Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey



# Should unlawfully obtained evidence be admitted in International Arbitration? – A comprehensive analysis vis-à-vis the 'Fruits of the Poisonous Tree' doctrine

Ritwik Guha Mustafi[a] Prakhar Jain[b] Himanshu Rana[c]

[a]CHRIST University, Bangalore, India [b]CHRIST University, Bangalore, India [c]CHRIST University, Bangalore, India

*Received* 09 January 2022; *Accepted* 19 January 2022; *Published* 21 January 2022

---

*'In the middle of every difficulty lies an opportunity.'*

\- *Albert Einstein*

*The issue of Unlawfully Obtained Evidence is a hotly debated topic in International Arbitration. The COVID-19 Pandemic has augmented the global dependence on digital platforms and technology. The revision to the International Bar Association Arbitration Rules came as an aftermath of rising data-related concerns. The revision provided for exclusion of unlawfully obtained evidence at the request of either party to the arbitration proceedings or at the arbitrator's discretion. The said revision reignited the academic deliberations on this issue. Numerous scholars and experts have questioned whether unlawfully obtained evidence should be admitted in International Arbitration. This article seeks to address the question mentioned above. This article makes a detailed exploration of the contemporary international trends, laws, and legal precedents regarding admission of unlawfully obtained evidence vis-à-vis the 'Fruits of the Poisonous Tree' doctrine. Furthermore, the article attempts to provide a set of feasible guidelines for resolving the existing loopholes. The article concludes that commonality in policy considerations should ideally offer a solid foundation for framing concrete guidelines to the Tribunals.*

**Keywords:** *arbitration, revision, unlawfully, obtained, evidence, admission.*

## INTRODUCTION

The COVID-19 Pandemic has influenced individuals, states, businesses, etc., in an unprecedented manner. Court systems across the world and the Alternative Dispute Resolution regimes have also been gravely affected. International Arbitration has emerged as an adaptable and resilient method of dispute resolution through these trying times. In essence, arbitration is a neutral private dispute resolution procedure. The parties consensually lodge their discord before one or more arbitrators. The said arbitrator(s) then examine the matter at hand and make a binding decision on the same. A pre-requisite for weighing the probative value of any arbitral proceeding is the submission of evidence. Strict evidentiary rules that are standard in domestic systems do not apply to International Arbitration.

Some significant rules to consider while dealing with the admissibility of evidence in International Arbitration are the International Bar Association Arbitration Rules (hereinafter referred to as the IBA Rules), the United Nations Commission on International Trade Law Arbitration Rules (hereinafter referred to as UNCITRAL Arbitration Rules) and the International Center for Settlement of Investment Disputes Arbitration rules (hereinafter referred to as ICSID Arbitration Rules). The Pandemic has necessitated an increased reliance on digital technology. An increase in data protection regulations worldwide motivated a revision in the Rules on Taking of Evidence in International Arbitration (hereinafter referred to as 2020 IBA Rules). Of late, the admissibility of unlawfully obtained evidence has been a pre-eminently contentious issue within International Arbitration. Illegal evidence can take various forms, including but not limited to illicit or felonious recordings, information obtained by trespass, and 'hacked evidence.'[1]

[1] Guillermo Garcia–Perrote, 'Admissibility of 'Hacked Evidence' in International Arbitration' *(Kluwer Arbitration Blog,* 7 July 2021)<http://arbitrationblog.kluwerarbitration.com/2021/07/07/admissibility-of-hacked-evidence-in-international-arbitration/> accessed 12 December 2021

In the United States, unlawfully procured evidence is generally considered invalid and impermissible due to the exclusionary principle and the 'fruits of the poisonous tree doctrine. The exclusionary rule provides that a judge may exclude incriminating evidence from a criminal trial if there is proof of police misconduct while obtaining the evidence. The doctrine of the "fruits of the poisonous tree" holds that the evidence (fruit) from an illegal search or seizure, which is a tainted source (the tree), would also be corrupted and hence, inadmissible.[2] In the landmark case of *Boyd v. the United States*[3], the United States Supreme Court observed that obtaining evidence through illegal search and seizure interferes unreasonably with the right to privacy and thus, violates the Fourth Amendment Rights.

