ADMISSIBILITY OF UNLAWFULLY OBTAINED EVIDENCE IN INTERNATIONAL ARBITRATION

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Abstract

In this internet-driven era, the horizon of obtaining evidence illegally has broadened, with many parties seeking to adduce such evidence. This issue gains more significance in the pandemic-hit world, where virtual arbitrations are on the rise and so are the risks of cyberspace. With the recent amendment of Article 9.3 of International Bar Association (IBA) Rules on Taking of Evidence in International Arbitration 2020, there has been a rekindling of concerns related to the admissibility of unlawfully obtained evidence in international arbitration. Though the issues surrounding unlawfully obtained evidence in arbitration have been raised earlier, this marks the first time that it has been incorporated within widely accepted international arbitration rules. Since the IBA Rules themselves do not lay down the criteria for exclusion of such evidence, it becomes necessary to evaluate the extent to which the illegally obtained evidence could be

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admissible, alongside key concerns arising from it.

This paper addresses the concerns surrounding this premise and attempts to resolve the dilemma faced in the exercise of the tribunal's discretionary power to balance the flexibility of the arbitration process on one hand, and the need to ensure a fair trial on the other. At the outset, it lays down the core principles of evidence in international arbitration and the consequent impact of the IBA 2020 Amendment. The approaches of various tribunals to this issue have been dissected to understand the key factors influencing the admission/exclusion of such evidence. Lastly, the paper attempts to lay down a harmonious standard for evaluating unlawfully obtained evidence, which could find practical application in contemporary times.

I. INTRODUCTION

The process of taking evidence maybe regarded as one of the most critical stages in an arbitration proceeding as it helps the tribunal in fact-finding and determination of the disputed issues of facts.[1]Evidentiary rules in international arbitration saw a major shift recently with the amendment of Article 9.3 in the IBA Rules on Taking of Evidence in International Arbitration, 2020 (hereinafter

[1]Julian D. M. Lew, Loukas A. Mistelis and Stefan M. Kröll, *Comparative International Commercial Arbitration*, ¶ 22-7 (Kluwer Law International 2003) [*hereinafter* "Lew, Mistelis and Kröll"].

"IBA Rules), which for the first time recognized the production of unlawfully obtained evidence. The text of Article 9.3 states that:

"The Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally."

Prior to this amendment, no provision discussed the treatment of illegally obtained evidence in international arbitration. Further, this proposition becomes more significant in a pandemic-struck world where virtual arbitrations are on a rise and so are the risks of cybercrimes and hacking of confidential information. Thus, it becomes important to account for certain standards which have not been defined under the IBA Rules, but which have to be taken into consideration when a tribunal is confronted with illegally obtained evidence.

The doctrine of "fruit of the poisonous tree" posits that if the evidence has been obtained through illegal means, such evidence should be excluded. It is based on the presumption that if the 'tree' is tainted then so is its 'fruit', subject to other considerations.[2] Although this doctrine is greatly appreciated by courts internationally, it is not applied directly in international arbitrations due to certain unique features of arbitration. One of these is the great flexibility of an arbitration proceeding where, unlike courts, the tribunal has a wide latitude of discretion to tailor the procedures to the nature of the dispute and the parties to improve efficiency. Thus, the challenge remains to carve out the necessary criteria to determine the admissibility of such illegally obtained evidence, in light of due process vis-à-vis the flexibility of the tribunal. Though there exists a plethora of literature on the treatment of unlawfully obtained evidence, very few relate exclusively to arbitration.

[2] 'Fruit of the poisonous tree' (*Legal Information Institute*) <https://www.law.cornell.edu/wex/fruit_of_the_poisonous_tree> accessed 20 October 2021.

Thus, the scope of this paper is limited to international arbitration and encompasses all of its forms including international commercial arbitration and investor-state arbitration. 'Illegally/Unlawfully obtained evidence' in the paper refers to evidence procured by breach of legal obligations under both civil and criminal law. This includes violation of the law of seat or *lex arbitri* and any other procedural rules whether institutional or ad-hoc, applicable to the arbitration.

This paper aims to analyse and determine the criteria for admissibility of unlawful evidence in international arbitration. This is done by dividing the paper into three main parts: The first part discusses the fundamental rules of evidentiary procedure in arbitration along with the effect of IBA Rules on it; The second part evaluates the key legal considerations used by the arbitral tribunal to specifically determine the admissibility or exclusion of illegally obtained evidence; The last part lays down a suggested standard based on the study, which could be used for practical implementation by the arbitral tribunals.

II. APPLICABLE RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION

To effectively understand how illegally obtained evidence is governed, it is necessary to appreciate the basic tenets of the evidentiary procedure. It is from these principles that the specific legal considerations to determine the admissibility of illegally obtained evidence originate.

