Transnational Notes

Admissibility of Hacked Emails as Evidence in Arbitration

MAY 14, 2018

Both the promise and the peril of modern communication systems lies in the ease of information transfer: although technology has facilitated information access and sharing, it has also created opportunities to illegally obtain private or privileged information. An evidentiary dilemma arises when information thus obtained falls into the hands of a party, who thereafter seeks to use it in arbitration. How should an arbitrator regard this evidence, in light of the fact that it was illegally obtained at some point? The question of whether to admit this evidence is uniquely vexing in international arbitration. Contrary to the relative uniformity of evidence-taking rules in domestic litigation, the rules in arbitration may change depending on the parties' agreement or choice of arbitral institution, creating a higher degree of variation.[1]

This is not merely a theoretical problem. In the wake of the WikiLeaks[2] scandal, several tribunals in investor-state arbitrations have been faced with parties seeking to use evidence initially obtained through a large-scale data breach.[3] The traditional approach under most countries' domestic rules would hold such communications inadmissible. However, the question is less clearcut in international arbitration, where the tribunal is not bound by national law, but has the final authority over admitting evidence.[4]

This paper takes a threefold approach to examining this issue: first, it will outline the basic rules on evidence-taking in international arbitration. Second, it will turn to recent cases that have dealt with the issue of hacked or leaked information being presented as evidence. Finally, it will analyze whether this evidence should be considered or not in future cases.

Rules on Taking of Evidence in International Arbitration

Party autonomy, being a key feature of arbitration, grants the parties broad latitude to determine the rules under which their dispute will be resolved. Often, parties exercise this autonomy to determine the rules for both the taking and presentation of evidence in the arbitration.[5] However, there is significant diversity in the modes of evidence-taking in international arbitration, and where the parties do not specify the rules, the taking and presentation of evidence will be analyzed pursuant to the parties' arbitration agreement, any applicable institutional rules, the *lex arbitri*; and the discretion of the arbitrator.[6] It should be noted, however, that even where the parties have spoken to the issue, in practice the arbitral tribunal will have substantial discretion to control the process of evidence taking.[7] It should be noted, of course, that it is highly unlikely that the parties would design a rule ex ante that explicitly allowed for the presentation of unlawfully obtained evidence.

One source of guidance may be the background rules on discovery. It is not common that the parties will include a provision in their arbitration agreement dealing expressly with discovery.[8] If a provision regarding discovery is included, typically it would be through incorporation of some set of institutional rules.[9] The most common set of rules used in international arbitration—such as the London Court of International Arbitration (LCIA) Rules[10] or the UNCITRAL Model Law[11]—embrace broad, permissive admissibility standards. In the investor-state context, International Centre for Settlement of Investment Disputes (ICSID)[12] adopts a discretionary approach, granting total authority to the tribunal to decide which evidence shall be admitted.[13] On the other hand, more specific guidance is found on the International Bar Association (IBA) Rules on the Taking of Evidence, specifically in its article 9(2) (3):

Article 9

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:
(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

...

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling;

3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
(d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and

> (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.[14]

In light of the aforementioned rules, *prima facie* we could affirm that hacked or leaked emails would not be accepted by an international arbitral tribunal unless one of the parties were to issue a waiver. Of course, this considers only the case of a party coming into possession of information that was previously illegally obtained by another party. If the hacking or leaking had been perpetrated by one of the parties directly, it would likely be considered a bad faith action on the part of that party, pursuant to the logic of article 9(7) of the IBA Rules:

> 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. [15]

This could have a range of consequences, and pursuant to this provision, would likely result in the party bearing the cost of the arbitration in light of its bad faith.

Although international tribunals are not prone to exclude evidence on the basis of confidentiality, there is case law from the Permanent Court of International Justice in which it elected to do so.[16] For instance, in the *Danube* case,[17] the Court declined the admission of the history of certain articles of the Versailles treaty, since those were confidential and had not been placed before the Court by, or with the consent of, the competent authority.[18] Likewise, in the *Chorzow* case,[19] the Court refused to consider declarations, admissions, or proposals made by the parties in the course of prior, abortive negotiations in order to preserve the confidentiality of earlier efforts at settlement.[20] Both of these cases represent the PCIJ's responsiveness to certain policy concerns even when it comes to confidentiality—a normally disfavored basis for exclusion.

Having laid out some of the legal rules that prohibit the parties from using confidential information as evidence, and having discussed other circumstances under which parties may be prohibiting from using evidence, we come to the question of whether an arbitral tribunal should admit or exclude now-public information that was initially obtained via WikiLeaks.

