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Admissibility of Illegally Obtained Evidence in International Arbitration: A Conduct Based Analysis

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Abstract

This article deals with the admissibility of illegally obtained evidence in arbitration. Though there exist vast jurisprudence on the concept of illegally obtained evidence in the domestic arena, there is very little arbitral jurisprudence that deals with the question of how international arbitral tribunals must treat illegally obtained evidence. Given that arbitral tribunals are granted wide discretion to decide on the admissibility of evidence, and in light of the absence of accurate guidelines in the arbitral rules, it becomes essential to determine the extent to which the arbitral tribunal could admit illegally obtained evidence, and the criteria to be used by arbitral tribunal while determining such admissibility. This paper attempts to determine and analyse the framework that must be used by international tribunals while deciding on the admissibility of illegally obtained evidence in international arbitration. It explores the approaches of the various international arbitral tribunals in order to understand the important factors that could influence the admissibility of illegally obtained evidence and posits that the conduct of the party in obtaining the illegal evidence could be the most crucial factor, while developing a framework. Though there has been a view that the conduct of the party to the arbitration proceedings should not be a guiding factor for the admissibility of illegally obtained evidence, the fact that every tribunal has refused to admit illegally obtained evidence based on the conduct of the party to the arbitration proves to be one major reason why conduct should be a yardstick. Based on the premise that the conduct of the party in obtaining the illegal evidence is the key factor in determining admissibility, the author finally lays down a framework for determining the admissibility of illegally obtained evidence in international arbitration.

I. Introduction

The taking of evidence is an important process in international arbitration as it enables the arbitral tribunal to ascertain the material facts and get an accurate picture of the facts and circumstances of the particular case. While taking evidence there may arise a situation where there might be shades of illegality attached to the evidence that is

[1] KNS Legal Services, India.

produced before the tribunal. Now, the question that arises is whether such evidence must be allowed irrespective of the illegality attached to the evidence. On the one hand, it is to be noted that arbitral tribunals are not bound by these domestic evidence laws and hence could, in their vast discretion, allow the illegally obtained evidence. Additionally, if the illegality precludes the illegally obtained evidence from being relied upon, then the question of whether the adjudication was done in a just and objective manner arises. In other words, it might lead to a situation where the award passed might be factually untrue. On the other hand, however, it is to be noted that allowing such evidence could condone and incentivise illegal activities and could also disregard violations of domestic law.[2] Further it would also result in unfairness to the party against whom such illegally obtained evidence might be sought to be produced. Though there exists vast jurisprudence on how the illegally obtained evidence must be treated in the domestic arenas, there exists only few sources which accurately deal with how such evidence must be treated in international arbitration. In light of these competing interests, it becomes essential that a framework be culled out, balancing the wide discretion given to the tribunal in light of the other competing interests.

In order to understand the question of admissibility of illegally obtained evidence in the case of international arbitration, it becomes important to understand the doctrines used by the various tribunals to exclude such illegally obtained evidence. In addressing the concerns as specified in the paragraph above, it is seen that the tribunals have relied upon two doctrines, namely equality of arms and good faith to exclude the illegally obtained evidence.[3] The fact that multiple arbitral awards have referred to these doctrines in cases where illegally obtained evidence was involved shows that an examination of these doctrines would be necessary in order for a framework to be suggested.[4]

This article seeks to analyse and determine the criteria for the admissibility of illegally obtained evidence in international arbitration. This article will first discuss the concept of equality of arms (Section- II) and of good faith (Section- III) and when

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[2] Nicole S Ng, 'Illegally Obtained Evidence in International Arbitration: Protecting the Integrity of the Arbitral Process' (2020) 32 SAcLJ 747, 748.

[3] ibid 748, 756; Kartik Gupta, 'Admissibility of Unlawfully Obtained Evidence in International Arbitration' (2022) Volume XI NLIU L. Rev 86, 104.

[4] *Methanex Corporation v United States of America* (2005) 44 ILM 1345 Final Award of the Tribunal on Jurisdiction and Merits Part II Chapter I, para 54; *EDF (Services) Limited v Romania* (2008) ICSID Case No ARB/05/13 Procedural Order No. 3, para 47; *Ahongalu Fusimalohi v FIFA* (2012) CAS 2011/A/2425 Award, para 73.

these doctrines would lead to the exclusion of illegally obtained evidence in international arbitration. Then it will discuss how the doctrines of equality of arms and good faith would apply when the conduct of the party is involved in the procurement of the illegally obtained evidence (Section- IV) and in situations where it is not (Section- V). Both aforementioned sections depict that, where a party to the arbitration is involved directly or indirectly in obtaining the illegal evidence, such evidence must be excluded, and in the absence of such conduct discretion is vested with the tribunal to determine the admissibility. Finally, on the basis of this rationale (Section -VI) a framework is suggested for the admissibility of illegally obtained evidence in international arbitration, using the conduct of the party in obtaining the unlawful evidence as a key factor.

