Arendt Case Review

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TORTIOUS LIABILITY
Traffic accident, rules on priority

District Court of and in Luxembourg - 11th Chamber
Civil judgment no. 89/18 of 18 May 2018

rules that "*absolute compliance with the rules on priority is essential to ensure that traffic can circulate safely and, to avoid arbitrariness and confusion, the responsibilities which emanate naturally from the principles of priority should not change, except in the case of wilful negligence. […]*
The party required to give way is thus responsible for any accident in the event of the arrival of a priority road user unless such road user approaches in an impetuous and unexpected manner thus thwarting by virtue of his culpable behaviour the reasonable and prudent calculations of the driver who does not have priority.
Such could be the case when a driver, who has right of way, by virtue of the speed at which he is driving his vehicle, thwarts the reasonable expectations of the party required to give way who has initiated a manoeuvre before the vehicle which has priority has become visible. In this case, the arrival of the vehicle which has right of way constitutes for the party required to give way an unforeseeable obstacle."

NON-CONTRACTUAL LIABILITY
Neighbourhood disturbances

District Court of and in Luxembourg, 8th Chamber
Civil judgment no. 2018TALCH08/00141 of 12 June 2018

states that Article 544 of the Civil Code provides that all owners have the right to enjoy the normal use of their property. As neighbouring owners therefore have an equal right to enjoy the use of their property, a balance must be maintained between the respective rights of owners. Owners may perform material acts of construction or destruction on their property but this right is subject to certain limits and owners may incur liability if they cause harm to third parties in the exercise of their rights. Trial judges decide at their own discretion whether or not normal sources of annoyance between neighbours have been exceeded. Such sources of annoyance must be assessed taking into account circumstances of place, but without seeking to determine whether the attitude of the neighbouring owner constitutes misconduct or negligence. Article 544 therefore establishes a special liability for the owner which is neither determined by the misconduct of the owner nor erased by vicarious liability. In particular, there are grounds for granting indemnity in matters relating to construction once a direct relationship of cause and effect has been established between the new construction and the prejudice suffered by the neighbour on condition that such harm is serious and exceeds the norm for damages normally resulting from construction works performed in the close vicinity. In order to establish the existence of sources of annoyance exceeding the normal disturbances of construction works, the parties may rely on a court-appointed adversarial expert's report. While it is true that the judge is not bound by the findings or conclusions of the expert, the judges in principle may only diverge from the opinions of the court-appointed experts with great prudence and where there are grounds for admitting that the court-appointed experts have erred, or where the error of such experts results henceforth either from the report or from other elements arising during the proceedings.

The Court of Cassation deemed that the liability arising from Article 544 of the Civil Code is a liability specific to the owner which does not depend on the misconduct of the latter (Cass. 29 June 2000, no. 38/00).

QUASI-CONTRACTS
Management of affairs (gestion d'affaires)

Court of Appeal of Luxembourg, 2nd Chamber
Civil Judgment no. 117/18 of 6 June 2018

The Court of Appeal points out that the management of affairs presupposes the purely voluntary involvement of its author. The Civil Code seeks to stress that the manager acts without title and of his own motion and that he is not obliged to act. His involvement in others' affairs has no legal basis. The management of affairs is only conceivable if the principal does not demonstrate his willigness at the time of the act. A mandate exists if the principal approves what the manager proposes to do for him.

CONTRACTUAL LIABILITY
Liability of a carrier

Court of Appeal of Luxembourg, 9th Chamber
Judgment no. 127/2018 of 29 March 2018