A. Governing Principles of Evidence

In the international sphere, there is no specific evidentiary procedure that uniformly applies in international arbitrations. Arbitration, being premised on party autonomy, allows the parties to specifically determine the rules governing the proceeding. Despite the lack of one

overarching set of binding procedures, there exist certain general legal principles which form the bedrock of evidentiary procedure in international arbitration and are consistently applied in *ad hoc* or institutional arbitrations.[3]These have been laid down in numerous model laws and rules of international arbitration institutions.

a) Tribunal's discretion

The cardinal principle of admissibility of evidence in international arbitration is the discretion of the tribunal. The tribunal exercises wide discretion to determine the admissibility, relevance, materiality, and weight of evidence produced in the conduct of proceedings,[4]even in the absence of an express rule.[5]This discretionary power is guided by supplementary principles of those purporting due process and good faith.

b) Due Process

Due process is recognized as the *magna carta* of arbitration.[6] This principle has been recognized by the New York Convention and includes equality amongst the parties as well as a reasonable opportunity to present its case.[7] This is applied in most cases by virtue of the chosen procedural rules, i.e., *Lex Arbitri,* and has even been recognized as a fundamental international procedure.[8]

[3]Nathan D. O'Malley, *Rules of Evidence in International Arbitration* (2nd edn, Informa Law 2019) 4 [*hereinafter* "D. O'Malley"].
[4]United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, UNGA Res 40/72 (11 December 1985) UN Doc A/RES/40/72, art 19, as amended by UNGA Res 61/33 (18 December 2006) UN Doc A/RES/61/33 [*hereinafte*r "UNCITRAL Model Law"]; IBA Rules on the Taking of Evidence in International Arbitration, art 9 (17 December 2020) [*hereinafter* "IBA Rules 2020"].
[5]Gary B. Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2310 [*hereinafter* "Born"].
[6]Lew, Mistelis and Kröll (n 1) 71- 97.
[7]Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958 entered into force 7 June 1959) 330 UNTS 3, art V(I)(b).
[8]D. O'Malley (n 3) 4.

Thus, aspects of due process like fairness have to be observed by the tribunal for the admissibility of evidence. A similar standard of admissibility has to be applied between both the parties, with the application of similar legal principles to weigh evidence from either side. However, the right to equal treatment is not absolute and only requires treating situations in a like manner.[9] These principles of fairness must appeal to parties from different jurisdictions and legal systems, i.e., civil law and common law, alike and could be an amalgamation of different legal systems. [10]

c) Good Faith

Good faith is not explicitly described as a governing principle under the Model Law but it follows from the general rule of *pacta sunt servanda*[11]and is recognized under IBA Rules.[12]The definition and application of good faith are subjective, depending on the circumstances of the transactions. It is seen that the most consistent interpretation of good faith is *"observance of reasonable commercial standards of fair dealing"*.[13]

d) On Application of Law of Seat

Contrary to speculations, it is now an accepted norm that neither the local rules of evidence from the seat nor the party's jurisdiction can be applied directly to international arbitration, even in the absence of agreed procedural rules.[14] Unless the parties have expressly agreed to the local laws of the seat, these cannot be applied. This is based on the

[9]Daniel Girsberger, Nathalie Voser and Angelina M. Petti, *International Arbitration In Switzerland* (2nd edn, Kluwer Law International 2013) 237 [*hereinafter* "Girsberger, Voser and Petti"]

[10]D.W. Shenton, 'An introduction to the IBA Rules of Evidence' (1985) 1(2) Arb Intl 118, 123.

[11]Born (n 5) para 8.02/B.

[12]IBA Rules 2020 (n 4) Preamble para 3.

[13]Peter Ashford, *IBA Rules on the Taking of Evidence International Arbitration* (CUP 2013) 38.

[14]Gary B. Born, *International Commercial Arbitration: Cases and Materials* (Kluwer Law Intl 2011) 715.

foundation that the parties to an international arbitration submit themselves to a neutral procedure that does not favour or prejudice any party. Accordingly, even the UNCITRAL Model law does not state any application of the law of seat for evidentiary procedures.[15]

Besides this, even the major institutional arbitration rules are silent on admissibility for unlawfully obtained evidence and give enormous discretionary powers to the tribunal. Rule 19.2 of Singapore International Arbitration Centre (SIAC) Rules 2016 explicitly states that the tribunal is not bound by rules of evidence of any applicable law in determining the relevancy, materiality, and admissibility of any evidence. Similarly, Article 22.1(vi) of London Court of International Arbitration (LCIA) Arbitration Rules2020and Article 22.2 of Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018 give complete discretion to the tribunal whether to apply strict rules of evidence or not.

