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Confidentiality of Already Disclosed Documents: Admissibility of Improperly Obtained "Privileged" Evidence

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Arbitral tribunals have, in various instances, allowed parties to rely on **documents obtained illegally** as evidence. Practically, however, such documents are of a **privileged** character, e.g. emails exchanged between attorneys and clients, any information related to a set of confidential proceedings or communications between a psychotherapist and a patient. Privileged documents deserve higher legal protection and they cannot be admitted as evidence in arbitration proceedings. The main reason for this protection is that the confidentiality of these documents encourages the concerned parties to speak freely. Without the confidentiality protection, they might be reluctant to disclose certain information potentially useful for settlement discussions on the basis that they risk it being used against them in later proceedings.

A gripping question now is *should illegally obtained confidential documents still be protected from being used as evidence in arbitration when they have already been disclosed?*

This question leads us to a more nuanced discussion around the admissibility of illegally obtained "privileged" documents. Two important considerations shape the answer. *First*, the admissibility of improperly obtained evidence must be assessed in conjunction with its privileged character. *Second*, the privileged character of the documents must be viewed in light of the fact that they have now been disclosed and made public. Recent arbitration practice sheds some light on how these considerations interplay in practice.

Illegally Obtained Documents and Illegally Obtained "Privileged" Documents

The final award in ***Caratube*** illustrates a difference between illegally obtained "privileged" documents and illegally obtained documents. There, the claimants sought to produce certain documents that were part of around 60,000 documents obtained through a hack of the Respondent's computer systems. These documents were later leaked on a publicly available website known as "KazakhLeaks". The respondent objected to the admission of such "leaked documents".

While the Tribunal admitted certain documents, it did not admit client-attorney communications due to their "privileged" nature. It was not the illicit means of obtaining the documents, but their privileged nature that barred them from being admitted as evidence. Such an outcome is even more interesting considering that the privileged documents had also been leaked and published on the website. This brings us to the second consideration.

The Public Domain Paradox

In the ***Spycatcher*** case, the book "Spycatcher", authored by a former member of the British Security Service (BSS), contained an account of alleged unlawful activities carried out by other members of the BSS. By reason of the terms of the contract of service with the Crown and the provisions of the Official Secrets Act 1911, there was no possibility of the book's publication in the United Kingdom. Consequently, the author got it published elsewhere. Later, when two notable English newspapers were about to publish this information in the United Kingdom, injunctions were sought against the same.

The court held that once information is freely available to the general public, it is nonsensical to talk about preventing its "disclosure". It further held that, as a general rule, the principle of confidentiality can have no application to information that has entered into the "public domain".

This rule was put to question in the ***HT SRL*** case. There, the emails in question contained information which was, prior to their uploading onto the Internet, undoubtedly privileged and confidential. The appellant argued in favor of admissibility of the emails. Its main argument was that, after the uploading, the emails had entered the "public domain" and confidential character of the documents should practically cease to exist. To a great extent, this argument was based on the finding in the *Spycatcher* case.

Accordingly, the question in the *HT SRL* case was whether the availability of the evidence in the public domain should have any impact on the scope of the duty to maintain confidentiality. The Singapore Court of Appeal, while acknowledging that accessibility does have a role to play, reasoned that it is not the only relevant factor. Rather, the court proposed an important test: the extent to which the general public has, in fact, accessed the confidential documents and not the extent to which such documents were accessible. The court reasoned that, while much of the information on the Internet is accessible, the general public does not access it.

The appellant, in the case, also argued that a party who has not, itself, caused the leak should be permitted to rely on the emails as evidence. In other words, the **clean hands doctrine** should allow them to rely on the evidence. Interestingly, the court, relying on numerous English precedents, held that there is still a point in enforcing the obligation of confidence as the party, despite having clean hands, was a third party. The confidential character of the evidence remains intact even after the general accessibility of the documents.

This finding is in line with the idea of discouraging improper obtaining of confidential information and valuing the intention of the parties who, at the time of drafting the emails/documents, chose to keep them confidential. However, the disadvantaged position of the party seeking admission of the evidence must not be completely overlooked. Acknowledgment that confidentiality is a lot more than mere secrecy of documents (but is based on the confidence of the parties) should not undermine the rights of the party seeking admission of the documents. Rather, the rights of the parties need to be balanced in every given case.

Factors to Consider for Balancing Interests of the Parties

A party's legitimate expectations regarding confidentiality come in direct competition with the right of the other to present its case. For balancing these interests, the following four factors, when cumulatively met, offer some guidance in ensuring the necessary balance.

First, the documents need to be reliable. Generally, illegally obtained documents are not authentic and as a result, they lack reliability. The party seeking to place reliance on them must establish that they are authentic in the first place, failing which the documents must be excluded for obvious reasons.

Second, the party, whose information has been leaked, needs to undertake adequate measures to preserve such information. In cases where the parties are negligent in securing their information, they should be considered to waive the protection that could have been afforded to the information.

Third, the level of involvement on the side of the party seeking admission of evidence. The clean hands doctrine should have a role to play, but it should not be decisive. The second and third factors would simply ascertain the conduct of the parties which is relevant for determining whose interests should prevail after applying the fourth factor.

The *fourth* and decisive factor is the extent to which the admission or the exclusion of these documents encourages the parties to arbitrate their dispute. Admission of relevant documents might discourage the party, whose confidential documents were leaked, from arbitrating their dispute. In that context, even the clean hands doctrine should not outweigh the need for the exclusion of documents. On the contrary, where documents have become freely accessible due to the negligence of the party itself, excluding already disclosed relevant documents for confidentiality would only discourage the party who is denied such admission. In such a case, this party's choice to settle the dispute, instead of litigating it, will not be duly regarded.

Conclusion

Arbitral tribunals can decide to admit or exclude evidence on the basis of their privileged nature when such documents have also been illegally obtained. Because arbitral tribunals possess a wide margin of discretion with respect to weighing and assessing such evidence, each decision made on the admissibility of evidence is inevitably fact-driven. As a result, it is highly likely that different tribunals will reach strikingly different results on seemingly similar questions.

In the absence of clear rules on the admissibility of illegally obtained privileged evidence, a common standard on the admission and weighing of such evidence has to be drawn from the existing case law. Here, it needs to be understood that the number of published international commercial arbitration awards in which this issue has been discussed is very few. Further, these awards are rarely accessible and even if certain commentaries provide brief information about these awards, the reasoning underlying the decision of the tribunal is missing.

Accordingly, the detailed discussions and reasoned decisions provided by ICSID tribunals and judicial courts, which are easily accessible, form a good basis for analyzing the issue at hand. Such analysis highlights the importance of the aforementioned four factors which could assist arbitral tribunals in rendering a reasoned award when faced with the issue of admissibility of such evidence.

To further deepen your knowledge on attorney-client privilege in international arbitration, including a summary introduction, important considerations, practical guidance, suggested reading and more, please consult the Wolters Kluwer Practical Insights page, available here.

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