

## ADMISSIBILITY OF EVIDENCE IN INTERNATIONAL ARBITRATION PROCEEDINGS: CAN AN ARBITRAL TRIBUNAL ALLOW PARTIES TO INTRODUCE EVIDENCE OBTAINED THROUGH A CYBER-LEAK?

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On May 2<sup>nd</sup>, 2018, during a presentation hosted by the Miami International Arbitration Society (MIAS), Kabir Duggal, attorney at Baker McKenzie<sup>2</sup> addressed the recent challenges raised by new technologies in international arbitration; more specifically related to cybersecurity. As background for the discussion, and to shed light on the issue of cybersecurity in international arbitration, Mr. Duggal discussed two cases, *ConocoPhillips v. Venezuela and Caratube International Oil Company* and *Mr Devincci Salah Hourani v. Kazakhstan*.

These cases led to a critical question: should documents obtained through WikiLeaks<sup>3</sup> or through the unauthorized access of data stored in a private computer system (i.e. cyber-attack<sup>4</sup> or hacking) be admitted as evidence during an arbitration? In other words, should an arbitral tribunal allow the parties to introduce illegally obtained evidence from a cyber-leak or a similar source? Looking at the case law, it is not possible to draw a uniform conclusion. Arbitral tribunals have not treated the issue uniformly, and have instead adopted a case-by-case approach when deciding whether documents that have been stolen or unlawfully obtained might be admitted as evidence and, therefore, influence the result of the case.

In *ConocoPhillips v. Venezuela*, Venezuela challenged the tribunal's decision that relied on U.S. diplomatic cables containing confidential communications between ConocoPhillips' executives and the U.S. Embassy obtained through WikiLeaks. Although Venezuela obtained this information legally from a public web search and the content of the cables was already part of public domain, the confidential nature of the information contained in any official correspondence might be considered "inviolable" under the 1961 Vienna Convention on Diplomatic Relations.

The Respondent presented these documents after the tribunal had rendered its decision and the proceedings had entered the phase of determining the quantum of the award. The majority of the tribunal held that it did not have the power to reconsider its decision since that decision had *res*

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<sup>2</sup> The views expressed during Mr. Duggal's presentation were personal and subject to change and do not bind his firm or its clients.

<sup>3</sup> Wikileaks is an international non-profit organization founded in 2006 that publishes confidential information provided by anonymous sources.

<sup>4</sup> Cyber-attack, also defined as hacking, is any type of attack against a computer system, networks and/or any personal computer device in order to steal, alter or destroy sensitive information.

*judicata* effect. Therefore, the tribunal did not resolve the issue of admissibility of the evidence of the cables obtained through WikiLeaks. In failing to express its position regarding the U.S. cables, the tribunal missed an important opportunity to shed light on the admissibility by an arbitral tribunal of illegally obtained evidence. Putting the *res judicata* argument aside, which some may see as an excuse employed by the tribunal to dodge the issue of having to weigh-in regarding the admissibility of illegally obtained evidence, a decision by the tribunal would have been an opportunity to offer the arbitration community some clarity regarding the treatment of such evidence.

On a separate note, the unfortunate reality of international arbitration is that the lack of reported legal decisions stifles the development of law. Party confidentiality is often cited as a reason for this. However, the downside is that there are very few reported arbitration decisions about the admissibility of improperly obtained documents as evidence in the arbitration proceedings. Therefore, there is no doctrine or case law to guide the arbitral community on this matter.

Another highlight of the *ConocoPhillips v. Venezuela* case, is the dissent by arbitrator George Abi-Saab who considered that since the cables were relevant to the outcome of the case they should have been given proper weight by the arbitral tribunal.<sup>5</sup> Furthermore, 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.”<sup>6</sup>

However, some crucial questions are still unresolved. Is the fact that such cables were publicly available enough to justify their use as evidence in the arbitration? How should the authenticity of the WikiLeaks cables be proven? Can an arbitral tribunal disregard such potentially incriminating evidence and still preserve its credibility as an independent and impartial decision-making body?<sup>7</sup> There is no simple answer to these questions in the context of international arbitration where arbitral tribunals have a broad power to decide on the admissibility of such evidence without being bound by any settled framework.

The wide discretion given to the arbitrators to evaluate and weigh the evidence is confirmed by Article 19(2) of the UNICITRAL Model Law which provides that “the power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.” Also, Article 9 of the 2010 IBA Rules on the Taking of Evidence provides that

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<sup>5</sup> See *ConocoPhillips v. Venezuela*, Dissenting Opinion of George Abi-Saab para 66.

<sup>6</sup> Id. para 64.

<sup>7</sup> Jessica O. Ireton, “Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cable as Evidence”, ICSID Review, Vol. 30, No. 1 (2015), p. 241.

“the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence.”<sup>8</sup>

Other major institutional rules, such as the ICDR International Dispute Resolution Procedures,<sup>9</sup> the AAA Commercial Arbitration Rules and Mediation Procedures,<sup>10</sup> and the LCIA Arbitration Rules,<sup>11</sup> include at least one provision that grants the arbitrators broad discretion in dealing with evidence.

Arbitrators usually do not apply strict rules of evidence the same way judges do in domestic litigation. Furthermore, national courts generally recognize the broad discretion conferred to arbitral tribunals.