states that "*by virtue of Article 1784 of the Civil Code, an overland carrier is liable for accidents involving passengers if it does not prove that such accidents arise from an extraneous cause which cannot be imputed to it. The obligation of safety inherent in an agreement for the carriage of persons which arises for the carrier from the above-mentioned article is an obligation of performance, the violation of which entails a presumption of liability of such carrier vis-à-vis the passenger who is the victim of an accident.*
The carrier may only be discharged from the presumption of liability attached to it by proving that the harmful event constitutes a case of force majeure in respect of it, this being the only eventuality where it may be deemed fully extraneous to the occurrence of the prejudice affecting the passenger. […]
To bear the characteristics of force majeure, the act of the third party must not only be extraneous to the carrier but also unforeseeable and unavoidable for it. […]
An external event is an event whose initial cause is not inherent to the carrier. […]
An unforeseeable event is an event the occurrence of which could not be reasonably anticipated by the carrier at the time the agreement was entered into. The unforeseeable nature of the event need not however be absolute, as all scenarios may in effect be imagined in the abstract. […]
An irresistible event for its part is an event which the carrier could not have averted either by avoiding the occurrence or by overcoming the effects thereof. The unavoidable nature of the event is assessed at the time of its occurrence taking into account the circumstances under which the harmful event occurred."

LIABILITY OF THE BANKER
Limitation period

District Court of and in Luxembourg - 2nd Chamber
Civil judgment no. 2018TALCH02/00942 of 1 June 2018

points out that public policy is not opposed to clauses in the general conditions of a contract predefined by one of the parties which restrict the limitation period under general principles of law, on condition that these clauses do not in fact deprive the creditor of any possibility of bringing proceedings subsequently (Court of Cassation 17 December 2009. Pas. 35 2/2011. p. 123). **However, under Article 1135-1 of the Civil Code, the general conditions of a contract predefined by one of the parties are only binding on the other party to the extent that such party has been able to examine them during the signing of the contract and if it must, depending on the circumstances, be deemed to have accepted them.**
In the absence of acceptance of the clause providing for a shorter limitation period by the client, the obligations arising out of commerce between a trader (the bank) and a non-trader (its non-trader individual client) are time-barred for ten years in accordance with Article 189 of the Commercial Code. The starting point for the ten-year limitation period of Article 189 of the Commercial Code is the day on which the obligation may be put into execution by an action at law. As a result, the limitation period runs from the day on which the holder of a right has learned of or should have learned of the facts enabling it to exercise the right, i.e. from the day on which the damage caused by a failure to perform an obligation revealed itself to the claimant.
As a result, the limitation period did not start to run from the subscription to the perpetual bonds, given that at this time the damage had not yet revealed itself to the claimant. In effect, even if the bank's obligation to provide advice and information existed at the time of the subscription to the bonds, the detrimental consequences for the claimant only became evident from the time when the securities underwent depreciation and at the time when the coupon was not paid respectively. The starting point of the limitation period is therefore the day on which the client became aware that its investment was exposed to substantial depreciation.

This is a ruling which is subject to appeal.

AGREEMENT OF A COMMERCIAL NATURE
The principle of accepted commercial correspondence

District Court of and in Luxembourg, 17th Chamber
Civil judgment no. 140/2018 of 16 May 2018

states that, by extension of the principle of the accepted invoice, the fact that traders do not respond to commercial correspondence implies acceptance of its contents. The District Court has pointed out that "*there is in effect a moral obligation to protest incumbent on the trader to whom an inaccurate statement is addressed which implies an obligation on its part. It is for this reason that acceptance of the contents of commercial correspondence by the silence of the addressee of letters is currently admitted.*" In the case at hand, the District Court deemed an objection to be too late as it was issued six months after a letter requesting payment and therefore ruled, amongst others, that this late letter of objection could not call into question the principle of accepted commercial correspondence.

The principle of accepted commercial correspondence is only applicable amongst traders.

CONTRACT OF A COMMERCIAL NATURE
The principle of Accepted commercial correspondence

District Court of and in Luxembourg - 10th Chamber
Civil judgment no. 2018TALCH10/00155 of 15 June 2018

states that admitting the principle of accepted commercial correspondence presupposes that it relates to a letter exchanged between traders. The District Court specifies that this principle admitted in commercial matters cannot be applied to letters emanating from a judicial representative who is involved in a litigation or pre-litigation phase, therefore after the time when direct communication between traders has ended.

