by lenders and lead counsel in a fund finance transaction involving Luxembourg-based investment funds concerns the enforcement of foreign judgments in Luxembourg.

In Luxembourg, regarding subscription facilities, we see generally three types of transactions:

- purely domestic fund finance transactions, where the facility agreement is governed by Luxembourg law with a Luxembourg law-governed security package;
- US-Lux cross-border transactions, where the credit agreement is governed by New York law with a Luxembourg law-governed security package (Transactions US-Lux); and
- English-Luxembourg cross-border transactions, where the facility agreement is governed by the laws of England and Wales with a Luxembourg law-governed security package (Transactions England-Lux).

For the rest of this article, we will be focusing on cross-border transactions.

### Transactions US-Lux

The point here is to determine under which conditions a final judgment rendered in the courts of New York in relation to the credit agreement would be recognized and enforceable in Luxembourg.

An enforcement procedure, established namely by the Luxembourg Code of Civil Procedure (*Nouveau Code de Procédure Civile*) is necessary. Moreover, Luxembourg case law provides

specific requirements for the recognition of foreign judgments in Luxembourg.

First, the judgment must be final and duly enforceable in the courts of New York.

Furthermore, according to Luxembourg conflicts of jurisdiction rules as well as in light of New York law, the courts of New York must have jurisdiction.

In addition, the proceedings in New York must have been held in compliance with New York law rules.

Also, the so-called rights of defense (*droits de la défense*) must have been respected.

Another requirement is that the New York courts have applied the law designated by the Luxembourg conflict law rules to the case.

Finally, the content of the judgment may not conflict with Luxembourg international public policy nor be rendered in the context of an evasion of law (*fraude à la loi*).

### **Transactions England-Lux**

Since the United Kingdom left the European Union, the reciprocal recognition principle and the simplified execution process does not exist any more.

Therefore, there are typically two situations that arise. The first is where the facility agreement does not contain an exclusive jurisdiction clause. In this occurrence, what we have described above concerning the judgments of the courts of New York applies *mutatis mutandis* to the English judgment.

The second situation is where the facility agreement contains an exclusive jurisdiction clause. In such instance, the judgment would be recognized and enforceable in Luxembourg in accordance with the provisions of the Hague Convention of 30 June 2005 on choice of court agreements (the "Hague Convention").

### **Conclusion**

The regime for the enforcement of New York judgments has been consistent. Regarding the judgments of the English courts, since Brexit, we have observed more exclusive jurisdiction clauses in the English law facility agreements in order to benefit from the regime of the Hague Convention and fewer asymmetric jurisdiction clauses (*i.e.*, where a party may decide to designate another court than the one expressly determined in the facility).