However, cases such as *Lefkowitz v United States Attorney*[4], *Nix v Williams*[5], and *United States v Leon*[6] highlight the exclusionary rule exceptions. These cases respectively held that the exclusionary rule could not be applied if: (a) a private individual retrieves the evidence instead of an officer of the law, (b) an illegal search leads to an inevitable discovery of evidence, and (c) an officer of law conducts a bona fide search, and subsequently the warrant is found to be illegitimate. In the United Kingdom, although obtained through illegal means, a piece of evidence is considered permissible if it is relevant to a particular case. The exclusion of such an unlawfully obtained piece of evidence is left at the discretion of the courts. The courts may exclude such evidence if it accords unfairness to the proceedings, known as the 'Unfair Operation Principle.'[7]The rule of Unfair Operation was systematically codified at a later point in time. The said rule grants an authority to the courts to exclude the evidence under section 78 of the Police and Criminal Evidence Act 1984(PACE)[8]. The rule

[2] Bharat Chugh & Taahaa Khan, 'Rethinking the 'Fruits of the Poisonous Tree' doctrine: Should the 'end' justify the 'means'?'*( SCC Online*, 15 June 2020) <https://www.scconline.com/blog/post/2020/06/15/rethinking-the-fruits-of-the-poisonous-tree-doctrine-should-the-ends-justify-the-means/> accessed 12 December 2021
[3]*Boyd and Ors. v United States* 116 U.S. 616 [1886]
[4] *Lefkowitz v United States Attorney* 52 F.2d [2d Cir. 1931]
[5] *Nix v Williams* 467 U.S. 431 [1984]
[6] *United States v Leon* 468 U.S. 897 [1984]
[7]*Kuruma v Queen* [1955] AC 197 (U.K.)
[8] Police and Criminal Evidence Ac, 1984, s 78

explicitly disallows the evidence if it negatively influences the notion of fairness of the proceedings.[9]

The Indian jurisprudence focuses majorly on the relevance of a given piece of evidence. In the landmark cases of *Natwarlal DamodardasSoni*[10], *R.M. Malkani*[11], and *Pooran Mal*[12], the Indian Judiciary has summarily observed that no constitutional or statutory provision provides for exclusion of unlawfully obtained evidence if the evidence is relevant to the matter. However, such evidence's value shall be dealt with with care and caution by the courts. The conviction of any accused cannot be upheld if the evidence is obtained by violating the procedural statutory right of the accused.[13] In the landmark case of *K.S. Puttaswamy,* the Supreme Court of India confirmed that the right to privacy is a natural, inalienable, and fundamental right. It safeguards an individual from the unreasonable inspection by the State in their home, of their movements, etc.[14]The right to privacy incorporates that one's data may be reasonably protected against wrongful and excessive intrusion by the State. It can be logically inferred that there exists a right against unreasonable search and seizure. Consequently, any evidence procured through broadly illegal means should ideally be considered inadmissible. It is to be noted that there is no express legislation in India dealing with privacy or unlawfully obtained evidence. Therefore, much is left at the court's discretion in most cases.

In Canada, the courts follow a discretionary rule while dealing with unlawfully obtained evidence. In *R. v Collins*[15], the Canadian Supreme Court observed that utilizing any form of evidence that violates rights enshrined in the Charter of Human Rights should be considered as an impediment to a fair trial and thus, should be rendered invalid. However, a mere

[9] Siddharth Shukla, 'Is unlawfully obtained evidence admissible under Indian Laws? A comparative analysis of unlawfully obtained evidence'(*Ipleaders*, 27 September 2018) <https://blog.ipleaders.in/exclusionary-rule-unlawfully-obtained-evidence/> accessed 13 December 2021