Cases Dealing with Hacked or Leaked Emails

In the *Conoco Phillips* case,[21] after issuing the award, the tribunal had to deal with new evidence presented due to information available in WikiLeaks.[22] This case concerned the expropriation of oil and gas assets by the Venezuelan government. Conoco Phillips claimed that Venezuela illegally forced it to cede its majority holding in certain oil and gas projects and was unwilling to negotiate fair compensation for the government's taking.[23] The tribunal found that Venezuela breached its obligation to negotiate in good faith in order to

reach an acceptable settlement between the parties.[24] After the award was issued, Venezuela sent a letter to the tribunal contesting this decision, in which Venezuela requested a new hearing to address the ruling on lack of good faith.[25] Specifically, the letter cited new evidence, obtained via WikiLeaks, including communications between diplomatic officials in the United States Embassy in Caracas and Conoco Phillips' executives discussing the Venezuelan government's offer to compensate the company for expropriation using market value standards instead of their previous offer of book value.[26]

Venezuela argued that this contradicted the tribunal's conclusion that Venezuela negotiated in bad faith.[27] Ultimately, however, the tribunal addressed neither the merits nor the admissibility question raised by this evidence: instead, it found that it did not have the power to reconsider its decision.[28] However, one of the arbitrators issued a dissenting opinion which relied on the revelations contained in the WikiLeaks cables,[29] effectively opening a new window by considering leaked information as evidence in an arbitration procedure.

In a more recent case involving the Kazakhstan government, the tribunal reached an admissibility decision that could come to be seen as a watershed. The arbitral tribunal basically stated that documents protected by legal professional privilege cannot be admitted as evidence, but others could be.[30] Caratube International Oil Company and American-national Devincci Salah Hourani, who were suing Kazakhstan over the alleged seizure of their oil exploration and production rights, wanted leaked documents that were now publicly available due to the WikiLeaks page to be considered by the tribunal as evidence.[31]

The Tribunal reasoned as follows: first, it noted that the plaintiffs alleged the documents were material and relevant to the dispute; second, it observed that the documents were now in the public domain.[32] Thus, the tribunal found that the balance tipped in favor of admitting the documents,[33] placing special emphasis on the fact that they were "lawfully available to the public."[34] In the view of the tribunal, this precluded them from being considered privileged information.

From these decisions, one can appreciate that although the *Conoco Philips* tribunal avoided the analysis of the leaked emails on procedural grounds, the dissenting opinion stated that this evidence should be considered; and in the most recent decision in *Caratube*, the Tribunal accepted the leaked information as evidence, on the basis that this information is now public, and thus is no longer privileged or confidential.

Conclusion

Since the WikiLeaks scandal, the legal parameters for admissible evidence seem poised to change: evidence that would have been considered inadmissible due to its privileged or confidential character is now admissible because it is considered to be public information. Nevertheless, this boundary should be carefully policed, due to the fact that this evidence was unlawfully obtained at some point. Therefore, in a *prima facie* analysis, the fact of the evidence having been obtained illegally would weigh against admissibility in light of on public policy grounds. Under the reasoning in *Caratube*, what would happen if one of the parties hacks the other parties' emails and then asks a third entity which is not part of the dispute to

publish this information in order to gain publicity for the purpose of using it in an arbitration procedure (based on the argument public availability destroys the privileged or confidential status of information)? In light of the foregoing concern, evidence that was unlawfully obtained and becomes public should only be accepted by an international arbitral tribunal on the consent of both parties. This will prevent any party from trying to unlawfully obtain information and will maintain fairness and equality among the parties in the process.

Ricardo Calvillo Ortiz, Licenciado en Derecho (Law Degree) July, 2010 Universidad Iberoamericana, Mexico City, Mexico. Candidate for LL.M in International Business Regulation, Litigation and Arbitration in New York University School of law, May 2016.

[1] Gary Born, International Arbitration Cases and Materials, (Aspen Publishers 2011). p. 768.

[2] WikiLeaks is an international, non-profit, journalistic organization, that publishes secret information, news leaks, and classified media from anonymous sources. Its website, initiated in 2006 in Iceland by the organization Sunshine Press, claimed a database of more than 1.2 million documents within a year of its launch. **https://en.wikipedia.org/wiki/WikiLeaks**.of Evidence. Jessica O. Iretoni ernational Arbitrationr diregarded.alidity of Wikileaks Cables as Evidence. Jessica O. Iretoni

[3] In 2010, WikiLeaks began disclosing over 250,000 private cables written by US diplomats, divulging candid comments from world leaders and detailing occasional US pressure tactics aimed at hot spots in Afghanistan, Iran, and North Korea. ***https://www.bostonglobe.com/metro/2015/11/28/this-day-history/Ahim2PrVK2h30km5V4dEFN/story.html***.