B. Effect of the IBA Rules 2020

The IBA Rules are a 'non-mandatory soft-law instrument' which were originally designed for international commercial arbitrations but have now been used in multiple investment treaty arbitrations as well.[16] These Rules are not binding upon the parties nor the tribunal unless expressly agreed upon.[17] However, these Rules are still of huge import and are used as a guide, even when not binding, as they reflect the experience of reputed professionals in the field.[18]

[15]D. O'Malley (n 3) 7.
[16]Stefan Riegler, Dalibor Valincic and Oleg Temnikov, 'Special Issues Arising when Taking Evidence from State Parties' (2021) Global Arb Rev <https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/1st-edition/article/special-issues-arising-when-taking-evidence-state-parties> accessed 31 July 2022.
[17]IBA Rules 2020 (n 4) art 1.1.
[18]*Railroad Development Corp (United States of America) v Republic of Guatemala* ICSID Case No ARB/07/23, Decision on Provisional Measures (15 October 2008) para 15.

Moreover, the IBA Rules are supplementary in nature as they were originally intended to address the gaps left by most arbitration rules.[19] This is supported by the fact that they may be applied partially or with modifications without hindering the flexibility of the arbitration.[20] The intention of the IBA Rules has unequivocally stated in its Preamble that it recognizes the advantage of, and cannot limit the flexibility of an arbitration process[21], implying that illegally obtained evidence can be admitted on a discretionary basis.

Secondly, the amendment of IBA Rules does not majorly affect the present legal proposition as Article 9.3 of the IBA Rules, 2020 gives discretionary power to the Arbitral Tribunal to exclude such evidence, which was present earlier as well. The IBA Commentary on the Revised Rules explained the reason behind imposing a discretionary power being that there existed no common approach to this issue. The past decisions of arbitral tribunals depended on a variety of factors such as if the party was involved in the illegality, the materiality of the evidence to the outcome, the information in the public domain, and the severity of illegality. Thus, it was decided that,

"The 2020 Review Task Force has sought to allow for this diversity by providing that the arbitral tribunal "may" exclude evidence under Article 9.3 whereas it "shall" exclude evidence where the grounds of Article 9.2 are present." [22]

Therefore, unless expressly agreed upon, the IBA Rules 2020 act as guiding principles and provide a skeletal framework in relation to evidentiary issues in international arbitration. However, it does not in any way limit the powers of the tribunal to admit any unlawfully

[19]D. O'Malley (n 3) 9.
[20]IBA Rules 2020 (n 4) Preamble para 2.
[21]ibid.
[22]'Commentary on the Revised Text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration' (*International Bar Association*, 30 January 2021) <https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D> accessed 31 July 2022.

obtained evidence as firstly, it gives discretionary power to arbitral tribunals under Article 9.3, and secondly, it does not curtail the flexibility of the process which varies across cases.

III. LEGAL CONSIDERATIONS FOR EVALUATING UNLAWFULLY OBTAINED EVIDENCE

As seen in the IBA Rules, 2020, there is no straitjacket formula to determine the conditions under which illegally obtained evidence will be admissible or not. In the absence of the discretionary power introduced by Article 9.3 of IBA Rules 2020, earlier the tribunals used to test illegally obtained evidence under Article 9.2 of IBA Rules which mandates the grounds of exclusion. Unlike Article 9.3, Article 9.2 is mandatory with the use of the word *"shall"*. Thus, the strict grounds for exclusion would still be determined through Article 9(2). Though the major jurisprudence on the admission of unlawfully obtained evidence has been developed through investment arbitrations, there is no distinction seen in the application of these principles to other forms of arbitration by any commentators.[23]

A. Involvement of the Party in Illegal Activity to Obtain Evidence

The foremost consideration which has often been examined by multiple tribunals is whether the illegal evidence has been obtained through unlawful means by the party producing such evidence. It emanates from the doctrine of clean hands, which requires that parties do not take advantage of their own wrongful acts.[24] It is important to

[23]Nicole S NG, 'Illegally Obtained Evidence in International Arbitration' [2020] 32 SAcLJ 747,750; Cherie Blair and EmaVidakGojković, 'WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence' [2018] 33(1) ICSID Rev 235 [*hereinafter* "Blair and Gojković"].

[24]'Clean hands doctrine' (*Legal Information Institute*) <https://www.law.cornell.edu/wex/clean_hands_doctrine> accessed 20 October 2021.

clarify that the scope of the illegal act includes evidence obtained from an illegal act of an agent or third party, interested in the outcome of the case. In all of these instances, the party adducing such evidence will be deemed to be involved in the illegal activity.

