

Can an Arbitral Tribunal Admit Evidence Obtained through a Cyber-Attack?

Kluwer Arbitration Blog

January 27, 2019

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Please refer to this post as: Nitya Jain, 'Can an Arbitral Tribunal Admit Evidence Obtained through a Cyber-Attack?', Kluwer Arbitration Blog, January 27 2019, <http://arbitrationblog.kluwerarbitration.com/2019/01/27/can-an-arbitral-tribunal-admit-evidence-obtained-through-a-cyber-attack/>

With the increase of cyber-attacks, arbitral tribunals face the question whether to accept evidence obtained via such an unlawful breach. The question even found its way to this year's Vis Moot problem, confirming the timeliness and need for a debate on a global level.

Current Framework on Admissibility of Evidence

An arbitral tribunal is not under an obligation to explicitly follow a binding evidentiary code, unless, of course, the parties agree otherwise. Most national arbitration laws and arbitration rules follow this approach. For example, Article 19(2) of the UNCITRAL Model Law states:

"Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

The arbitral tribunal will determine and adapt the procedure to the specifics of a given case. Consequently, each procedure will differ. In doing so, the tribunals have little guidance from the IBA Rules on the Taking of Evidence in International

Arbitration. Article 9(2) of the IBA Rules provides some standards of admissibility of evidence. The provision, however, is not exclusive and does not include the issues reflected in certain jurisdictions, such as limiting or excluding the admissibility of the evidence. At the same time, the inclusion of illegally obtained evidence can lead to an unreasonable conclusion, endangering due process, subjecting the award to a potential challenge.

Often, the importance of the evidence has overshadowed the illegality of its source: gaining evidence as a result of unauthorized access to data in a system or computer. Attaching the term *illegal* with evidence *prima facie* perturbs its admissibility. How can tribunal admit and use evidence primarily obtained through an unlawful breach? On the face, such a stance may seem to resonate with the travesty of justice. Certain circumstances, however, may call for the admission of an illegally obtained evidence in the interest of justice.

Arbitral Tribunal Can Admit Evidence Obtained via an Unlawful Breach

First, the tribunal needs to consider if a party to the proceedings was itself involved in the illegal activity. The *clean hands* doctrine plays a seminal role in deciding the admissibility of an illegally obtained evidence.

If a party seeking admission of evidence has *clean hands* the possibly unlawful nature of that disclosure cannot be held against it. Evidence originally obtained through unlawful conduct should be considered *prima facie* admissible if it has found its way to the tribunal through the hands of a *third disinterested* party. In other words, such evidence should be regarded as *prima facie* of superior credibility. Where a party seeks to benefit from its own unlawful conduct (i.e., if it does not have clean hands), the evidence should be considered inadmissible. Even in such case, the wrongdoing needs to be egregious for evidence to be deemed inadmissible. The tribunal may show less willingness to admit evidence when the illegal activity through which it was obtained was particularly grave.

In *Bible v. United Student Aid Funds, Inc.*, Seventh Circuit Court declined the application to strike references to documents that had been released by others on WikiLeaks. There, the plaintiff obtained the evidence through WikiLeaks disclosure websites and argued for its admission in the proceedings. The court held that the evidence is admissible as the information was already in the public domain. Public domain implies to be a state wherein the evidence is accessible to the public at

large without undue hardship. In this particular case, as the evidence was available on the internet for five (5) years, the court saw no problem in using the evidence for a more accurate assessment of the case. The court also stressed upon the probative value of the evidence.

Second, the arbitral tribunal has the duty to ensure the parties' right to be heard. A failure by the arbitral tribunal to observe the rights of fair trial and due process constitutes a violation of public policy and exposes the award to the risk of annulment.

The right to be heard includes each party's right to propose evidence on pertinent facts. Dismissal of evidence that is material to the outcome of the case impairs party's procedural right to a fair trial. Equality of arms, or a fair balance principle, must be preserved between the parties in adversarial proceedings. Each party must be afforded a reasonable opportunity to present their case - including their evidence - under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent. With that said, illegally obtained evidence should be admitted if there is no other evidence available to prove a necessary aspect of a case

In *Conoco Phillips v. Venezuela*, Venezuela sought to rely on US diplomatic cables obtained through Wikileaks. The case was different on the grounds that the Respondent presented the illegally obtained documents only post the Decision on the Merits had been rendered and the proceedings had entered the quantum phase. Arbitrator George Abi-Saab stated that since the leaked cables were relevant to the outcome of the case, they should have been given proper weight by the arbitral tribunal. Mr. Abi-Saab concluded that, in his view, the cables should have been admitted as valid evidence because of their "high degree of credibility" and "level of detail".

Third, ignoring illegally obtained evidence may not provide a just solution and may even lead to an award that is factually wrong. The relevance and materiality of the evidence play a fundamental role. The evidence is relevant when it is reasonably necessary for a party to support, contradict, or weaken any contention or fact in the proceeding or to discharge its burden of proof. In dealing with the admissibility of evidence the tribunal considers the likely or *prima facie* materiality of evidence. The evidence is considered to be material to the case when it would help to assess whether a factual allegation is true or not and would assist in

bearing upon the final award. Uncovering the truth outweighs the unlawfulness in which submitted evidence was obtained.

Striking a Balance between the Interest of Justice and Due Process

Today, cyber-intrusion can be accomplished with utmost ease and the almost daily reports of hacks suggest that arbitrators are likely to be presented with issues related to breaches of cybersecurity. The reasons outlined here may compel a tribunal to overlook the illegality of the source. It is, however, difficult to strike a balance between the requirements of due process and right to be heard and the prohibition of accepting evidence obtained via illegal means.

The nature of illegality cannot be ignored as an admission of illegally obtained evidence will likely endanger enforceability of an award on the grounds of public policy violation. Beyond that, it may influence parties' procedural behavior in other proceedings. For example, it may encourage illegal behavior in future – showcasing illegally obtained evidence may incentivize future unlawful disclosures. When an arbitral tribunal hands down an order to the effect upholding that illegally obtained evidence is admissible, it may encourage the parties to resort to illegal means of obtaining evidence.

To counter such outcome, the relevancy and materiality of the evidence should be given utmost importance. It is of crucial importance for a tribunal to know the complete facts and circumstances of the case for proper resolution of the dispute. In those cases, exclusion of evidence would be an infringement of a party's right to be heard.

There is no straight-jacketed formula that can outrightly decide the fate of evidence; rather, it comes down to the facts and circumstances of a given case. Nonetheless, to achieve the necessary balance, the tribunal should consider two factors when deciding on the admissibility of evidence obtained via an unlawful breach of data or computer. First, the evidence should be accepted if obtained without the claiming party's involvement in the illegal act. Second, such evidence should be accepted only if it is material to the outcome of the case. This would cover, for example, materials already available on the internet. Where, however, the illegal activity is direct and of severe nature, the tribunal should prima facie deny admissibility of evidence. Such two-prong test preserves due process and procedural fairness, and, therefore, safeguards the award.