[4] Jessica O. Ireton, The Admissibility of evidence in ICSID Arbitration: considering the validity of WikiLeaks Cables as Evidence. ICSID Review, Vol. 30, No. 1 (2015) p.1.

[5] Gary Born, International Arbitration Cases and Materials, (Aspen Publishers 2011). p. 768.

[6] Id.at p. 769.

[7] Id.

[8] Id at p. 775.

[9] Id.

[10] LCIA Rules Article 22.1: *The Arbitral Tribunal shall have the power … (vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or*

expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal.

[11]Uncitral Model Law Article 19: *(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. (2) 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.*

[12] ICSID Arbitration Rules, Article 34(1): "*The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value*" (These Rules are applicable to investment arbitration cases).

[13] Jessica O. Ireton, The Admissibility of evidence in ICSID Arbitration: considering the validity of WikiLeaks Cables as Evidence. ICSID Review, Vol. 30, No. 1 (2015). p.5.

[14] International Bar Association (hereinafter the IBA Rules) Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the IBA Council 29 may 2010. Article 9

[15] Id.

[16] W. Michael Reisman, and Eric E. Freedman, "The Plaintiff's Dilemma: Illegally obtained Evidence and admissibility in international Adjudication" (1982). Faculty Scholarship Series Paper 730. http://digitalcommons.law.yale.edu/fss_papers/730, p. 742.

[17] Id at 743 (citing Jurisdiction of the European Community of the Danube between Galatz and Braila, 1927 PCIJ, ser. B, No. 14.)

[18] Id.

[19] Id.

[20] Id.

[21]ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela, ICSID Case No ARB/07/30, decision on Jurisdiction and the Merits (3 September 2013).

[22]Jessica O. Ireton, The Admissibility of evidence in ICSID Arbitration: considering the validity of WikiLeaks Cables as Evidence. ICSID Review, Vol. 30, No. 1 (2015) p. 2

[23] Id at p.1 (Citing the ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela, ICSID Case No ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2013) para. 212.)

[24] *Id.* at p. 2.

[25] *Id.* at p. 9 (citing the Conoco Phillips, Curtis letter, September 8, 2013. p. 5).

[26] *Id.* at p. 9 (citing the Conoco Phillips, Curtis letter, September 8, 2013. p. 5).

[27] The Conoco Phillips, Curtis letter, September 8, 2013, p. 5: *"We do not endorse everything reported in these cables, but the notion that the Republic did not negotiate in good faith because it never discussed fair market value is patently false, as both ConocoPhillips and the U.S. Government are fully aware."*

[28] ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v Bolivarian Republic of Venezuela, ICSID Case No ARB/07/30, decision on respondent's request for reconsideration, (10 march 2014) para 24. The reasoning for this desicion is stated in paras.19- 23: *"The overall structure and the detailed provisions of the ICSID Convention were plainly designed to provide for review or actions in respect of decisions of a tribunal only once the Award was rendered.... Section 3 of Part IV of the ICSID Convention sets out the Powers and Functions of the Tribunal, with nothing among its provisions even hinting at such a power... [I]n Section 5 ... powers are conferred on the Tribunal to interpret and revise the Award and on an ad hoc Committee to annul an Award on prescribed grounds. It is in those ways and those alone that decisions such as that in September 2013 can be questioned, changed or set aside. Those provisions and that structure exclude the possibility of the proposed powers of reconsideration being read into the Convention."*

[29] Conoco Phillips, Dissenting Opinion of Georges Abi-Saab, paras. 24 and 65. *"However, with the revelations of the Wikileaks cables submitted to the Tribunal as annexes to the Respondent's letter of 8 September 2013... the ground or cause for reconsideration changes radically in dimension and importance." "...Here we have a full narrative of the negotiations, with a high degree of credibility, ... It is a narrative that radically confutes the one reconstructed by the Majority, relying almost exclusively on the assertions of the Claimants throughout their pleadings that the Respondent did not budge from its initial offer."*

[30] *Alison Ross, Tribunals Rules on admissibility of hacked Kazakh emails*. 22 September, 2015, Global Arbitration Review http://globalarbitrationreview.com/news/article/34166/tribunal-rules-admissibility-hacked-kazakh-emails/

[31] Id at p.3. (Citing the unpublished decision of the Caratube International Oil Company LLP v. The Republic of Kazakhstan case).

[32] Id. (Citing the unpublished decision of the Caratube International Oil Company LLP v. The Republic of Kazakhstan case).

[33] Id. (Citing the unpublished decision of the Caratube International Oil Company LLP v. The Republic of Kazakhstan case).

[34] Id. (Citing the unpublished decision of the Caratube International Oil Company LLP v. The Republic of Kazakhstan case).