Procedural tactics in corporate and financial disputes – the forced disclosure of evidence

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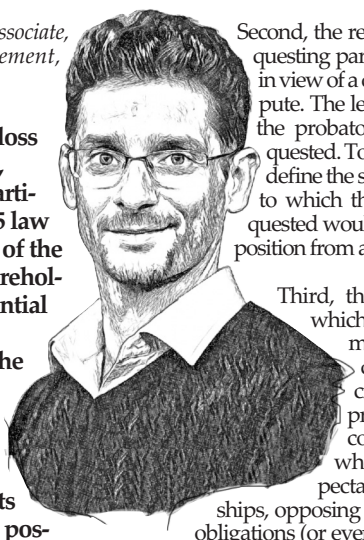

In the event of significant loss of value of an investment, breach of the company's articles of association, of the 1915 law on commercial companies or of the relevant fund legislation, shareholders, creditors and other potential claimants are likely to experience evidentiary hurdles. The documents necessary to evidence the existence of a potential misconduct and connect it to one's contractual obligations to establish its liability, may solely be in the possession of third parties. If these are potential adverse parties in a litigation case, they may not be supportive and may reject outright requests for information and documents. While there is no common law style discovery process in Luxembourg, Luxembourg procedural law provides tools allowing one to force the disclosure of documents, either before initiating proceedings on the merits, or during proceedings on the merits, subject to certain differences.

Forced disclosure prior to proceedings on the merits

Before initiating proceedings on the merits, a potential claimant may file a writ before the judge of summary proceedings (*juge des référés*) for the sole purpose of forcing the opposing party to disclose evidence or documents so as to assess the opportunity, strength and weaknesses of a future action (*assignation en référé probatoire*) (article 350 of the *Nouveau code de procedure civile* (**NCPC**)). The responding party does not need to be the same as the responding party in the proceedings on the merits. To be successful, the request must meet a number of criteria well established by case law.

First, the requested evidence must be relevant and useful for a potential dispute. The requesting party is expected to demonstrate that the evidence sought will help to formulate demands in separate proceedings, generally on the merits to allow to establish one's liability before the Luxembourg courts or an arbitral tribunal. A foreign judgment creditor which will seek to have a foreign judgment recognized in Luxembourg may also seek an order for the production of evidence if the preservation of the documents is at risk and if it meets the relevant conditions.

Defending parties may argue in defense that the requesting party does not need the documents requested to make its case, or that it is already in possession of all relevant information. For this reason, it is useful to provide sufficient context and background information on the existence of a plausible dispute on the merits, so as to argue that the evidence requested would be determinative (or at least useful) to decide its outcome, and that the requesting party cannot obtain the evidence other than by forcing its disclosure.

Second, the reason must be legitimate. The requesting party must seek at establishing facts in view of a determinable and subsequent dispute. The legitimacy of the request relates to the probatory value of the documents requested. To satisfy this criteria, it is relevant to define the scope of the dispute and the extent to which the information or document requested would improve the requesting party's position from an evidentiary standpoint.

Third, there must be no legal obstacle which would justify refusal. The summary judge will assess whether ordering the disclosure would circumvent any legal rule, ethical principle or fundamental liberty. In corporate and financial disputes, where there is generally a strong expectation of confidentially in relationships, opposing parties may raise confidentiality obligations (or even professional secrecy if requests are directed against chartered accountants, audit firms or statutory auditors).

The existence of a legal obstacle is not always insurmountable for the requesting party, if it is able to convince the judge that its legitimate interest in obtaining the evidence is greater than the necessity to uphold the legal rule, ethical principle or fundamental liberty which would be breached. It is an exercise of balancing the interests at stake. In order to tip the balance in its favor, the requesting party may raise any serious and compelling reasons. In the context of large scale corporate and financial disputes, these reasons may include concerns for the public interest and public policy (*ordre public*), protection of investors and reputation of the jurisdiction as a financial center, overall significance and cross border nature of the matter, amounts in dispute, possible criminal ramifications, etc..

Fourth, proceedings on the merits (before a court or an arbitral tribunal) must not have already been initiated. According to the Luxembourg Supreme Court, the summary judge cannot rule on a request for forced disclosure if there are proceedings pending between the same parties, before a judge on the merits, if the evidence requested is meant to be used in this dispute. Given the multijurisdictional nature of corporate and financial litigations, defending parties may try to raise the existence of proceedings in foreign jurisdictions, for example directed against entities of the same corporate group, to argue that this condition is not met. In order to dissipate any doubt, it may be useful for requesting parties to provide sufficient details of the anticipated litigation in Luxembourg, including information concerning potential defendants.

Fifth, it must be likely that the evidence requested exists and that it is in possession of the party from which disclosure is sought. It is in principle not necessary for the requesting party to demonstrate to the summary judge the existence of the evidence with certainty, but rather that its existence is likely. Determining which documents are standard in a particular transaction or contractual relationship, or which party may be expected to be in possession of what document, is both a matter of common sense and general understanding of the relevant corporate, financial or investment funds legislation.

