WHERE ARE THE DOCUMENTS? A COMPARATIVE AND ARBITRATOR'S PERSPECTIVE ON DOCUMENT PRODUCTION AND THE ROLE OF STATE COURTS

By Youssef Ben Khamsa

On Wednesday, 20 March 2024, as part of Paris Arbitration Week 2024, Loyens & Loeff organized an enriching event entitled "*Where are the documents? A comparative and arbitrator's perspective on document production and the role of state courts*". The event attracted a diverse assembly including legal practitioners, arbitrators, and industry professionals eager to explore the nuanced intricacies of document production in arbitration proceedings.

The panel included esteemed partners and associates from Loyens & Loeff, Olivier van der Haegen (*Partner*), Bastiaan Kemp (*Partner*), Robin Moser (*Partner*), Melle Boevink (*Senior Associate*), Romy Menasalvas Garrones (*Senior Associate*), and Johanna Haedinger (*Associate*). Additionally, the roundtable featured guest speakers Alexander Blumrosen (*Partner at Polaris Law*), who acts as a litigator and as an arbitrator, and Sara Nadeau-Seguin (*Partner at Teynier Pic*), who also acts both as counsel and as arbitrator. Their expertise enriched the discussions, providing comparative perspectives and practical strategies for navigating the complexities of document production in arbitration proceedings.

The session commenced with a warm welcome from Mr. van der Haegen and Mr. Kemp. As part of their opening remarks, they highlighted the pivotal role of document production in ensuring fairness and efficiency in arbitration proceedings. Stressing the importance of cross-jurisdictional collaboration, they set the stage for a thorough exploration of the topic.

The discussion was divided into two parts, each led by different speakers, offering diverse perspectives and insights. The first part was led by Ms. Nadeau-Seguin and Mr. Blumrosen, who delved into the various aspects of document production in international arbitration proceedings, including the criteria applied to document production, the scope of documents covered by confidentiality, requests targeting specific categories of documents, requests targeting affiliates or third parties, and the practical tools available for document production.

Meanwhile, Ms. Menasalvas Garrones and Ms. Haedinger took the reins during the second part of the discussion, offering a comparative approach with regard to document production and related state court aid. Their analysis shed light on jurisdictional differences and procedural nuances. They have also outlined the interplay between arbitration proceedings and state court jurisdiction. This division of the event's discussion ensured a comprehensive exploration of the process of document production, covering both theoretical considerations and practical challenges encountered in real-world arbitration cases.

In the first part of the roundtable, Ms. Nadeau-Seguin and Mr. Blumrosen led the discussion, providing invaluable insights from the tribunal's perspective on document production. The speakers elaborated on the key criteria outlined in the International Bar Association ('IBA') Rules and the Prague Rules, explaining nuances such as specificity, relevance, materiality and proportionality. Sara Nadeau-Seguin also explained the criterion of burden of proof, which is not explicitly addressed in Articles 3 and 9.2 of the IBA Rules. Mr. van der Haegen further highlighted that in Belgium, similar to other civil law jurisdictions, the criteria of the burden of proof may be less significant due to the Respondent's increased obligation to collaborate in the research for truth. Mr. van der Haegen's insights underscored the nuanced perspective on burden of proof, emphasising its relative nature in light of evolving procedural norms.

Ms. Nadeau-Seguin then emphasised the subjective nature of relevance and materiality, highlighting the importance of contextual considerations in assessing document requests. Drawing from her extensive experience, she delved into hypothetical scenarios, illustrating the inherent complexities of determining the significance of requested documents to the outcome of arbitration proceedings.

Mr. Blumrosen complemented Ms. Nadeau-Seguin's insights by providing a comparative analysis of document production norms. He contrasted the document production standards under the US Federal Rules with the more stringent standards prevalent under the French procedural framework. He also traced the evolution of document production practices, highlighting recent reforms aimed at enhancing efficiency and the trend toward merging civil and common law rules and traditions.