[10] *State of Maharashtra v Natwarlal DamodardasSoni* [1980] 4 SCC 669

[11] *R.M. Malkani v State of Maharashtra* AIR 1973, SC 157

[12] *Pooran Mal, etc. v Director of Inspection (Investigation) of Income Tax* AIR 1974, SC 348

[13] Khagesh Gautam, 'The Unfair Operation Principle and the Exclusionary Rule: On the Admissibility of Unlawfully Obtained Evidence in Criminal Trial in India', 27(2) Indiana International & Comperative Law Review 163-164 [2017]

[14] Trilegal, 'Supreme Court declares Right to Privacy as a Fundamental Right'(*Mondaq*, 31 August, 2017), <https://www.mondaq.com/india/privacy-protection/625192/supreme-court-declares-right-to-privacy-a-fundamental-right> accessed 14 December 2021

[15] *R. v Collins* [1987] 1 S.C.R 660 [Can]

misdemeanor by the officer(s) of law cannot automatically invalidate an unlawfully obtained piece of evidence. Thus, it is evident that there is no uniform set of guidelines across jurisdictions to deal with unlawfully obtained evidence. As it happens, norms permitting and restraining the overly zealous collection of evidence for judicial purposes are under continuing stress. In the international legal realm, compulsory sanctioned and codified formulae for acquiring necessary evidence do not exist.[16] The field of International Arbitration lacks a thorough and exhaustive set of rules to regulate the admissibility of unlawfully obtained evidence (hereinafter referred to as UOE). However, the UOEs are not automatically rejected across jurisdictions just on the grounds of their origin. It can be hypothesized that concerned authorities have considerable scope to frame standard guidelines and tests for admissibility of unlawfully obtained evidence in International Arbitration.

In Part II of this article, the author makes a detailed examination of the relevant provisions within the IBA, UNCITRAL, and ICSID Arbitration Rules with an aim to recognize the general treatment of unlawfully obtained evidence in International Arbitration. Further, the author touches upon the relevance of the 'Fruits of the Poisonous Tree' doctrine and test of relevancy and materiality in International Arbitration vis-à-vis UOE. In this part, the author additionally provides a detailed analysis of a few landmark legal precedents dealing with the admissibility of UOE. In Part III, the author recommends a few approaches that the Tribunals may consider while dealing with the issue of admissibility of UOE. The author intends that the mentioned approaches provide a foundation for the Tribunals and relevant authorities to build a structured and uniform system. In Part IV, the author concludes the article after considering all the points of analysis.

## THE STAND OF INTERNATIONAL ARBITRATION RULES AND LEGAL PRECEDENTS ON THE ADMISSIBILITY OF UOE

[16] W. Michael Reisman & Eric E. Freedman, 'The Plaintiff's Dilemma: Unlawfully Obtained Evidence and Admissibility in International Adjudication'(*JSTOR*)<https://www.jstor.org/stable/2201551> 14 December 2021

In the international scenario, the proceedings may differ according to the legal background of the participants. There is no rigid set of regulations or guidelines for governing the admissibility factor of evidence. Arbitral Tribunals often apply international standards for determining the admissibility and weight of the submitted evidence. Such measures are then outlined in arbitration treaties, model laws, institutional rules, etc. The parties to International Arbitration have been given adequate freedom for submitting all and any reliable pieces of evidence to support a concerning matter. The Arbitral Tribunals exercise complete discretion vis-à-vis admissibility and evaluation of such evidence(s).[17] Thus, the Tribunals have the authority to declare a given piece of evidence as 'illegally procured', given the existence of reasonable circumstances for such declaration.[18]

**THE REVISED IBA RULES 2020**

The IBA Rules were introduced with an objective to systematically organize some of the best practices for admitting evidence in the proceedings of International Arbitration. Such practices have been influenced significantly by existing and upcoming trends in civil and common law jurisdictions. Consequently, they have become almost ubiquitous in their use by parties and arbitral tribunals.[19] Article 9 of the IBA rules 2010 dealt with the admissibility, assessment, and overall validation of a given piece of evidence within arbitration proceedings. The IBA authorizes the Arbitral Tribunals to exercise their discretion to determine the evidence's admissibility, relevance, materiality, and weight.[20] The 2010 rules also provided that the Tribunal can, on its motion or through a party's request, exclude evidence if such evidence is irrelevant, legal impediment, politically or institutionally