LEASE
Fire

Court of Appeal of Luxembourg, 4th Chamber
Civil Judgment no. 76/18 of 13 June 2018

holds that under Article 1733 of the Civil Code, the lessee assumes liability for fire, unless he can prove that the fire broke out through no fault of his own. The Court points out that it is only vis-à-vis the lessor that the lessee of the private areas where the fire broke out is presumed to be liable for the fire, unless evidence is furnished that he committed no fault. The owners of the adjacent lots to which the fire spread may not invoke this presumption and are required to prove the fault of the lessee or the fault of the persons under his responsibility. Where the fire breaks out in the common areas, no presumption of fault can be attributed by reason of the joint enjoyment of use to which the parties are subject.

This judgment is handed down within the framework of an appeal brought by the insurer subrogated to the rights of the lessor. The judgement ordered the reopening of the proceedings, however, and invited the parties to take positions on the jurisdiction of the District Court dealing with commercial matters to hear the claim of the insurer subrogated to the rights of the lessor in order to hear a claim initiated against its lessee and the lessee's insurer.

COMPANY LAW
Expert assessment of management

District Court (sitting with a single judge)
Order no. 2018TALCH02/00732 of 27 April 2018

states that an expert assessment of management ordered pursuant to Article 1400-3 of the amended law of 10 August 1915 on commercial companies may deal with management operations carried out by foreign subsidiaries, but limited to information available at the level of the Luxembourg parent company.

LIQUIDATION
Passive survival of a company

District Court of and in Luxembourg - 11th Chamber
Civil judgment no. 2018TALCH11/00101 of 1 June 2018

underlines that the completion of the liquidation of a company brings about the termination of its existence and its legal personality. This completion of liquidation thereby results in the disappearance of the company as a result of the loss of its legal personality. Both Luxembourg and Belgian case-law admits that the disappearance of a legal person following the closure of its liquidation is not absolute. It is indeed implicitly evident from Article 157, sub-paragraph 3 of the amended law of 10 August 1915 on commercial companies (the Belgian equivalent is Article 198 of the Belgian Company Code) that the company continues to exist in order to face actions which corporate creditors may bring against it in the person of its liquidators as long as the limitation period has not lapsed through the expiry of the five-year period subsequent to the publication of the closure of the liquidation. The passive survival of the company during this five-year period

subsequent to the closure of the liquidation however has no effect other than enabling creditors to act against the company in the person of its liquidator. The actions brought against the company following the closure of the liquidation must therefore be brought against the liquidator "in this capacity". After the closure of the liquidation, the creditors only have the opportunity to summon the company by bringing proceedings against the liquidators *qualitate qua*. In the case at hand, the summons was not notified to the liquidator of the company, but to the company itself, "*represented by its manager who is currently in office*." The summons therefore could not be notified to the company, which, at the date of the writ initiating proceedings, no longer had legal personality. The company could not therefore be validly affected by the writ initiating proceedings.

! *The decision refers to the law of 10 August 1915 on commercial companies, such as amended, in its version prior to the version coordinated by the Grand Ducal Regulation of 5 December 2017*

BANKRUPTCY
Effects of the closure

District Court of and in Luxembourg, 8th Chamber
Civil judgment no. 124/2018 of 29 May 2018

points out that the closure of bankruptcy by liquidation terminates the existence of the entity organised and represented by the receiver. As the closure terminates his powers, actions brought at the request of the receiver or against him are no longer admissible. The closure however does not remove the necessary powers of the trustee arising from this closure. The bankrupt resumes, from the moment of closure, the free exercise of all its rights and its unencumbered legal capacity. After the closure, the creditors may once again bring individual actions.

MEASURES OF EXECUTION
Garnishment (registered shares)

District Court of and in Luxembourg, 17th Chamber
Civil judgment no. 100/2018 of 18 April 2018

states that Article 715 of the New Code of Civil Procedure does not specify the arrangements provided, once a seizure or restraining order is declared valid, for the sale of the assets seized where they do not concern credit in the form a sum of money but rather another intangible asset, such as registered or bearer shares. In this instance, the seizure related to registered shares.
The District Court, finding that French legal doctrine holds that this question is left to the discretion of the courts, states in the case at hand that there are grounds to refer to Article 116 of the Commercial Code on the realisation of pledged moveable securities, which specifies that pledged goods shall be sold publicly.
The Court therefore orders that the registered shares be sold by public auction and by a public officer, who must designate a bailiff to perform the sale and orders the publication of an opinion in two Luxembourg newspapers one week before the date to be determined for the sale.