II. Principle of Equal Treatment and Equality of Arms in International Arbitration

The concept of equality of arms is difficult to define in the context of the taking of evidence in international arbitration as it was developed primarily with regard to fair trials in the domestic arena. In the context of international arbitration however, it is to be noted that not all of the fair trial guarantees as specified in Article 6(1) of the European Convention on Human Rights would apply to the arbitration process, as certain fairness guarantees are traded off in favour of expedient commercial justice. The commercial interest served by this trade-off is legitimised by the fact that parties are given discretion to choose the arbitrator, applicable law, and arbitration procedure.[5] This does not mean that the arbitration process is completely free of the fairness guarantees. In particular, the principles of equal treatment and the parties' right to be heard (equality of arms) have been recognised in the various arbitration legislations and rules.[6] These principles are considered non-derogatory and as the procedural *'Magna Carta'* of international commercial arbitration.[7]

[5] Ilias Bantekas, 'Equal Treatment Of Parties In International Commercial Arbitration' (2020) 69 International and Comparative Law Quarterly 991, 994.

[6] United Nations Commission on International Trade Law, 'UNCITRAL Model Law on International Commercial Arbitration 1985' Article 18 (21 June 1985) UN Doc A/40/17, Annexe I.

[7] *Methanex Corporation v United States of America* (15 January 2001) Decision of the Tribunal on Petitions from Third Persons to Intervene as "amici curiae", para 26.

A. The Principle of Equal Treatment and Equality of Arms, and its nexus with taking of evidence in International Arbitration

The question now arises as to whether the principle of equal treatment and the equality of arms can extend to the case of taking evidence in arbitration. The answer to this would be affirmative as these principles are arranged under the heading *'conduct of arbitration'* in many of the arbitration rules worldwide.[8] Thus, it is an acceptable proposition that the conduct of the tribunal requiring the respect of the principles of equal treatment of the parties, and the equality of arms, must apply to the evidentiary procedures. In the paragraph below, the principle of equality of arms and equal treatment will be discussed in detail in relation to the taking of evidence in international arbitration.

The principle of equal treatment in the case of the taking of evidence in international arbitration refers to applying the evidentiary procedure with equal standards.[9] The principle of equal treatment includes the principle of equality of arms as equality requires that the parties receive an adequate opportunity to present themselves on the matter in issue.[10] The importance of the principle of equality of arms is recognised in Article 5(1)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (from now on, New York Convention) whereby the enforcement of an arbitral award may be refused if the parties were not able to present their cases adequately.[11] Equality of arms in the taking of evidence in arbitration is also recognised explicitly in article 9.2(g) of the IBA Rules of taking evidence (from now on referred to as the IBA Rules) whereby the tribunal shall exclude evidence on the basis of concerns of fairness or equality of the parties.[12] Fairness in the IBA Rules refers to the concept of procedural fairness whereby parties to the arbitration are given a reasonable opportunity to present their evidence (equality of arms).[13] However, certain rules provide only for the concept of equal

[8] HKIAC Administered Arbitration Rules (18 November 2018) Section IV Article 13.
[9] Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide*, (1st edn, Informa Law 2012) para 9.127.
[10] Institute of International Law, 'Equality of Parties Before International Investment Tribunals' (2019) 409, 492 <https://www.idi-iil.org/app/uploads/2019/06/Commission-18-Equality-of-parties-before-international-investment-tribunals-McLachlan-Travaux-La-Haye-2019.pdf> accessed 6 November 2022.
[11] United Nations Commission on International Trade Law, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' Article XVI (June 10 1958) 330 U.N.T.S. 3.
[12] IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules') (17 December 2020) Article 9.2(g).
[13] O'Malley (n 9) 319, para 9.115.

treatment and the right to be heard, omitting the fairness part.[14] Even in the absence, it is impliedly present as the principle of equal treatment and equality of arms contain sub-aspects that materialise as procedural fairness.[15]

B. How the Principle of Equal Treatment and Equality of Arms leads to the exclusion of Illegally Obtained Evidence in International Arbitration

The importance of the concept of equality of arms for excluding illegally obtained evidence has been recognised in the *Methanex* case wherein the tribunal has held:

> In the Tribunal's view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of 'equal treatment' and procedural fairness being also required by Article 15(1) of the UNCITRAL Rules. As a general principle, therefore, just as it would be wrong for the USA ex hypothesi to misuse its intelligence assets to spy on Methanex (and its witnesses) and to introduce into evidence the resulting materials into this arbitration, so too would it be wrong for Methanex to introduce evidential materials obtained by Methanex unlawfully.[16]

Even though the tribunal in the above matter has referred to the principles of good faith and equality of arms to exclude the evidence, the real question is how the principle of equality of arms / procedural fairness excludes the unlawfully obtained evidence. If equality of arms refers to granting a reasonable opportunity to present their claims and evidence in the arbitration and if the arbitral tribunal provided the parties a reasonable opportunity to present their evidence, it is not sound to conclude that equality of arms could exclude the illegally obtained evidence. Relying on the concept of equality of arms might have led the tribunal in the *Methanex* case to admit the illegally obtained evidence, as the refusal to admit relevant material evidence negatively affects the right of the party to present its case and makes the arbitral award unenforceable per article 5(1) (b) of the New York Convention.[17]. In this regard, the Federal Supreme Court of Switzerland held that the right to be heard would be

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[14] United Nations Commission on International Trade Law, 'UNCITRAL Model Law on International Commercial Arbitration 1985' Article 18 (21 June 1985) UN Doc A/40/17, Annexe I.