Sixth, the request must identify the information or document with sufficient specificity. This seeks to ensure that the defending party can easily identify the documents to disclose should the request be granted, and to prevent so-called "*fishing expeditions*". For example, the Court of Appeal ruled that the summary judge is expected to limit the measure granted to what is sufficient for the solution of the dispute, and that requesting "*all documents recorded and downloaded*" and "*all documents concerning activities*" until a particular date, is not sufficiently specific. Requests for disclosure of communications which are neither determined nor determinable as to the nature, date and persons concerned, may be deemed vague and imprecise and may not allow a judge to order their disclosure.

Forced disclosure during proceedings on the merits

When a claimant has already initiated proceedings on the merits, it may seek to force a defending party to disclose documents during these proceedings (articles 284, 285 and 288 NCPC), to be used as evidence in support of its allegations. To stand the most chances of success, a claimant should approach the forced disclosure in the same way as it would approach it in a pre-trial proceeding (article 350 NCPC), applying the same criteria, with the necessary adjustments since the dispute on the merits has already begun and the disclosure concerns a party to the proceedings.

Thus, claimants would be advised to put the emphasis on identifying the documents with sufficient specificity, on the likelihood that the evidence requested exists and is in possession of the party from which disclosure is sought, and that it is relevant and useful to solve the existing dispute. Claimants may ask the tribunal to rule on the request for forced disclosure first as a separate judgment, before the tribunal rules on the merits of the case.

Practical drafting tips

Requesting parties should carefully consider their drafting and pleadings, and be aware of the interactions between the different criteria they have to meet to obtain the measure sought.

Providing too much information may lead the judge to conclude that sufficient evidence is already available to initiate proceedings on the merits, and that the measure sought would be neither relevant nor useful. However, providing too little information may not convince the judge that the evidence requested would be determinative or useful for future proceedings, or even that future proceedings are likely.

Several criteria may impact the required degree of specificity of the request. For example, when faced with an overbroad request for disclosure, a defending party may argue that the administrative burden to review too many communications is disproportionate, as compared to the requesting party's legitimate interest to obtain the measure. However, a requesting party may be held to a higher standard regarding the specificity criteria if granting the disclosure may result in a breach of confidentiality or professional secrecy.

There are in principle no restrictions concerning the type of documents requested, insofar as the requesting party is able to meet the required criteria. When preparing for – or when already engaged in – a corporate or financial dispute, a party requesting the forced disclosure may seek to clarify details of the contractual relationship and the role, rights and obligations of the entities involved in the allegedly damaging decision-making process. Thus, the documents may be contractual agreements, corporate documents, minutes of meetings and communications, to shed light on the relevant facts, understand the obligations of all entities, identify potential breaches of these obligations and tie them to one's prejudice, as well as to anticipate defense strategies.

Whether claimants request the forced production before or during the proceedings on the merits, it is good practice to request the disclosure under penalty of a fine (*astreinte*) of an amount to be determined *ex aequo et bono* by the court.

Production of documents in the context of arbitral proceedings

The new Luxembourg arbitration law of 19 April 2023 provides for various rules on court assistance in arbitration proceedings, and introduces in particular the support judge (*juge d'appui*), which can be involved in the taking of evidence irrespective of whether the arbitration proceedings are *ad hoc* or administered. Domestic courts and arbitral tribunals have concurrent jurisdictions on this issue, depending on (i) the moment when one wants to request the forced production of evidence (either *during* the proceedings, or *before* the proceedings have begun) and (ii) who has the documents (a party to the dispute or a third party). There is no distinction to be made between the documents which an arbitral tribunal or a domestic court may order to disclose.

When a potential claimant seeks the disclosure of evidence or documents *before* the proceedings have begun, the above criteria applies. The competent jurisdiction is the summary judge. When it makes its request *during* the proceedings, and the documents are in the hands of the opposing party in the arbitral proceedings, the requesting party shall address its request to the arbitral tribunal which may order the disclosure on the basis of any conditions it deems appropriate, including under penalty of a fine (*astreinte*) (article 1231-8(1) and article 1231-13 NCPC).

When it makes its request *during* the proceedings, and the documents are in the hands of a person which is not party to the arbitration proceedings, the arbitral tribunal lacks jurisdiction to order itself the disclosure, so the requesting party first needs to justify its request to the arbitral tribunal, which would then invite it to have the third party summoned before the support judge (article 1231-8(2) NCPC).

The same criteria identified above would be applicable. In principle, both parties to the arbitration proceedings may submit a common request to the arbitral tribunal. The support judge is seized by application (*requête*), so the court clerk summons the third party by registered letter and then informs the arbitral tribunal. The support judge sits as would sit the summary judge (*comme en matière de référé*), and renders its decision fairly quickly (typically within a few weeks), also under penalty of a fine (*astreinte*) if appropriate. The order of the support judge may be appealed within 15 days.

In the context of the enforcement of a foreign award, the Luxembourg district court recently refused to grant the disclosure of a litigation funding agreement, on the grounds of lack of relevance for the enforcement proceedings, and lack of sufficient precision regarding the existence of the funding agreement and the identify of the parties to this agreement.

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