[17] Cherie Blair &EmaVidakGojkovic, 'Wikileaks and Beyond: Discerning an International Standard for Admissibility of Unlawfully Obtained Evidence'(*Research Gate,* February 2008) <https://www.researchgate.net/publication/327368584_WikiLeaks_and_Beyond_Discerning_an_International_Standard_for_the_Admissibility_of_Illegally_Obtained_Evidence> accessed 14 December 2021

[18] *Ibid*

[19] Duncan Gorst & Stephanie Tutt, '2020 Revision of the IBA Rules on the taking of the evidence in International Arbitration'(*Kluwer Arbitration Blog*, 28 March 2021) <http://arbitrationblog.kluwerarbitration.com/2021/03/28/2020-revision-of-the-iba-rules-on-the-taking-of-evidence-in-international-arbitration/> accessed 15 December 2021

[20] International Bar Association Arbitration Rules, art. 9, cl. 1<https://www.ibanet.org/MediaHandler?id=68336C49-4106-46BF-A1C6-A8F0880444DC> accessed 16 December 2021

sensitive, etc.[21] The revised 2020 rules shed some light upon the circumstances of inadmissibility of evidence. The addition of Article 9.3 to the IBA Rules on Taking of Evidence in International Arbitration (2020) has expressly affirmed that the Tribunal, at the request of a party or on its motion, may exclude evidence obtained unlawfully.[22]

The revised IBA Rules have introduced a consultation on cybersecurity and data protection issues. This means that the talks in evidentiary matters between the Arbitral Tribunal and the parties may address the scope, timing, and manner of the taking of evidence, including now, among other things, the treatment of any issues of cybersecurity and data protection to the extent applicable {Article 2.2(e)}.[23] Article 8.2 of the revised rules additionally provides that the Arbitral Tribunal, at the request of a Party or on its motion and on the existence of reasonable circumstances, may order that the evidentiary hearing be conducted as a Remote Hearing.[24] A Remote Hearing Protocol may be established through collaboration between the Tribunal and the concerned parties. This shall further aid to organize the hearing efficiently, fairly, and without unintended interruptions.[25]

These revised provisions indicate that the 2020 IBA rules have given ample consideration to the ongoing COVID-19 Pandemic and the consequent developments. The rules have considered the critical issue of data and information protection. They aim to be dynamic by giving parties more freedom to select and adopt the best practice

---

[21] International Bar Association Arbitration Rules, art. 9, cl. 2, <*https://www.ibanet.org/MediaHandler?id=68336C49-4106-46BF-A1C6-A8F0880444DC*> accessed 16 December 2021

[22] Natalia Zuleta, 'Changes to the 2020 IBA Rules on the Taking of Evidence in the International Arbitration: Modernizing the Rules for a Digital Age'(*Sidely*, 26 April 2021) <https://www.sidley.com/en/insights/publications/2021/04/changes-to-the-2020-iba-rules-on-the-taking-of-evidence-in-international-arbitration> accessed 16 December 2021

[23] Dr. StylianiAmpatzi, '2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration'(*Clyde & Co.*, 16 June 2021) <https://www.clydeco.com/en/insights/2021/06/2020-revision-of-the-iba-rules-on-the-taking-of-ev> accessed 17 December 2021; See also 'Revised 2020 IBA Rules on Taking Evidence in International Arbitration'*(Aceris Law LLP,* 14 March, 2021)<*https://www.acerislaw.com/revised-2020-iba-rules-on-taking-evidence-in-international-arbitration/*> accessed 17 December 2021

[24] Mr. Antolin Fernandez Antuna, 'Evidence in Investor-State Arbitration'(*Jus Mundi,* 19 November 2021)<https://jusmundi.com/en/document/wiki/en-evidence-in-investor-state-arbitration> accessed 17 December 2021