[15] Fabien V Rutz, 'Admissibility of Unlawfully Obtained Evidence in International Arbitration in Switzerland' (SAA) CAS in arbitration essays series 1, 8 <https://www.pyxislaw.ch/wp-content/uploads/2020/09/Fabien-V.-RUTZ-Admissibility-of-unlawfully-obtained-evidence-in-international-arbitration-in-Switzerland-2020-1.pdf> accessed 11 November 2022.

[16] *Methanex Corporation v United States of America* (2005) 44 ILM 1345 Final Award of the Tribunal on Jurisdiction and Merits Part II Chapter I, para 54.

[17] George M Von Mehren and Claudia T Salomon, 'Submitting Evidence in an International Arbitration: The Common Lawyer's Guide' (2003) 20 Journal of International Arbitration 285, 296.

violated if the arbitral tribunal *inadvertently or mistakenly* fails to consider evidence or offers of evidence raised by a party that are important for the case.[18] Additionally, if the tribunal excluded the illegally obtained evidence that is material to the outcome of the arbitration proceedings, it would lead to the exclusion of justice.[19]

The problem is that the tribunal in the *Methanex* award has relied on the concept of procedural fairness which cannot explain why the illegally obtained evidence must be excluded. The only way that the viewpoint of the tribunal could be explained is by considering substantive fairness which relates to the inherent power of the tribunal to make a decision that is not erroneous. In the matter of the taking of evidence in arbitration, it must mean that there is an adequate reason as to why the unlawfully obtained evidence must be excluded. The criteria for invoking the concept of substantive fairness are only where it would be prima facie erroneous to allow the evidence to be admitted. One example of this would be the arbitral award of *Libananco v Turkey* where the state party had exercised its sovereign power of domestic policing to obtain evidence; a power which the other party lacked.[20] The tribunal in this award excluded the evidence which was obtained in this manner. Allowing such evidence to be admitted would result in an informal inequality and imbalance of power.[21] In cases where the party to arbitration is directly involved in obtaining the illegal evidence, it would be prima facie erroneous and unfair to allow such evidence to be admitted. Another example where substantive fairness might be justified is where the parties use threat of force or intimidation to obtain the evidence, where it would neither be fair nor prudent to admit the evidence. Thus, where the party is directly or indirectly involved in obtaining the illegal evidence, it would be unfair for the arbitral tribunal to allow the admission and in such cases, exclusion must be warranted.

There exists justification for the use of substantive fairness as the yardstick in these cases. The first reason would be the inherent power of the arbitral tribunal to determine the relevancy, the admissibility, materiality, and weight of evidence as per

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[18]Axel Buhr, 'The Right to Be Heard – a Constitutional Guarantee of No Formal Nature' (Gabriel-Arbitration, 9 May 2019) <https://www.gabriel-arbitration.ch/en/publications-and-speaking/right-to-be-heard> accessed 1 November 2022.

[19] Patricia Shaughnessy, 'Dealing with Privileges in International Commercial Arbitration' in Faculty of Law Stockholm University(eds), *Scandinavian Studies: Procedural Law* (Faculty of Law Stockholm University 2007).

[20] *Libananco Holdings Co Limited v Republic of Turkey* (2 September 2011) ICSID Case No. ARB/06/8 Award.

[21] Ng (n 2) 759. Citing Frédéric Gilles Sourgens, Ian A Laird, and Kabir Duggal 'Evidence in International Investment Arbitration' [2018] Oxford University Press 259.

Article 9.3 of the IBA rules of taking evidence.[22] The second reason would be that the arbitral tribunal has a duty to maintain the integrity of the arbitration process. In this regard, the tribunals are generally guided by a duty to maintain the integrity of the arbitration process when determining the admissibility of evidence.[23] The concept of the integrity of the tribunal was first noted in *ConocoPhillips Petrozuata B.V. v Bolivarian Republic of Venezuela* wherein Professor Georges Abi-Saab in his dissent opined that a tribunal that is tasked with the duty of seeking the truth and dispensing justice would not omit evidence relevant to the arbitration even if it was obtained through sources like WikiLeaks; otherwise it would be a travesty of justice and a mockery of very process of adjudication.[24] What this implies is even though the arbitrator may make a decision on the admissibility of evidence which is non-reviewable by the domestic court; in general the tribunal would be less inclined to take a decision on admissibility which may interfere with the integrity of process. Although, this matter concerned the *WikiLeaks* data and it is to be noted that none of the parties had a role to play in the procurement of the illegal evidence. Should a situation arise where the conduct of the parties is involved, the search for the truth and dispensation of justice cannot be reasons to allow erroneous conduct. In such situations, the very search for the truth and dispensation of justice by condoning the illegal conduct would lead to a travesty of justice, mockery of the adjudication and would interfere with the integrity of the arbitration process.