In the second case discussed in the presentation, *Mr Devincci Salah Hourani v. Kazakhstan*, the arbitral tribunal relied on Article 9 of the 2010 IBA Rules to render its decision on the admissibility of documents obtained from hacking a computer. In this case, the Claimant attempted to use as evidence 11 documents from a batch of 60,000 documents that had been made public as a result of a breach in the information network of the government of Kazakhstan. This leak of information, known as “Kazakhleaks”, also included documents purportedly covered by the attorney-client privilege. The arbitral tribunal did not admit the privileged documents into evidence. However, the tribunal decided to admit all other documents (deemed not privileged), because in the arbitral tribunal’s view those documents were already available in the public domain and were relevant and material to the dispute.<sup>12</sup>

The position taken by the arbitral tribunal in this case is different from the one adopted in the *ConocoPhillips* case. This shows that there is no uniform approach or standard or test among arbitral tribunals to decide on whether to admit evidence obtained through the unauthorized access of data stored in a private computer system. Given that data breaches and the leakage of private information is becoming increasingly common in today’s interconnected world, it behooves the international arbitration community to formulate clear guidelines that govern the admissibility of illegally obtained evidence. Since both the Model Law and the arbitral rules from major institutions empower arbitral tribunals to determine which evidence shall be admitted, the solution seems to be in their hands. Moreover, arbitral tribunals are also called upon to compel the parties to act fairly and to conduct

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<sup>8</sup> Available at

[https://www.ibanet.org/ENews\\_Archive/IBA\\_30June\\_2010\\_Enews\\_Taking\\_of\\_Evidence\\_new\\_rules.aspx](https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx) (last visited September 14, 2018).

<sup>9</sup> Article 20(6) of the 2014 ICDR rules provides that “the tribunal shall determine the admissibility, relevance, materiality and weight of the evidence”.

<sup>10</sup> Rule 34(a) of the 2013 AAA Rules provides that “conformity to legal rules of evidence shall not be necessary”.

<sup>11</sup> Rule 22.1(v) of the 2014 LCIA rules provide that the tribunal “shall have the power ...to decide whether or not to apply any strict rules of evidence as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact...”.

<sup>12</sup> *Caratube International Oil Company and Mr Devincci Saleh Hourani v. Kazakhstan Award ICSID Case No. ARB/13/13*, “Ignoring such information would risk leading to an award that is artificial and factually wrong when considered in light of the publicly available information”.

themselves in good faith to preserve the integrity of the arbitral process. This is a particularly difficult task given that arbitral tribunals have few compulsory measures at their disposal.

Besides the exclusion of illegally-obtained evidence, arbitral tribunals might make negative inferences, disqualify counsel, impose costs and other sanctions. Indeed, according to Article 9(7) of the 2010 IBA Rules on the Taking of Evidence “if the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.” In accordance with this provision, the tribunal has the power to use awards of costs as a tool to ensure good faith during the exchange of evidence.

Another possible solution could originate with the parties themselves. One of the advantages of international arbitration is that it gives the parties the freedom to agree on a procedure that they deem appropriate to their particular circumstances. Therefore, at the time of agreeing on a procedure, the parties could negotiate the inclusion of an express provision that requires the arbitral tribunal to reject any illegally obtained evidence that results from a data breach or similar manner. This provision could also be incorporated in a procedural order by the arbitral tribunal.

Cybersecurity is a particularly important topic in international arbitration, especially in the wake of the almost daily reports of data breaches, intrusion, corporate espionage, and other cyber-attacks that occur around the world. In today’s world, it is almost impossible to find a human activity that does not involve the electronic or digital exchange of data. In the case of international arbitral proceedings, they often involve parties of different nationalities, with lawyers and arbitrators from different countries, and evidence located in different jurisdictions. As a result, the reliance on modern technologies for communications and data exchange is of the utmost importance. The same is true for the underlying transactions—commercial and otherwise—that give rise to international disputes. The downside of this reality is the increased vulnerability to which every industry is exposed, and the international arbitration community is not an exception.

Cyber intrusion is an important question that needs to be addressed as well as the need to provide guidance to the arbitration community, arbitrators, lawyers, and users. This is the context that justified the 2018 ICCA – CPR Draft Cybersecurity Protocol for International Arbitration. The stated mission of this protocol is to “encourage participants in international arbitration to become more aware of cybersecurity risks in arbitration and to provide guidance that will facilitate collaboration in individual matters about the cybersecurity measures that should reasonably be taken, in light of those risks and the individualized circumstances of the case to protect information exchanged in the arbitral process.” We must give credit to ICCA and the CPR for publishing this

draft protocol. It is the first major protocol on cybersecurity in international arbitration. Indeed, the Working Group's members are leading practitioners and scholars in international arbitration. The draft itself is very detailed and considers: (i) the factors to be considered when determining what cybersecurity measures should be adopted; (ii) a procedural framework for adopting cybersecurity measures during an arbitration; and (iii) cybersecurity breaches.

This protocol is intended to be used as guidance or "soft law," and could be adopted when the parties have agreed to do so or when an arbitral tribunal has decided to employ it.

Furthermore, some law firms have promptly responded to the increasing concerns with respect to cybersecurity by developing and adopting protocols. This is the case of the "Debevoise & Plimpton LLP Protocol to Promote Cybersecurity in International Arbitration," which assures more control over the flow of data generated and produced as part of arbitral proceedings.

The question is whether these protocols will ultimately achieve their lofty goals. It is still too early to tell but undoubtedly these are valuable contributions to the field that help raise awareness about cybersecurity and encourage the international arbitral community to become more aware about this pressing issue.

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*The **MIAS Focus Reports** are brief summaries that comment and expand on current topics related to international arbitration, presented at the speaker series of the Miami International Arbitration Society (MIAS). The **MIAS Focus Reports** are a collaborative effort between MIAS and the World Arbitration and Mediation Review (WAMR) and are intended to contribute to the debate on issues that matter to the international dispute resolution community of Miami and beyond.*