[25] International Bar Association Arbitration Rules, art. 8, cl. 2,<*https://www.ibanet.org/MediaHandler?id=3E6FF222-61EB-4ED6-9A3D-67D642629539*>accessed 18 December 2021

as per their situations. The 2020 revised rules acknowledge the differences in jurisdictional positions regarding the admissibility of unlawfully obtained evidence. They do not specify the criteria for determining a piece of evidence as 'unlawfully obtained.' They correctly imply that there is no uniform civil or criminal standard for determining whether illegality has occurred while obtaining the evidence. Thus, the revised rules are flexible enough to accommodate parties from diverse legal backgrounds and jurisdictions.

## THE UNCITRAL RULES 2013

The UNCITRAL Model Law states that Arbitral Tribunal's powers include determining any given evidence's admissibility, relevance, weight, and materiality.[26] The UNCITRAL Arbitration Rules enunciate that the parties may be required to produce documents, exhibits, or other evidence within a stipulated period set by the Arbitral Tribunal.[27] The rules further authorize the Arbitral Tribunals to determine the admissibility, relevance, aptness, and leverage of the exhibited evidence.[28]Thus, we see broad discretionary powers accorded to the Tribunals for admitting evidence. These rules imply that the Tribunals have enough flexibility to consider even unlawfully obtained evidence as admissible. In actual proceedings, the Arbitral Tribunals rarely exclude evidence on the grounds of inadmissibility.[29]When it comes to analyzing evidence, the Tribunals tend to focus on a party's right to be heard. The defects in the evidence are usually accounted for while assessing its cogency, leverage, and value. The focus on the pronouncements on admissibility is comparatively less.

## THE ICSID ARBITRATION RULES 2006

---

[26] Cherie Blair &EmaVidak Gojkovic, (n 16)

[27] Uncitral Rules on Transparency in Treaty-based Investor-State Arbitration, art. 27, cl. 3,<https://www.acerislaw.com/wp-content/uploads/2018/08/2013-UNCITRAL-Arbitration-Rules.pdf> accessed 18 December 2021 ; See also Jessica Ericson, 'Bespoke Discovery', 71 (6) Vanderbilt Law Review 1873 [2018]

[28] UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, art. 27, cl. 4, <*https://www.acerislaw.com/wp-content/uploads/2018/08/2013-UNCITRAL-Arbitration-Rules.pdf*> accessed 18 December 2021

[29] Cherie Blair &EmaVidakGojkovic (n 16)

The ICSID Rules accord broad powers to the Arbitration Tribunal. The Tribunal may call upon the parties to produce documents, witnesses, and experts at any stage.[30] The ICSID provides that the Tribunals shall have the discretion to gauge the pertinence of any evidence adduced and measure its corroborative value.[31] Simply put, the Tribunal shall be the judge of its competence.[32] The focus is on preserving the respective rights of the parties. For that purpose, the Tribunal has been accorded with the power of recommending any provisional measures.

## LANDMARK LEGAL PRECEDENTS

As is evident from the analytical overview of the International Arbitration Rules, the model laws, and the institutional rules do not address an actual situation or standard of unlawfully obtained evidence. They emphasize more on broad permissive admissibility powers. Notwithstanding the broad discretionary powers granted to the Tribunals by the model rules and laws, the Tribunals must act fairly and impartially. The allegations of duties of good faith may arise.[33] The admissibility of UOE often sparks up a debate on the grounds of the 'Fruits of the Poisonous Tree' Doctrine. The crux of this doctrine enunciates that if the foundation or source of the evidence adduced, i.e., the tree, is flawed, then the same flaw exists in everything obtained from it, i.e., the fruit.[34]The term was first used in the case of *Nardone v the United States [308 U.S. 338 (1939)]*, wherein it was held that evidence obtained by wiretapping was inadmissible as it violated the protection granted by the Fourth