III. Good Faith in International Arbitration

The other factor that was discussed in the *Methanex* decision by the arbitral tribunal was the concept of *good faith*. The concept of good faith has been described in the Black's Law dictionary as 'A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. Also termed bona fides'.[25]
As indicated in the definition above, the concept of good faith relates to the idea whereby a person acts in a *bona fide* manner with *sincere honest feelings*. The concept of

[22] IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules') (17 December 2020) Article 9.1
[23] Ng (n 2) 760.
[24] *Conoco Phillips Petrozuata B V v Bolivarian Republic of Venezuela* (10 March 2014) ICSID Case No ARB/07/30 Dissenting Opinion of Georges Abi-Saab, paras 66-67.
[25] Bryan A Garner, *Black's Law Dictionary* (7th edn, 1999) 701.

good faith plays a key role in the field of international commercial arbitration.[26] In fact, the tribunal in the case of *Libananco v Turkey* held that the parties should arbitrate in good faith and that the duty extends to all forms and parties to the arbitration[27] Thus, the performance of the arbitration agreement, and the arbitration process must be governed by the principle of good faith.[28]

A. Principle of Good Faith and how it leads to the exclusion of Illegally Obtained Evidence in International Arbitration

With regard to international arbitration, the parties are free to choose the rules/ procedure that govern the arbitration process, including the evidentiary procedures.[29] As the parties are free to choose the procedure governing the taking of evidence including the evidential procedures, it is only sound to conclude that the good faith applicable in this context would be procedural good faith.

The concept of procedural good faith in the context of the taking of evidence relates to the duty of a party to co-operate with the tribunal and the opposing party in the taking of evidence.[30] If the concept of procedural good faith requires the parties to effectively participate without obstruction or delay in the taking of evidence, then how can the admission of illegally obtained evidence be denied on that ground?[31] O'Malley opines that the attempts to illicitly obtain privileged communications are generally considered "bad faith" procedural behaviour and would justify the exclusion.[32] However, what O'Malley fails to account for is that it is very possible that a party may not obstruct the procedure involved in the taking of evidence and yet seek the admission of illegally obtained evidence procured either through their own actions or evidence that is illegally obtained via an independent third party. Similarly, O'Malley argues that the "observance of good faith in the taking of evidence includes the

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[26] Martha Belete Hailu, 'Good Faith (Lack of) in Investment Arbitration and the Conduct of the Ethiopian Government in the Salini Case: Exercise of Legitimate Right or "Exhibit A" for Guerrilla Tactics?' *5 Ethiopian Business Law Series, The Resolution of Commercial/Business Disputes in Ethiopia: Towards Alternatives to Adjudication?* (Addis Ababa University Press 2012).
[27] *Libananco Holdings Co Limited v Republic of Turkey* (23 June 2008) ICSID Case No. ABR/06/8 Decision on Preliminary Issues, para 78.
[28] Bernardo M Cremades, 'Good Faith in International Arbitration' (2012) 27(4) Am U Intl L Rev 761, 786.
[29] Anna Kubalczyk, 'Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation' (2015) 3(1) Gro JIL 85, 97.
[30] O'Malley (n 9) 222-225.
[31] Ng (n 2) 757.
[32] O'Malley (n 9) 225.

obligation to refrain from actions aimed at disturbing the equality of arms between the parties".[33] However, the above statement cannot hold true in so far as the concept of equality of arms and the concept of procedural good faith are distinct concepts with different connotations in the context of the taking of evidence. Thus, the conclusion that follows from the above sentences is that procedural good faith *cannot* justify why illegally obtained evidence must be excluded.

The only way that the decision of the *Methanex* tribunal can be functional is by considering the concept of good faith outside of the context of procedure. This requires an analysis of the conduct of Methanex in relation to the arbitration as a whole and not just the conduct involved in the procedure of taking evidence.[34] Such an approach would lead to the conclusion that the party Methanex has approached the tribunal with unclean hands and breached good faith.

The doctrine of clean hands / unclean hands / dirty hands is a rule of law whereby a person approaching the court for a lawsuit or litigation must be free from unfair conduct in regards to the subject matter of the claim.[35] As regards the taking of evidence in arbitration, the tribunals in the *Methanex* and *Libananco* arbitrations have indicated that the admission of illegally procured evidence, when the party requesting the admission is involved in the procurement, would be against the principle of clean hands.[36] The logical corollary that flows is that where the party is involved in the procurement of the illegal evidence, then the doctrine of clean hands can exclude the admission of the evidence.

It appears to be an acceptable proposition that where the opposite party is involved in obtaining illegal evidence, such evidence should not be admitted. Even if such a view seems logically tenable, there exist arbitral awards that suggest inferences otherwise. In the matter of *Ahongalu Fusimalohi v FIFA* (from now on referred to as *Fusimalohi*), the Court of Arbitration for Sport in the arbitration (from now on called CAS) referred to the both the *Methanex* and the *Libananco* awards and held that the

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[33] ibid.

[34] *Methanex Corporation v United States of America* (2005) 44 ILM 1345 Final Award of the Tribunal on Jurisdiction and Merits Part II Chapter 2, paras 58-59.

[35] 'Clean hands doctrine' (Dictionary, ALM/Law.com) <https://dictionary.law.com/Default.aspx?selected=211> accessed 1 November 2022.