This principle was staunchly applied in *Methanex v. USA*[25], where the claimant relied on documents obtained through civil trespass, i.e., by searching the dumpsters of a particular lobbying organization. The tribunal did not admit this evidence and regarded it as a violation of equity and procedural fairness under Article 15(1) of the UNCITRAL Rules. It reasoned that the principle of good faith applies equally to both the parties, and since USA cannot use its intelligence assets to spy on Methanex, similarly, the claimant cannot produce evidence obtained illegally.[26] Secondly, on the issue of materiality, the arbitral tribunal held that the documents presented by Methanex for its case were *"of only marginal evidential significance"*.[27]

In *EDF v. Romania*,[28] the claimant's main contention was that it was being targeted for its denial to bribe the Prime Minister of Romania at that time. To advance this assertion, it introduced a discreet audio recording of a meeting conducted between EDF's agent and a member of the Prime Minister's Staff seven years after the incident. The tribunal did not admit this audiotape as the conversation was recorded in the adverse party's home, without her consent. It held the recording to be in breach of her privacy and demonstrated bad faith by EDF.[29] Moreover, the authenticity of the document was also questionable[30] which is discussed in Section 3.3.

[25]*Methanex Corporation v United States of America*, UNCITRAL, Final Award (3 August 2005).
[26]ibid, para 54.
[27]ibid, para 56.
[28]*EDF (Services) Limited v Republic of Romania*, ICSID Case No ARB/05/13, Award (8 October 2009) [*hereinafter* "EDF (Services) Limited"].
[29]ibid, para 47.
[30]ibid, para 35.

Though illegally obtaining evidence by a party decreases the possibility of admitting such evidence, it cannot be considered in isolation. In *Methanex*, the tribunal observed that the evidence was not material to the outcome as it was of only marginal significance. In *EDF*, meanwhile, questions were raised about the authenticity of the recording which was produced after 7 years. Thus, additional factors are responsible as well.

B. Nature of Illegality carried out by the Party

Not every piece of evidence procured through any illegal activity can be ruled out. The nature of the activity and its proportionality plays a major role in this determination by the tribunal. Otherwise, every minor breach of rules would result in the exclusion of evidence.[31]

In *Enron v. Argentina*[32], the tribunal's inherent discretionary power in determining the admissibility of evidence in the circumstances of the case was reinforced. The witness whose testimony was taken by the tribunal was in a breach of a confidentiality undertaking as well as a court injunction, both of which restrained him from testifying. The annulment committee on the admittance of evidence held that the tribunals may reach different conclusions in such circumstances, but this cannot amount to an annullable error.[33]Thus, evidence obtained by breach of contractual obligation was admitted.

This proposition is further supported by the landmark case of *Corfu Channel*[34], where the ICJ held Albania liable based on evidence obtained illegally by the UK by breaching the territorial sovereignty of Albania. The ICJ's admittance demonstrates that illegally procured evidence directly by the party may be admitted if it is of sufficient probative value.

[31]Blair and Gojković (n 23) 250.
[32]*Enron Creditors Recovery Corp, Ponderosa Assets LP v The Argentine Republic*, ICSID Case No. Arb/01/3 [*hereinafter* "Enron"].
[33] ibid, Decision on Annulment (30 July 2010) para 178.
[34] *UK v Albania* [1949] ICJ Rep 4.

This bolsters the discretionary power of the tribunal seen in Section 2.1, which can admit such illegally obtained evidence in light of surrounding circumstances. The discretionary power has also been affirmed by an ICC tribunal which held that in international arbitrations, strict rules of evidence do not apply as they may apply in the seat of arbitration or in the jurisdiction of the parties.[35] Under the ICC Rules, the tribunal had complete power to determine which evidence shall be admitted and with what credibility. Thus, the nature of illegality is juxtaposed with probative value to determine admissibility.

C. Evidence Protected by Privilege

Article 9.2(b), Article 9.2(e) and Article 9.2(f) classify three types of privileged information that can be excluded from evidence, namely legal, commercial and governmental respectively. There are arbitral proceedings where illegally obtained evidence has been excluded for these privileges.