[30] ICSID Additional Facility Arbitration Rules, art. 43, cl. 1, <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> accessed 19 December 2021; See also 'Evidence – ICSID Convention Arbitration'(*ICSID*, 15 December 2021) <https://icsid.worldbank.org/services/arbitration/convention/process/evidence> accessed 19 December 2021

[31] William Ahern & Dr. Kabir Duggal, 'Admissibility (Evidence)'(*Jus Mundi*, 10 December 2021) <https://jusmundi.com/en/document/wiki/en-admissibility-evidence> accessed 19 December 2021

[32] ICSID Additional Facility Arbitration Rules, art. 41, cl. 1, <https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf> accessed 19 December 2021

[33] Peter Ashford, 'The Admissibility of Unlawfully Obtained Evidence'(*Fox Williams,* 15 December 2021) <https://www.foxwilliams.com/uploadedFiles/Unlawfully%20Obtained%20Evidence.pdf> accessed 20 December 2021

[34] Utkarsh Jha, 'The Doctrine of 'Fruit of the Poisonous Tree' and its implementation in India'(*Indian Review Of Advanced Legal Research,* 17 March 2021)<https://www.iralr.in/post/the-doctrine-of-fruit-of-the-poisonous-tree-and-its-implementation-in-india> accessed 20 December 2021

Amendment to the U.S. Constitution, that guarantees a right to privacy.[35] The general objective behind the doctrine is to prevent the officers of law from violating the constitutionally-guaranteed right of life and that of personal liberty. However, it must be noted that this doctrine is not uniformly applied across jurisdictions. Therefore, in cases of International Arbitration, this doctrine does not have a binding effect on UOEs.

In most cases, an illegal piece of evidence is obtained without the consent of the other party. Many arbitral institutions apply the test of relevance and materiality to endorse the admission of evidence. In a nutshell, the adduced evidence is relevant in case it is helpful to prove a fact from which a reasonable legal conclusion can be unsheathed. The same evidence is considered as material if the information is needed for an absolute contemplation of legal issues that are relevant to the case.[36] In case the party adducing the information has obtained the same in an illegal manner, the test of relevancy and materiality may be exempted.[37] This exemption is rooted in the 'Fruits of the Poisonous Tree' Doctrine. It follows a fundamental notion that a right cannot originate from a wrong, and no one ought to reap the benefits of one's wrongdoings.[38]

**Following are some landmark case laws related to the admissibility of UOE:-**

***Methanex Corporation v the United States of America*** - Methanex Corporation case was an investment-related dispute between the United States and Canada-based Methanex Corp. The latter is a leading manufacturer of methanol which is a crucial component of MTBE (methyl tertiary butyl ether) and is used to augment oxygen content in unleaded gasoline.[39] The disputed provision was the NAFTA Chapter 11 on investment. In 2002, California

---

[35] Pushkar Deo, 'Applicability of the 'Fruits of the Poisonous Tree' Doctrine under the Arbitration and Conciliation Act, 1996'(*Arbitration And Corporate Law Review*, 27 January 2021), <https://www.arbitrationcorporatelawreview.com/post/applicability-of-the-fruits-of-the-poisonous-tree-doctrine-under-the-arbitration-and-conciliation> accessed 20 December 2021

[36]Devarakonda Venkata Sai Yasaschandra& Siddharth Jain, 'Admissibility of Unlawfully Obtained Evidence: A right from a wrong?'(*RMLNLU Arbitration Law Blog*, 26 August 2019) <https://rmlnluseal.home.blog/2019/08/26/admissibility-of-unlawfully-obtained-evidence-a-right-from-a-wrong/> accessed 21 December 2021

[37]*Ibid*

[38]*Ibid*

[39] Peter Ashford (n 33)

banned MTBE, and Methanex launched its arbitration against the United States. The U.S., during the proceedings, sought the declaration of certain pieces of evidence as inadmissible. The U.S. claimed that those pieces of evidence were adduced through successive acts of trespass by Methanex.[40]

