From Our Archives: Admitting Illegally Obtained Evidence in International Arbitration

Kluwer Arbitration Blog
March 28, 2019

Patricia Živković (University of Aberdeen)

Please refer to this post as: Patricia Živković, 'From Our Archives: Admitting Illegally Obtained Evidence in International Arbitration', Kluwer Arbitration Blog, March 28 2019, http://arbitrationblog.kluwerarbitration.com/2019/03/28/from-our-archives-admitting-illegally-obtained-evidence-in-international-arbitration/

The admissibility of illegal evidence in international commercial arbitration is for sure, at the moment, a widely discussed topic among law students and arbitration lawyers thanks to this year's problem at the Willem C Vis International Commercial Arbitration Moot competition ("*Vis Moot Problem*"). *The Kluwer Arbitration Blog ("KAB") covered the topic extensively as well in previous posts, some of which we will mention here again. For the discussion on the issue of law applicable to an arbitration agreement, see the post written by Kiran Nasir Gore and available here.*

Arbitral tribunals enjoy a rather wide discretion when deciding on the admissibility of evidence. Arbitration rules contain almost no guidance regarding the admissibility of illegal evidence specifically, and the Vis Moot Problem raising such an issue should be very much welcomed in the arbitration community. The admission of such evidence is put in the juxtaposition between the party's right to be heard, i.e. to be in a position to prove the facts supporting a party's claim, and the requirement to render an award which is in accordance with public policy, i.e. not tainted by the illegality of admitted evidence (for a discussion on this matter in the Swiss jurisdiction see a KAB post available here). The attempt to strike the balance between these two was discussed in a piece published on the KAB by Nitya Jain:

> *"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 the future – showcasing illegally obtained evidence may incentivize future unlawful disclosures. […] 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."*

In other words, the admission of illegal evidence has a potential to damage the reputation of arbitration as a dispute resolution mechanism by encouraging such illegal behaviour, but at the same time, authors are invoking the materiality and relevance of the evidence to guide arbitrators when considering evidence, even the illegal one. The recent development of due process paranoia (for KAB posts on this topic see here and here) is certainly not very helpful in this regard, as it forces arbitrators to think twice when considering evidence submitted to them, even when there is a strong indication that the evidence is obtained in an illegal way.

The Vis Moot Problem this year specifically focused on the issue of an *alleged* cyber-attack, and/or a leak of information available in an electronic form. The need for the implementation of cybersecurity measures was discussed at the KAB. On that matter, Claire Morel de Westgaver stated the following:

> *"47% of respondents indicated that, where appropriate, their clients would be willing to pay a higher fee/incur an additional cost with an arbitration institution that provided advice and assistance on appropriate security measures and/or provided a secure platform (or similar) on which all communications and data sharing storage in the arbitration could take place. This particular finding may provide comfort to institutions."*

The fact that the parties in arbitration are ready to pay a higher price for more security in the cyberspace of an arbitration institution does not say much about the admissibility of evidence which would be obtained by a breach of such security, or through a breach of cybersecurity of another (non-arbitration) institution. Still, it

shows us the important tendency and expectations of the parties when they submit their case to arbitration. Moreover, if an arbitration institution "*introduce[d] mandatory filing and communication systems under which data would be transmitted exclusively through an internet-based secured platform, moving away from sharing external drives, hard copies and emails with sensitive attachments*" (as suggested by Claire Morel de Westgaver in another piece at the KAB), these expectations, together with the new intra-institution regulation, should form the attitude of the tribunal towards such illegally obtained evidence as well. The parties to the proceedings should be provided with the procedure shaped in accordance with their initial intent, especially if the breach of security happened within the same institution in which the case is being arbitrated.

However, the decision on the admittance of illegally obtained evidence involves another important question: Who should decide on the illegality of evidence submitted by a party? Surely, the illegality of evidence raises as a possible violation of international public policy; still, even if this is so, the question of the standard of proving illegality remains undefined. Is it sufficient that the party *alleges* such illegality, or is it necessary for a national court to decide on this? Should the tribunal stay the proceedings until such a court's decision is rendered, or should the tribunal decide itself on this issue and, if yes, under which law? What if the illegality of the evidence is not established in the end – can costs incurred in the meantime be claimed as damages by the party requesting the admission of the evidence in the first place, and *vice versa*? Hence, decision-making in these cases is not only to be balanced between the pursuit of the truth, i.e. the right to be heard, and the protection of public policy, but also against the possible abuse by the party against which such evidence is to be used. Namely, if a mere *allegation* of illegality sufficed, then the right to be heard of the party seeking the admission of the evidence would be in the hands of the opposing party, who could simply allege the illegality of such evidence without any grounds and exclude it from consideration during the tribunal's deliberations. The question is not an easy one to answer. Whereas the tribunal has wide discretion as to the admissibility of evidence, this does not necessarily extend to decision-making on the illegality of obtaining the evidence in question. It would be advisable to regulate this issue in arbitration rules to create a clear standard for tribunals when they deal with these *allegations*.

In the meantime, there might be some corrective remedies that are available to

the tribunal during the proceedings, if the tribunal finds out that either party acted in bad faith during the production of evidence. As discussed by Margaret Moses in a post published on the KAB, allocation of costs might be a punitive measure which can be used against the party who either sought the production of evidence which was obtained illegally or against the party who falsely alleged its illegality:

> *"Article 9(7) [of the IBA Rules] simply states that the Tribunal, when it assigns costs, may take into account a party's failure to conduct itself in good faith in the taking of evidence. Fairness would seem to support compensating the party who acted properly and in good faith from the burden of the inefficiencies created by the bad faith conduct of the other party. The Rules do not suggest that bad faith in the taking of evidence would shift all costs. Rather, bad faith conduct would be a factor for the tribunal to consider along with other factors in making a determination as to the proper cost allocation."*

This approach would, indeed, be within the discretion of a tribunal under most of the provisions on the allocation of costs in arbitration rules, but it does not solve any of the issues discussed above. What it can actually provide is an incentive for the parties to refrain from either producing illegal evidence or to falsely making claims on the nature of evidence submitted in the proceedings.

In conclusion, the discussion that is led worldwide by law students regarding this matter is certainly going to shed some light on these issues, whereas it will be on the arbitration community to take it from there by either implementing the solutions in arbitration rules, or, which is less likely to happen, in national arbitration legislation. We should bear in mind, however, that cybersecurity is taking an important place in the legal community overall, and as such should not be overlooked in arbitration as well. For that reason, the trend to prevent and punish cyber breaches and leaks of data should not be taken easily when conducting arbitration. The need to render an *enforceable* and, at the end of the day also, – *just* award is certainly requiring some mind-stretching from arbitrators in today's world of technology. However, arbitration, even in transnational terms, is not an isolated phenomenon, and it should adapt to the change of policy based on technological and economic development whenever needed.