In *Libananco v. Turkey*[36], the respondent adduced thousands of privileged attorney-client communications of the claimant that were intercepted in ongoing nationwide surveillance ordered by the court, in a financial crime investigation against third parties. The tribunals ordered the Republic of Turkey to destroy all the privileged communication of the claimant and its counsel that it had obtained which related to the arbitration in any way.[37] It further ordered that its criminal investigators would not provide details of such communication to any person involved in the arbitration. The tribunal recognized the right of a sovereign state to conduct investigations into criminal activity, but did not let it hamper the ongoing ICSID

[35]Albert Jan van den Berg, *Technical know-how buyer P v Engineer/seller A, Final Award in ICC Case No. 7626 of 1995*[1997] 12 YBCA 132.
[36]*Libananco Holdings Co Limited v Republic of Turkey*, ICSID Case No ARB/06/8, Award (2 September 2011).
[37]ibid para 82.

arbitration as such attorney-client privilege was *"at the heart of the ICSID arbitral process."*[38]

Thus, the tribunal preserved the legal privilege, which has been accepted as a transnational rule of procedural law in international arbitration.[39]As affirmed by Blair and Gojković, this privilege must be absolutely protected from disclosure in arbitral proceedings to ensure honest and transparent communication between the client and its counsel.[40]

In *Caratube v. Kazakhstan*[41], the tribunal decided on the admissibility of hacked and leaked documents that were published online on a website called 'KazakhLeaks'. These documents were in the public domain. The claimant sought to produce eleven such documents out of which four were protected by legal privilege. The tribunal did not admit the documents protected by the attorney-client privilege. However, it did admit the other seven documents, contrary to the respondent's contention of equality of arms. The tribunal reasoned that not allowing such publicly disclosed documents, even though obtained illegally, would render the award factually incorrect.

This legal privilege is contrasted with governmental privilege and commercial privilege, which may not be absolute and be subject to weighing of interests.[42] Where the probative value of evidence protected under governmental privilege outweighs the need to preserve its confidentiality, then such evidence has been admitted for the proper administration of justice.[43] Similarly, commercially privileged evidence is considered in light of its probative value as

[38]ibid para 78.
[39]D. O'Malley (n 3) 291.
[40]Blair and Gojković (n 23) 251-252.
[41]*Caratube International Oil Company LLP v Republic of Kazakhstan* ICSID Case No ARB/08/12, Award (5 June 2012).
[42]D. O'Malley (n 3) 313,323.
[43]*Glamis Gold Ltd v United States of America* NAFTA/UNCITRAL/ICSID, Decision on Objections to Document Production (20 July 2005) para 25.

against the risks posed by its disclosure,[44]which maybe curtailed by the tribunal by setting specific rules for preserving its confidentiality.[45]

Moreover, both the cases shed light on the previously discussed principle, *i.e.*, evidence obtained directly through illegal means, and where the same has been previously brought out in the public domain. In *Libananco*, considering the circumstances of the case, the tribunal did not reprimand the claimant for obtaining information directly but excluded the evidence on the grounds of privilege. Whereas in *Caratube*, the tribunal noted that the information was publicly available and its ignorance could lead to a factually incorrect award. Such information in the public domain has been admitted in other instances [46]as well, as elaborated in Section 3.4.

D. Probative Value of the Evidence

The internationally recognized principle in admitting evidence is that if its probative value outweighs its prejudicial effect, then such evidence could be admitted.[47] This principle has been recognized in the context of international arbitration as well. Article 9.1 of IBA Rules 2020, gives the tribunal the power to adjudge a piece of evidence on its materiality, relevance, admissibility, and weight. Thus, even if the evidence is illegally obtained, it can still be admitted but its relevancy and materiality would be subject to a higher standard

[44]*Publicis Communications v True North Communications Inc et al.* [2000] 206 F.3d 725 (7th Cir. Ill. 2000).
[45]Decisions on ICC Arbitration Procedure, *Procedural Order of 19 May 2004 in Case 13046*, Special Supplements of ICC Bulletin 89 (2010).
[46]*Yukos Universal Limited (Isle of Man) v The Russian Federation* PCA Case No AA 227, Final Award (18 July 2014).
[47]*Muhammad bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 para 55; Fed R Evid 403.

to balance the interests of the other parties who have been victims of its unlawful conduct.[48]

a) Materiality

The language of the IBA Rules implies that 'materiality' and 'relevancy' are distinguishable. Materiality refers to the bearing that evidence will have over the final award.[49] In *ABB v. Hochtief,*[50]the LCIA award was challenged before an English Court on grounds that the tribunal has unfairly denied numerous documents during the proceeding, which were relevant to its arguments. The court acknowledged the relevancy of the documents to the argument but held that the tribunal appropriately denied such document production as it did not consider that particular argument material to the award.