The Tribunal gave its decision in favor of the U.S. The Tribunal reasoned that unlawful use of national intelligence by both parties to spy on each other would be erroneous. The Tribunal further opined – "It would be unfair to allow Methanex to introduce this documentation into these proceedings in violation of its general duty of good faith".[41] The Tribunal observed that Methanex had, through its conduct, violated the basic principles of justice and fairness that are expected out of all concerned parties to an International Arbitration proceeding.[42] In this case, the Tribunal majorly focused on the duty of good faith owed by the parties towards each other. In case a UOE is violating the said duty unreasonably, such evidence may be considered objectionable. Other investment tribunals seem to have followed a similar line of reasoning in subsequent cases. In *EDF v Romania*, the Tribunal excluded an audiotape meant to prove an allegation of corruption, primarily based on a lack of authenticity.[43] The Tribunal emphasized procedural fairness and the general principle of equal treatment for the parties.

**Caratube International Oil Company LLP v The Republic of Kazakhstan –** In 2008, the claimant's five-year oil exploration and production contract were later terminated unilaterally by the Kazakh Ministry of Energy and Mineral Resources and Consolidated Contractors.[44] The claimant (Caratube) argued that the respondent had unlawfully terminated the contract due to political motivations, while the respondent (Kazakhstan)

[40] *Methanex Corporation v the United States of America* [2005] 44 ILM 1345
[41] J.H. Boykin & M. Havalic, 'Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Arbitration'(*Transnational Dispute Management*, 16 October 2014) <https://www.iadclaw.org/assets/1/7/6_Bassiri_Boykin_and_Havalic,_Fruits_of_the_Poisonous_Tree_-Admissibility_of_Unlawfully_Obtained_Evidence.pdf> accessed 21 December 2021
[42] *Ibid*
[43] Sara Mansour Fallah, 'The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals'(*BRILL*, 26 August 2020) <https://brill.com/view/journals/lape/19/2/article-p147_2.xml?language=en> accessed 21 December 2021
[44] *Caratube International Oil Company LLP v the Republic of Kazakhstan* ICSID Case No. ARB/08/12

argued that the said termination resulted due to a material breach.[45] The Tribunal defined expropriation as (i) unreasonable, substantial deprivation of existing rights, (ii) the said deprivation of rights is of a precise duration, and (iii) the said deprivation is caused by a sovereign act of the host state.[46] The claimant had accrued evidence through leaked emails that were published on the website 'KazakhLeaks,' post a cyber-breach of the Kazakh Government's computer network.[47] The Tribunal accepted the non-privileged documents for the proceedings but excluded the privileged leaked documents. The Tribunal did concede that the said documents were material and relevant to the dispute. However, the Tribunal observed that since the records were accessible over a public domain, they could not be categorized as 'confidential'.

It can be seen that evidence obtained in a non-consensual manner is perused with extreme caution by the Tribunals. The reasonable interests of the parties and neutrality in proceedings are of paramount concern. This trend can be seen in some other cases as well. In the case of *Libananco Holdings Co. Limited v Republic of Turkey,* the Tribunal did not specifically categorize the adduced evidence as a UOE. Still, the Tribunal ordered its exclusion for protecting the duty of good faith, procedural fairness, and legal privilege.[48] In the case of *Conoco Phillips v Venezuela*, a powerful argument was for the admissibility of UOE. However, the admissibility was made dependent on the relevance and materiality of the evidence submitted. If the concerned evidence becomes accessible to the public, then admissibility has to be determined on public policy grounds.[49]

---

[45] Mintewab Abebe, 'Kazakhstan held liable for expropriation of Hourani family's investment on second round of ICSID arbitration'(*IISD News*, 21 December 2017) <https://www.iisd.org/itn/en/2017/12/21/kazakhstan-liable-expropriation-hourani-familys-investment-second-round-icsid-arbitration-caratube-international-oil-company-llp-devincci-salah-hourani-icsid-case-arb-13-13/> accessed 22 December 2021