In discussing the topic of "documents covered by confidentiality", Ms. Nadeau-Seguin and Mr. Blumrosen explored the complexities surrounding privilege and confidentiality in arbitration proceedings. Mr. Blumrosen emphasized the importance of procedural clarity in addressing privilege issues, stressing the need for proactive tribunal intervention to identify and manage privilege-related challenges early on during the arbitration process. In fact, Mr. Blumrosen highlighted the importance of "Procedural Order No. 1" for the arbitral tribunal in handling questions related to privilege and confidentiality.

Moving on to the third topic of "categories of documents", Ms. Nadeau-Seguin explored requests pertaining to specific categories of documents. She emphasized the importance of specificity and reasonable time limits in document requests, stressing the need for clarity to facilitate efficient document production. She provided insights into the nuances of document categorization, highlighting challenges associated with overly broad requests and the need for parties to adopt reasonable keyword strategies to optimize the process.

In addressing the topic of "requests targeting affiliates", Mr. Blumrosen shed light on the disparity between court-ordered discovery in common law jurisdictions and arbitrator-ordered document production, emphasizing the challenges posed by jurisdictional differences. Ms. Nadeau-Seguin echoed this sentiment, stressing the need for a nuanced approach in balancing competing sovereign interests and ensuring procedural fairness.

Finally, in the discussion of the fifth topic on "practical tools available to help document productions" Ms. Nadeau-Seguin highlighted the utility of schedules such as the Redfern Schedule, the Stern Schedule, and the Armesto Schedule in managing document requests, as much as adverse inferences, illustrating proactive issue identification and resolution strategies. The Speakers further provided insights into the application of adverse inferences in addressing non-compliance with document production orders, emphasizing tribunals' reluctance to draw such inferences without clear evidence of deliberate document destruction.

Real-life examples enriched the discussion, providing attendees with tangible insights into navigating complex scenarios and maximizing procedural efficiency. Participants actively engaged in dynamic exchanges, leveraging the opportunity to pose questions and share insights gleaned from their professional experiences.

The discussion then transitioned to the subsequent segment, whereby Ms. Menasalvas Garrones and Ms. Haedinger delved into jurisdictional differences in document production and related state court aid. The discussion revolved around two key topics, namely the authority to seek assistance from state courts and the legal techniques available in this regard.

Ms. Menasalvas Garrones started off by explaining which individuals involved in arbitration could petition state courts to obtain document production. She highlighted the varying approaches across jurisdictions, noting that parties in some jurisdictions have the discretion to approach state courts independently, while in others, such action requires authorization from the arbitral tribunal itself.

Two critical observations were drawn from Ms. Menasalvas Garrones's analysis. Firstly, she explored whether tribunals could proactively seek relevant documents through state court assistance. She explained that in certain jurisdictions like the Netherlands, tribunals lack the authority to directly request state court assistance. However, in jurisdictions such as Switzerland and Luxembourg, arbitral tribunals may seek aid from state courts, subject to specific procedures and permissions.

Secondly, she addressed whether parties must obtain the tribunal's approval before petitioning state courts for assistance. While Switzerland and Luxembourg require parties to obtain the tribunal's approval, the Netherlands grant parties autonomy in directly approaching state courts for aid. In all cases, the tribunal plays a role in ensuring the relevance and necessity of requested documents.

Following Ms. Menasalvas Garrones's insights, Ms. Haedinger navigated the discussion towards jurisdictional considerations and the availability of state court assistance in different arbitration proceedings. She outlined two key angles through which this can be analysed. Firstly, Johanna Haedinger examined the jurisdictions in which state court assistance may be sought, drawing attention to provisions like the UNCITRAL Model Law. She highlighted Luxembourg and Switzerland as examples where foreign arbitral tribunals and parties to foreign arbitration proceedings may seek assistance from state courts. Secondly, she explored the scope of documents accessible through state court assistance. She cited examples like the new law in Luxembourg, which is inspired by a provision of French Law that restricts state court measures geographically to documents located in France or to individuals residing in France.

Mr. Blumrosen contributed to the discussion by highlighting default rules in certain jurisdictions, such as France, where the concept of denial of justice is commonly invoked in arbitration proceedings. He emphasised the importance of demonstrating a connection to the jurisdiction or the necessity of the requested document for obtaining state court assistance.