Even in the case of *Methanex* as seen in Section 3.1, one of the grounds along with good faith for excluding such evidence was its lack of materiality in relation to the outcome of the case.

b) Relevancy

The standard for relevancy is often determined by evaluating the probative value of evidence to the party's burden of proof. When considering relevancy, the tribunal examines if the evidence is necessary for that party to prove an allegation or in its defence.[51] The Swiss Federal Tribunal in a challenge to an ICC award commented on instances when a tribunal may refuse evidence on relevance and materiality.[52]As per the tribunal, such evidence maybe excluded if: it does not substantiate a contention, the fact in question has already

[48]James H Boykin and Malik Havalic, 'Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration' (2015) 12(5) TDM 1, 34.
[49]D. O'Malley (n 3) 63.
[50]*ABB AG v Hochtief Airport GmbH* [2006] EWHC 388 (Comm) para 85.
[51]D. O'Malley (n 3) 281.
[52]*W. Ltd. v D. GmbH and E. GmbH* 4P.196/2003 (7 January 2004) 22(3)ASA Bulletin 592, 597.

been established, for lack of relevance, or if the tribunal after an anticipatory evaluation of evidence considers that even after admitting that evidence, its decision will not change.

c) Authenticity

The most dubious factor with respect to unlawfully obtained evidence is its veracity and authenticity. Since the evidence is not obtained through lawful means, many tribunals are precluded from admitting it as it may corrupt the facts of the case. Therefore, this is the most important criterion to assess illegally obtained evidence. If the tribunal has doubts related to the completeness of a copy or its accuracy from the original version, then the probative value of such document is hindered.[53]

This was seen in *EDF v. Romania*[54], where the tribunal considered the authenticity of the audio recordings produced after seven years, alleged to be illegally obtained. Though the initial presumption was that the recording resembled the original version, but this was overcome when it was shown that the copy was missing a portion of the original soundtrack. This indicated some manipulation in the eyes of the tribunal and was rejected.

The *Special Tribunal for Lebanon*[55]adjudicated the admissibility of documents published on 'WikiLeaks' under Article 149(D) of the Lebanon Tribunal's Rules of Procedure and Evidence, which mandates the exclusion of evidence if its probative value is superseded by the need to ensure a fair trial. The tribunal rejected the admission because it did not have 'indicia of reliability', which constituted authenticity and accuracy.[56] Thus, even though the tribunal considered the documents relevant and material, they were

[53]D. O'Malley (n 3) 213.
[54]EDF (Services) Limited (n 28).
[55]*Ayyash et al.*, Case No. STL-11–01/T/TC, ICL 1051, Special Tribunal for Lebanon (21 May 2015).
[56]ibid para 38.

denied for lack of authenticity. While this was not an arbitral proceeding, it still has significance in the jurisprudence of illegally obtained evidence as the conditions under which the evidence was tested, i.e., the probative value vis-à-vis fairness of the trial is similar to that involved in international arbitration. Additionally, it has been observed by Blair and Gojkovic that if the authenticity of illegally obtained documents from sources like WikiLeaks is disputed, then they may be limited in their evidentiary value.[57]

In *ConocoPhillips v. Venezuela*[58] the tribunal was requested by the respondent to reconsider the award under the newly obtained information related to the facts, published on WikiLeaks. The WikiLeaks cables negated the previous factual findings. The majority of the tribunal rejected to revisit the award citing lack of authority but remained silent as to the authenticity and admissibility of the cables. This decision was accompanied by strong dissent from Arbitrator Georges Abi-Saab who categorized this action of the tribunal as a 'travesty of justice' and 'legal comedy of errors' since it had ignored to take into account an extremely crucial piece of evidence.[59]

Though the tribunal in *ConocoPhillips* did not decide on authenticity, the dissenting arbitrator had strongly based his opinion on the materiality and relevance of the evidence obtained. Thus, when the illegally obtained evidence is so material and relevant to the case that it may determine the outcome, provided there are no sufficient objections with respect to its authenticity, then the tribunal may admit and rely on such evidence.

[57]Blair and Gojković (n 23) 254.
[58]*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* ICSID Case No. ARB/07/30.
[59]ibid, Dissenting Opinion of Georges Abi-Saab, Decision on Jurisdiction and Merits (3 September 2013) 23.

This can be drawn from the rulings of the Permanent Court of Arbitration in *Yukos v. Russia*[60] and *Hulley Enterprises v. Russia*.[61]In these rulings, the tribunal extensively relied on the confidential ties published by WikiLeaks, to prove that Russia had put undue pressure on the auditors of the claimant to its disadvantage. The tribunal in *Yukos* did not opine on the admissibility or authenticity of the illegally obtained evidence through WikiLeaks yet relied heavily on it to conclude on the facts. In *Hulley Enterprises*, the tribunal's decision implied that unlawfully obtained evidence can be relied on in international arbitrations.