[36] Grégoire Bertrou and Sergey Alekhin, 'The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means?' (2018) 4 Les Cahiers de l'Arbitrage / The Paris Journal of International Arbitration 11, 43.

duty of good faith and respect for the arbitral process requires that a party to an arbitration does not cheat the other party and illegally obtain evidence.[37] The tribunal however reiterated the view in *Alejandro Valverde Belmonte v CONI* and held that the exclusion of evidence, illegal or otherwise, would only be warranted if the admission is irreconcilable with the Swiss Procedural Public Order.[38] Thus, an inference that may arise is that even if the opposite party was involved in the procurement of illegally obtained evidence, it would not be an automatic bar to the admissibility unless it is untenable with procedural public policy.

The concept of procedural public policy as propounded by the Swiss Federal Tribunal relates to an independent judgement that is given according to the applicable procedure based upon the submissions and facts provided to the arbitral tribunal.[39] Such a principle would be violated where some fundamental notions are breached which would be contradictory with the principles of justice.[40] Thus, if the party acts in bad faith and illegally obtains the evidence then such evidence would be inadmissible if the governing procedure clearly specifies good faith observance in arbitration.[41] On the other hand, other rules of procedure do not specifically require good faith to be observed. Even where it is not specifically mentioned in the procedural rules, the principle of good faith still forms an important part of public policy. In this regard, the Swiss Federal Tribunal has held in one case that compliance with the rules of good faith does form a part of public policy as it is a fundamental legal principle.[42] Thus, the inference suggested in the *Fusimalohi* award, that the conduct of the party to the arbitration in obtaining the evidence illegally would not be a bar to admissibility cannot hold true in so far as good faith does form a part of Swiss public policy.

Although the argument in the previous paragraph applies to matters in Switzerland, even in other countries, in the absence of explicit recognition in the rules governing the arbitration, concept of good faith and its derivative, the clean hands doctrine forms a fundamental principle of law.[43] In this regard, the Indian law on

[37] *Ahongalu Fusimalohi v FIFA* (2012) CAS 2011/A/2425 Award, para 73.
[38] ibid, para 80.
[39] *4A_342/2015* (26 April 2016) (First Civil Division, Federal Supreme Court of Switzerland), para 5.1.
[40] ibid.
[41] Swiss Rules of International Arbitration (June 2021), article 16.
[42] *E. AG vs. K. Ltd* (14 November 1990) 116 II 634 (First Civil Division, Federal Supreme Court of Switzerland).
[43] The doctrine of good faith requires the absence of action of the parties with the intent to defraud or gain an unconscionable advantage to the proceedings. The doctrine of clean hands goes on to

arbitration provides that an award, domestic or foreign, which is against the 'fundamental policy of Indian law' may be refused to be enforced on the grounds of public policy.[44] The Supreme Court of India has held that the term 'fundamental policy of Indian law' means those 'core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts'.[45] Similarly, the courts worldwide have held a very restrictive view of the concept of public policy, holding that the setting aside of an award would have to be on the basis of a breach of the most basic notions of justice and morality.[46] Public policy in this regard can be divided into international and domestic public policy. The consensus that exists is that international public policy 'refers to that irreducible core of the enforcing forum's (domestic) public policy, which the forum deems inalienable, even where pertaining to a foreign suit'.[47]

The question that arises now is whether the non-observance of good faith and the clean hands doctrine would amount to a breach untenable with the concept of core domestic public policy and consequently international public policy. In this regard, it becomes important to notice that every country follows the concept of good faith. Similarly, the concept of clean hands, whether as a reflection of good faith or independently, has also been recognised.[48] The fact that these concepts have been upheld and generally recognised shows that it does form a time hallowed fundamental principle of the concerned countries laws and would prima facie be an indispensable part of its public policy, both domestic and international. Even though such positive assertions as aforementioned can be made, it would be extremely hard to find a case where good faith and the clean hands doctrine have been used to exclude illegally obtained evidence, much less in the case of international arbitration. This is primarily because each country has its own domestic framework, in regards to the admissibility of illegally obtained evidence in civil and criminal cases applicable in

disallow the advantage that is gained through such an act. Hence the former is genus and the latter is a specie.

[44] Arbitration and Conciliation Act 1996 (Act no. 26 of 1996) Section 34, 48 (India).

[45] *Vijay Karia v Prysmian Cavi E Sistemi Srl* (2020) SCC OnLine SC 177 (Supreme Court of India).

[46] *RBRG Trading (UK) Ltd v Sinocore International Co Ltd* [2018] EWCA Civ 838 [25]; *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, para 59 (Singapore).

[47] Edward Ti Seng Wei, 'Why Egregious Errors of Law May Yet Justify A Refusal Of Enforcement Under The 'New York Convention' [2009] Sing JLS 592, 603.

[48] Richard Kreindler, 'Corruption in International Investment Arbitration: Jurisdiction and the Unclean Hands Doctrine' in Kaj Hobér and others (ed), *Between East and West: Essays in Honour of Ulf Franke* (Juris Publishing 2010) 317.

trials, which never refer to either good faith or the clean hands principle.[49] However, even in such a situation, the only means of challenging the decision of the arbitrator in allowing the illegal evidence obtained through the conduct of the party (excluding a plea based on equality of arms), would be on the basis of public policy infringement by way of violation of good faith and the clean hands doctrine.