EMPLOYMENT LAW/SOCIAL SECURITY
Monetary illness indemnity

Court of Cassation of Luxembourg,
Judgment no. 49/2018 of 31 May 2018

underlines that under Article 14, subparagraph 3 of the Social Security Code, "*in the event of termination of affiliation, entitlement to the monetary indemnity is maintained (...) on condition that an insured party has been affiliated for a continuous period of six months immediately preceding the disaffiliation. The condition of continuous affiliation is not invalidated by an interruption of less than eight days. (…).*"
The monetary indemnity is not, however, owing to those who, by virtue of Article 1, subparagraph 1, number 10) of the Social Security Code, are insured insofar as they receive replacement income.
The Court of Cassation thus quashes the judgment on appeal which had found that an insured party could rely on the insurance period pursuant to Article 1, subparagraph 1, number 10) of the Social Security Code for the calculation of the qualifying period of six months of affiliation required for maintaining the monetary indemnity for illness.

PROCEDURE
Expert's report

District Court of and in Luxembourg, 8th Chamber
Civil judgment no. 124/2018 of 29 May 2018

reiterates that the provisions of Article 438 of the New Code of Civil Procedure prohibiting an expert from responding to questions other than those which he has been engaged to examine and from making legal assessments are not sanctioned by the nullity of the expert's report.
It is therefore admitted that the judge can use the opinion of the expert in his decision on the merits, even if this opinion has exceeded the scope of its purpose, if he has expressed an opinion exceeding the limits of his duties or if he has issued an opinion of a legal nature (*Encyclopédie Dalloz, Répertoire de procédure civile, Mesures d'instruction confiées à un technicien, n°254 et 265*).
The plea of nullity invoked vis-à-vis the expert's report was therefore rejected by the court.

PROCEDURE
Nullity of a writ (*obscuri libelli*)

District Court of and in Luxembourg - 1st Chamber
Civil judgment no. 157/2018 of 9 May 2018

declares a writ of summons void for *obscuri libelli* because of the failure to state reasons in respect of joint and several liability.
The Court holds that in order to enable the defendants to organise their defence in respect of the allegation of joint and several liability raised against them, which would oblige them to pay all damages, the writ of summons is required to specify in which regard they are jointly and severally liable. It is therefore incumbent on the plaintiffs to set out the arguments in fact and in law which, in their opinion, would be likely to incur joint and several liability between the defendants so that these defendants can raise the appropriate arguments to challenge the existence of such joint and several liability.

This is a ruling which is subject to appeal.

PROCEDURE
Seizure and discontinuation of proceedings

Court of Appeal of Luxembourg, 7th Chamber
Judgment no. 91/18-VII-CIV of 16 May 2018

enables a seized bank to apply, in validation proceedings for a seizure pending between the seizing bank and the debtor, a client of the bank, for the discontinuation of the proceedings, if it has been discontinued for a period of at least three years. The Court is of the opinion "*that the seized bank has a manifest interest in the fact that validation proceedings for a seizure which have been suspended for longer than three years are declared terminated by discontinuation of the proceedings and that it can thus withdraw from the seizure and recover the right to pay the debtor.*"

This judgment overturns the previous judgment no. 401/2016 of the District Court of Luxembourg of 16 November 2016, docket numbers 163095 and 177604, which had ruled that "*save in exceptional circumstances, a third party cannot be permitted to intervene in these proceedings to alter the rhythm which the parties have wished to impart to it*".

Current news

Clara Mara-Marhuenda, Partner, and **Grégory Minne**, Partner, were speakers at the "*International Workshop – Cross-Border Debt Recovery in the EU Application of the "second generation" regulations in France and Luxembourg*" organised by the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law on 8 June 2018.

The following publications are available:

- the article « *Planification patrimoniale, loi successorale et assurance-vie : tour d'horizon* » by **Marianne Rau**, Partner, and **Marc Berna**, Associate, in Entreprises Magazine of July/August 2018.

- the blog on the case-law of the Court of Justice of the European Union by **Philippe-Emmanuel Partsch**, by clicking on the following link: http://eucaselaw.com/