E. Procedural Economy and Fairness

In the evidentiary procedure, equal treatment and fairness are the overarching themes that guide the acts of the tribunal. These grounds are given under Article 9.2(g) of IBA Rules and have a wide ambit. Nathan D. O'Malley lays down three criteria to adjudge admissibility of evidence on the procedural economy – firstly, the probative value of the evidence; secondly, the prejudice caused to the adverse party after admitting such evidence that includes considering the disruption that would be caused in the procedure; and lastly, the cause of the delay.[62]This section will examine the tribunal's consideration of the prejudicial effect caused to the adverse party.

The tribunal in *Caratube*[63] observed while admitting the illegally obtained evidence that it needs to be considered with procedural fairness, which includes giving the opposing party adequate time to respond to such evidence and produce counter-evidence. Similarly, an *ad hoc* annulment committee had ruled that a serious procedural

[60]*Yukos Universal Limited (Isle of Man) v The Russian Federation* PCA Case No AA 227, Final Award (18 July 2014).
[61]*Hulley Enterprises Limited (Cyprus) v The Russian Federation* PCA Case No AA 226, Final Award (18 July 2014).
[62]D. O'Malley (n 3) 329.
[63]*Caratube International Oil Company LLP v Republic of Kazakhstan* ICSID Case No ARB/08/12.

error had occurred when the ICSID tribunal admitted evidence after the closure of the evidentiary stage but did not provide the adverse party sufficient opportunity to produce counter evidence.[64]Thus, in the limited instances where illegally obtained evidence is admitted, it becomes necessary to minimize the prejudicial effect caused to the adverse party by offering it reasonable opportunity and standards to present its case.

In conjunction with the above principle, there must exist 'equality of arms' which underlies fairness. This principle states that neither party should be disadvantaged in presenting its case due to the actions of the other party.[65] Several arbitration tribunals have applied this concept to justify the exclusion of illegally obtained evidence including in *Methanex v. USA*[66]as seen above. In *Libananco*[67] as well, the tribunal did not let the state make use of its illegally obtained communications of the claimant through the exercise of its sovereign power. Hence, fairness and equality amongst the parties were enforced.

Finally, the tribunal's ultimate duty of maintaining equality in the process of evidence is satisfied by applying the evidentiary procedure with equal force amongst the parties without unnecessarily pressing the same result.[68] This justifies instances where the tribunal admitted evidence pertaining to hacked information published on websites like WikiLeaks and KazakhLeaks, abiding by equality of arms as the party producing it did not illegally obtain it.

[64]*Fraport AG Frankfurt Airport Services Worldwide v The Philippines* ICSID Case No. ARB/03/25, Decision on the Application for Annulment (23 December 2010) para 133.
[65]D. O'Malley (n 3) 333; *DomboBeheer BV v The Netherlands* ECHR Case No 14448/88 (27 October 1993).
[66]*Methanex Corporation v United States of America* UNCITRAL Final Award (3 August 2005).
[67]*Libananco Holdings Co Limited v Republic of Turkey* ICSID Case No ARB/06/8.
[68]D. O'Malley (n 3) 337; Girsberger, Voser and Petti (n 9).

A similar application was observed in the award by CAS in *Ahongalu Fusimalohi v. FIFA*[69] and *Amos Adamu v. FIFA.*[70] In both cases, FIFA brought disciplinary proceedings against its officials on the basis of their covert recordings with an undercover journalist published in the Sunday Times. CAS admitted the illegally obtained recordings and distinguished the instant proceeding with *Libananco* and *Methanex*, as FIFA itself did not act illegally. Thus, it declared that FIFA did not violate the duties of good faith by obtaining these recordings.

IV. SUGGESTED STANDARDS FOR IMPLEMENTATION

After an extensive examination of all relevant legal principles used in international arbitration to deal with illegally obtained evidence, there are certain standards which may be incorporated. These can effectively test the admittance of illegally obtained evidence expeditiously and fairly in a pragmatic environment. Though these are mere principles, the extent of their application would be based on surrounding circumstances at the tribunal's discretion.

A. A Balanced Approach

All legal considerations that have emerged in each of the arbitration proceedings have their own merit and justification. There is no consideration that can be absolutely negated by the other. Thus, there should be a harmonious application of all the standards evaluated above. Owing to this, the IBA 2020 Review Task Force has not

[69] *AhongaluFusimalohi v Fédération Internationale de Football Association*, Case No CAS 2011/A/2425 (8 March 2012).

[70] *Amos Adamu v Fédération Internationale de Football Association*, Case No CAS 2011/A/2426 (24 February 2012).

specified any clear ground for discerning illegally obtained evidence as admissible[71]and has left this to the tribunal's discretion.