At this stage, it becomes pertinent to determine what form of conduct breaches this good faith principle. In this situation, the fourth connotation of good faith as given by the Black's Law Dictionary becomes relevant, i.e. 'absence of intent to defraud or to seek unconscionable advantage'.[50] It is only common sense to understand that the party Methanex sought to gain an advantage in the arbitration by searching for extra evidence in the trash can of the opposing party. Viewed in this regard, the intent must be to get an unconscionable advantage. The term unconscionable signifies that the conduct must be extremely unjust. The sentiments of justice can by no means be stretched to include a situation where a party stands to gain from his own wrongdoing, and this would create doubts as to the credibility of the arbitration processes. This good faith concept is further reinforced by the fact that, where the party has been directly or indirectly involved in the illegal procurement, the tribunals have constantly declined to admit such evidence.[51] Thus, where the conduct of the party is involved in the obtaining of illegally obtained evidence, then the concept of good faith prevents the admissibility of such evidence.

IV. Admissibility of the Illegally Obtained Evidence where the parties are involved in its procurement

As stated in the preceding parts of this article, where the conduct of the party is involved in obtaining the evidence illegally, both the principles of equality of arms and good faith could lead to the exclusion of evidence so obtained. Therefore, where there is conduct of the party involved, it would easy and fairly direct to exclude the illegally obtained evidence.

[49] Sara Mansour Fallah, 'The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals' (2020) 19(2) The Law & Practice of International Courts and Tribunals 147.
[50] Bryan A Garner, *Black's Law Dictionary* (7th edn, 1999) 701.
[51] Ng (n 2) 752-755.

V. Admissibility of the Illegally Obtained Evidence where the parties are not involved in its procurement

The situation becomes difficult in cases where the party to the arbitration is not directly or indirectly involved in obtaining the evidence. In such cases, as there is no conduct involved, prima facie the concept of good faith would not be applicable. Additionally, the concept of equality of arms would not facilitate the exclusion as it is not prima facie erroneous and unfair to rely on evidence which was obtained illegally not by a party to the arbitration but by an independent third party. In this regard, Professor Georges Abi-Saab in *ConocoPhillips Petrozuata B.V. v Bolivarian Republic of Venezuela* held that a tribunal that is tasked with the duty of seeking the truth and dispensing justice would not omit evidence which was available through a third-party source like WikiLeaks.[52] It would be outright absurd in such situations to grant an award that is cut-off from the truth of the matter. Thus, the search for the truth in such a situation would propel the tribunal to consider the evidence.

The search for the truth of the matter is, however, not absolute. Allowing the illegally obtained evidence to be admitted in cases where a party to the arbitration is not involved in the procurement might cause certain rights of the persons, such as privacy, to be hampered i.e. whether the use of the illegal evidence in the matter might violate his privacy.[53] In such cases, the tribunal will have to strike a balance between the rights of the persons that are involved and the interest in finding the truth of the matter. In this regard, the *Caratube* tribunal admitted the leaked emails of the government officials of Kazakhstan as the need for an award that was not artificial in light of the publicly available e-mails outweighed the unfairness that would result from the admission.[54] It is pertinent to note that in this decision the tribunal regarded the interest in finding the truth above the fundamental right to privacy.[55] This balancing approach was in fact supported by the Swiss Federal Tribunal in one case wherein it was held that the admission of illegally obtained evidence would not in every case be opposed to the Swiss procedural public policy if the tribunal has

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[52] *ConocoPhillips Petrozuata B V v Bolivarian Republic of Venezuela* (10 March 2014) ICSID Case No ARB/07/30 Dissenting Opinion of Georges Abi-Saab paras 66-67.

[53] *Ahongalu Fusimalohi v FIFA* (2012) CAS 2011/A/2425 Award, para 101.

[54] Fabien V Rutz, 'Admissibility of Unlawfully Obtained Evidence in International Arbitration in Switzerland' (SAA) CAS in arbitration essay series 1, 16 <https://www.pyxislaw.ch/wp-content/uploads/2020/09/Fabien-V.-RUTZ-Admissibility-of-unlawfully-obtained-evidence-in-international-arbitration-in-Switzerland-2020-1.pdf> accessed 11 November 2022.

[55] ibid.

balanced 'on the one hand, the interest in finding the truth and, on the other hand, the interest in protecting the legal protection infringed upon by the gathering of the evidence'.[56] On the merits of this case, the Swiss Federal Tribunal held that the CAS tribunal did balance the interests in the admission of the illegal evidence and consequently declined to the set aside the award. What is remarkable about this case is that the party which challenged the award of CAS was not involved in the procurement of the illegal evidence. Thus, where the party to arbitration was not involved in the procurement of the illegal evidence; the tribunals would have to balance the various interests involved in the matter.