The most important factor for consideration would be the authenticity of such evidence, so as to eliminate the possibility of any tampering with the evidence.[72] Once that is satisfied, then the tribunal may consider whether the party itself has been involved in the illegal act of procuring evidence. This proposition further has two considerations that have to be viewed and assessed on equal footing:

i. The nature of illegality committed by the party in procuring such evidence including acts done through a third party or agent.
ii. The probative value i.e., materiality and relevance of this evidence

If the nature of illegality is minor such as in *Enron v. Argentina*[73], then this evidence maybe admitted. Moreover, if the illegality is of a relatively higher degree but the evidence obtained is also of sufficient materiality or importance to the case, then such evidence maybe admitted as in the *Corfu Channel Case.*[74]However, such instances can be very rare due to the principle of equality of arms.

Thirdly, the tribunal needs to determine if such information is privileged. Evidence protected by attorney-client privilege cannot be admitted but that under governmental or commercial privilege may be admitted if the interest of justice outweighs the need to preserve its confidentiality.

Lastly, the tribunal has to ascertain the prejudicial effect caused to the party in light of due process and good faith. If the opposite party has stepped beyond its normal course of transactions to illegally obtain

[71]Blair and Gojković (n 23).
[72]EDF (Services) Limited (n 28).
[73]Enron (n 32)
[74]*UK v Albania* [1949] ICJ Rep 4.

the evidence, then such evidence maybe rejected under equality of arms and fairness.[75] But if the evidence is procured from an external source and is present in the public domain, then such evidence maybe admitted provided the adverse party is given sufficient time to produce counter evidence.[76]

It is suggested that since efficiency is one of the key features of international arbitration, the tribunal could impose costs based on the behaviour of the parties.[77]If the party obtains evidence in bad faith during the proceedings, resulting in an inordinate delay caused by the determination of its admissibility, then the tribunal may impose costs to disincentivize such behaviour.

B. Considerations for Virtual Arbitration

Due to the pandemic, virtual arbitrations have seen a huge rise, resulting in an increased risk of cyber security breaches and hacking during the proceedings. However, the standards for admissibility of unlawfully obtained evidence will remain the same as those in physical arbitrations it has previously dealt with evidence obtained through cybercrimes in the case of WikiLeaks and KazakhLeaks. The equality of arms and clean hands doctrine would be tested to a greater extent to determine whether the hacked information was obtained:

i. Directly by the beneficiary party or if it employed a third party as a hacker to obtain the evidence: This would be barred by the clean hands doctrine and equality of arms.
ii. Information hacked by an external third party and leaked in the public domain: This maybe admitted subject to other conditions on grounds of fairness.

[75]*Methanex Corporation v United States of America*, UNCITRAL Final Award (3 August 2005).
[76]*Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No ARB/08/12.
[77]D. O'Malley (n 3) 231.

By establishing a predetermined procedure for the exchange of sensitive information, the parties can alleviate the risk of potential cyber interception.[78] As a pre-emptive measure against cyber-attacks, the tribunal with the help of the parties can introduce a security protocol for saving and transferring information with the priority given to the most confidential information.[79]

Since there are no uniform measures to alleviate cybercrimes, but merely generic guidelines, it becomes the responsibility of the parties and tribunal to prepare a protocol specifically suitable for their proceeding.[80]

V. CONCLUSION

The admissibility of unlawfully obtained evidence is ascertained by the tribunal through certain legal standards that arise from the basic principles of evidence like due process, good faith, and tribunal's discretion. The four key considerations that originate on this issue are: the party's illegal involvement in procuring the evidence, evidence protected under privilege, the probative value of the evidence, and procedural economy and fairness. No legal principle could absolutely bind the prospective proceedings to admit or exclude the unlawfully obtained evidence as the extent of its application varies on a case-to-case basis. Thus, a balanced approach is suggested, amalgamating all the relevant legal considerations used in this regard and their harmonious application. Amongst these considerations, the authenticity of evidence is the most significant one, followed by the

[78]'Virtual Hearing Guides' (*American Arbitration Association And International Centre For Dispute Resolution*) <https://go.adr.org/covid-19-virtual-hearings.html> accessed 20 October 2021.
[79]Jim Pastore, 'Practical Approaches to Cybersecurity in Arbitration' (2017) 40(3)FordhamIntlLJ 1023, 1028-1030.
[80]Rebeca E. Mosquera, '13. Cybersecurity in Times of Virtual Hearings' in Carlos González-Bueno (eds), *40 under 40 International Arbitration* (2021) 201, 204.

party's involvement in an illegal act to procure evidence vis-à-vis the probative value of such evidence. This is accompanied by the test of such evidence as privileged information and lastly, the principle of fairness. Ultimately, there are no watertight criteria, and any tribunal may consider additional factors provided they align with the basic principles of evidence stated above.