VI. A possible solution to the admissibility of Illegally Obtained Evidence in International Arbitration?

At this stage in the article, there come two conclusions. The first being that the where the party to the arbitration is involved in the procurement of the illegal evidence, the concept of equality of arms and good faith would lead to the exclusion of such evidence. The second conclusion that arises is that where the party is not involved in the procurement of the illegally obtained evidence, the tribunal could admit the illegally obtained evidence subject to the balancing of interests. In the most recent version of the IBA Rules released in 2020, there was an insertion of Article 9.3 whereby the tribunal *may* exclude the illegally obtained evidence.[57] Whereas in the situation that arises in Article 9.2, the tribunal *shall* exclude the illegal evidence, in the case of Article 9.3, the tribunal *may* exclude the illegally obtained evidence.[58] What could be inferred from this is that in case of a situation arising under Article 9.2, the tribunal should mandatorily discard the evidence whereas under 9.3, the discretion would be vested with the Tribunal to decide on the admissibility of such illegally obtained evidence. As seen in previous parts of this article, since the involvement of the party in obtaining the illegally obtained evidence would lead to the breach of 'equality of arms', it would seem that such a situation would clearly fall under Article 9.2 and, in those cases, the tribunal should mandatorily exclude the illegally obtained

[56] *A v Club B 4A_362/2013* (March 27 2014) para 3.2.2.

[57] IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules') (17 December 2020) Article 9.3.

[58] IBA Task Force For The Revision Of The IBA Rules On The Taking Of Evidence In International Arbitration, 'Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration' (2021) 1, 30, Para 6 <https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D> accessed 6 November 2022.

evidence.[59] Similarly, the breach of the good faith principle in obtaining the evidence through illegal means by a party to the arbitration should lead the tribunal to refuse admission. On the other hand, if the party is not involved in the procurement of the illegal evidence, neither the principle of equality of arms nor the principle of good faith could be harmed and hence the *may standard* as used in Article 9.3 becomes applicable, admission being contingent upon the balancing of various interests. Thus, to determine the admissibility of the illegally obtained evidence the following questions become important to answer;

1. *What is the legal nature of the evidence?*
2. *Whether such evidence is relevant, material, and reliable?*
3. *Whether it should be admitted:*
    a. *Where the conduct of the party is involved.*
    b. *Where the conduct of the party is not involved.*
        i. *The need for a just and fair arbitral award vs the need for the legal entity to be protected by the rights accorded to it.*

The first question in this regard deals with how the evidence was obtained; whether it is considered illegal or legal under the law governing the arbitration. The question of admission of the evidence only arises once it is determined to be legal or illegal and, in this manner, the first question becomes important. The second question deals with the qualitative aspect of the evidence. The evidence should only be admitted if it is relevant and material. Logic dictates that illegal evidence, if it is not relevant to the dispute, should not be admitted. Additionally, the arbitral tribunal can refuse to consider the admissibility of evidence which is not relevant to the dispute. Even if the evidence is material and relevant, it must also be reliable at the same time. For example, if there is clear indication that a particular piece of evidence is not authentic, then such evidence should be excluded no matter how relevant it is to the subject matter of the dispute.[60] In this regard, the tribunal in the award of *Libananco v Turkey* held that evidence of telephonic conversations as contained in exhibits R-113 and R-771 ought to be inadmissible as the evidence was not completely presented and, additionally, they could not be authenticated.[61] Likewise, the tribunal in the arbitration of *EDF (Services) v Romania* refused to admit the illegally obtained evidence on certain grounds; one such ground being that a substantial part of the recorded

[59] ibid.
[60] *EDF (Services) Limited v Romania* (2008) ICSID Case No ARB/05/13 Procedural Order No. 3, para 35.
[61] *Libananco Holdings Co Limited v Republic of Turkey* (2 September 2011) ICSID Case No. ARB/06/8 Award, para 375-376, 383-384.

conversation was missing and, further, in the absence of authentication.[62]

The third question that is raised would relate to the facts regarding the admissibility of the evidence. In this case a division can be made based upon the conduct of the party involved. As stated previously, where the conduct is involved in obtaining the illegal evidence, it must be excluded whereas in cases where there is no conduct, the evidence can be admitted subject to the balancing of interests by the Tribunal. An accurate formulation of the balancing act in the case of illegal evidence could be found in the Lawrie Principle wherein Lord Justice Cooper held that the Court must draw a balance between the '(a) The interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on a merely formal or technical ground'.[63]

In the case of international arbitration, the Lawrie Principle should transform as a balance between (a) the interest of the legal entity to be protected by the rights accorded to it, and (b) the interest of the tribunal to ensure that truth and justice would prevail in the dispute arising in arbitration. Once this balancing act is performed, the tribunal could determine whether the illegal evidence could be admitted. For instance, in the case of competitive sports where evidence of doping has been released through an anonymous third party and the matter is proceeded by a sport regulatory authority against a sport professional, then if the tribunal determines that the evidence is reliable and material, it would turn to balance the interests in the matter. The interests in this matter would be between the protection of the privacy of the individual, the concerns of proportionality and the interest of the regulating authority to promote fair sporting. In this case, the tribunal upon consideration of the facts could hold that the public interest in fair sporting could override the privacy concerns of the individual.
Perhaps another situation where this balancing act would be required would be where there is a question of privilege and confidentiality involved. In such a situation, the tribunal would have to consider the kind of confidentiality that is involved in the facts of the matter at hand and then decided whether the confidentiality involved would outweigh the needs for a just arbitral award. In this regard, as per the IBA Rules, it is seen that there are three different types of confidential / privileged information that are protected, namely legal, technical or commercial, and finally governmental

[62] *EDF (Services) Limited v Romania* (2008) ICSID Case No. ARB/05/13 Procedural Order No. 3, para 35.
[63] *Lawrie v Muir* 1950 SLT 37, 39-40.

information.[64] In fact, the IBA Rules clarify that the tribunal shall exclude evidence containing the aforementioned privileged / confidential information.[65] In the case of *Libananco v Turkey*, where the Respondent State of Turkey, in pursuance of a court order, had adduced thousands of documents containing privileged attorney-client communications, the tribunal held such evidence must not be admitted and that the principle of legal privilege is one which lies at the 'very heart of the ICSID Arbitral process'.[66] Since the conduct of the Respondent was present in obtaining the evidence by interception, the tribunal did not in this case perform the balancing act and proceeded to exclude the evidence. However, what is important here is that the tribunal had recognised and emphasised the importance of legal privilege. The reason for such protection is to ensure the honest and transparent communications between the advocate and the client which should not be impaired owing to the wrongful acts of others.[67] In the *Caratube* case, where the tribunal was tasked with the responsibility of deciding the admissibility of leaked e-mails obtained without the conduct of the party to arbitration, the tribunal only admitted the documents which were not protected by legal privilege.[68] The tribunal in the aforementioned case, after performing the balancing act, had held that the documents containing attorney-client communications were protected by privilege whereas the other leaked documents could be admitted since non admission of the non-privileged e-mails could lead to an award that would be artificial and factually incorrect.[69] Similarly, in the case of commercial or technical and government confidentiality, the tribunal could perform this balancing act in order to determine the admissibility of the illegally obtained evidence. For example, in the case of leaked evidence containing the details of the financial and economic status of a company, an arbitral tribunal could possibly admit such details/documents illegally obtained if we suppose that the matter to be arbitrated is closely related to the fiscal or economic situation of the concerned legal

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[64] IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules') (17 December 2020) Article 9.2(b), 9.2(e), 9.2(f).

[65] ibid.

[66] *Libananco Holdings Co Limited v Republic of Turkey* (23 June 2008) ICSID Case No. ARB/06/8 Decision on Preliminary Issues, para 72, 78-82.

[67] Cherie Blair and Ema Vidak Gojković, 'WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence' (2018) 33 ICSID Review - Foreign Investment Law Journal 235, 257.

[68] *Caratube International Oil Company LLP v Republic of Kazakhstan* (27 September 2017) ICSID Case No. ARB/13/13 Award, para 156, 157, 166.

[69] Fabien V Rutz, 'Admissibility of Unlawfully Obtained Evidence in International Arbitration in Switzerland' (SAA) CAS in arbitration essay series 1, 16 <https://www.pyxislaw.ch/wp-content/uploads/2020/09/Fabien-V.-RUTZ-Admissibility-of-unlawfully-obtained-evidence-in-international-arbitration-in-Switzerland-2020-1.pdf> accessed 11 November 2022.

entity.

VII. Conclusion

This article would reveal two major conclusions – the first is that where the party is involved in obtaining the illegal evidence then such evidence must be discarded. In such a case, the concept of equality of arms and good faith would prevent the admissibility of such forms of evidence. The second conclusion here is that where the party is not involved in the procurement, then in those cases, the discretion is vested with the arbitral tribunal to decide the question of whether the illegally obtained evidence must be admitted or not depending on the facts and circumstances of the case. Based on these two conclusions and the existing case law, a determinative process has been culled in this article by which the admissibility of the illegally obtained evidence in international arbitration could be decided by answering three questions. The first question in the determinative process is a mere enquiry that would be performed by every tribunal to determine the nature of the evidence. After determining the nature, the tribunal would move on to the second question in which it would determine whether the evidence is reliable, relevant, and material. This becomes important as the question of admission would only arise where it has been determined that the evidence is relevant and reliable. If it is not then the tribunal does not have to determine the admissibility as it would be a mere waste of time and resources. Once the tribunal notes that the evidence is both relevant and reliable, then it could determine the third question, i.e., whether the evidence must be admitted. In determining the admission, where the conduct is involved in the procurement of the illegal evidence, it could be excluded, whereas in absence of conduct the discretion is vested with the tribunal to determine the admissibility depending on the facts and circumstances of the given case.

The framework that is suggested by this paper applies to situations where the evidence is obtained illegally both physically and by electronic means. Recently with the Covid-19 pandemic, it is seen that there is an increase in virtual arbitration, which is highly susceptible to hacking and breaches during the proceedings of the arbitral tribunal. However, even in such a situation, the criteria for dealing with the admissibility would be same as those that prevail in physical arbitration. If the party to the arbitration either directly hacks or indirectly hacks by way of a third party, in those cases, the doctrine of equality of arms and good faith would lead to the exclusion of the illegally obtained evidence. On the other hand, if an independent party obtains

such illegal evidence without the influence of the parties to the arbitration, then in those cases, the discretion is vested with the tribunal to determine the admissibility on a case-to-case basis. Ultimately, there are no airtight criteria as such and the arbitral tribunal can consider other factors provided that they would not oppose the basic questions determining the admissibility as suggested by this paper.