[46]*Ibid.* <https://www.iisd.org/itn/en/2017/12/21/kazakhstan-liable-expropriation-hourani-familys-investment-second-round-icsid-arbitration-caratube-international-oil-company-llp-devincci-salah-hourani-icsid-case-arb-13-13/>

[47]Arjun Chakladar & Aman Kumar Yadav, 'Admissibility of Illegally Obtained Evidence in International Arbitration'(*India Corp Law*, 6 July 2021) <https://indiacorplaw.in/2021/07/admissibility-of-illegally-obtained-evidence-in-international-arbitration.html> accessed 22 December 2021

[48] *Libananco Holdings Co. Limited v Republic of Turkey* ICSID Case No. ARB/06/8

[49] *Conoco Phillips v Venezuela* ICSID Case No. ARB/07/30

**Yukos Shareholders v Russia –** This case was a conjunction of three cases before the Permanent Court of Arbitration (PCA). The majority shareholders of Yukos, an oil and gas company in Russia, alleged that the Russian courts weren't acting in good faith in launching tax evasion criminal proceedings against Yukos. An arbitration case was filed against the Russian Federation under the Energy Charter Treaty (ECT).[50] In this case, the Arbitral Tribunal relied heavily on UOEs that was in the form of confidential diplomatic cables divulged by WikiLeaks. The Yukos awards notably failed to offer a precise and adequate perusal of the admissibility issue of such illegally-adduced evidence. The PCA concluded in a conjunctive case of *Hulley Enterprises* that UOE may be allowed before tribunals that may rely on it, thus expanding the scope of admissibility of UOEs.[51] There exists a common international understanding in favor of the admissibility of UOE. Party autonomy, procedural fairness, and good faith are the significant points of concern in International Arbitration. The parties should not ideally engage in the illegal procurement of evidence. Therefore, a UOE is admissible if it does not violate any concerns mentioned above and is relevant and material to the matter.

## THE WAY FORWARD

It is undisputed that in recent times there has been a measured escalation in cases dealing with the admissibility of cyber attack-generated evidence. However, Arbitral Tribunals across the globe lack consensus among themselves regarding the approach to determine the admissibility of UOE. In some cases, the Tribunals have adopted a strict approach towards UOE to protect procedural integrity and sanctity of dispute resolution. On the other hand, some Tribunals have adopted a much more liberal policy by deciding cases based on the merits of given facts. The digital revolution has resulted in the incorporation of technology into our daily life. The growth in privacy invasions followed as a consequence. The increased dependency on digital technology, courtesy of the COVID-19 Pandemic, has raised individual privacy concerns. There needs to be a uniform method to adjudicate upon UOE without violating any constitutional rights.

[50] *Yukos Shareholders v Russia* PCA Case No. AA 226
[51] Arjun Chakladar & Aman Kumar Yadav (n 47)

To adjudicate issues related to the admissibility of UOE, the Tribunals may entertain the following questions:-

- Whether the evidence submitted is authentic, and has it been tampered with?
- Has the evidence been adduced through an unlawful mode? Is the party who adduces the evidence benefitted by it?
- What are the interests of justice and the public interest vis-à-vis a UOE?

The Arbitral Tribunals should be attentive to the fact of the accuracy of a piece of evidence. Suppose a party has directly indulged in unlawful procurement of evidence. In that case, it should ideally be subjected to the principle of *ex turpi causa non orituractio* (a right cannot stem from a wrong). A party cannot stand to gain from his misdemeanor.

However, if the said piece of evidence reaches the Tribunal through a third, disinterested party, then such a piece of evidence should be admissible, even if unlawfully obtained. In such cases, the relevance and materiality of the said evidence should be examined. The Tribunals should consider and prioritize public interest adequately. The Tribunals need to ensure that while justice is being executed, society becomes more secure. The Tribunals should adequately scrutinize public policy considerations, such as professional privilege, inviolability, etc. Tribunals additionally need to balance the diverse principles and interests. Principles such as the need to discharge the required functionalities fairly and in a way that ensures a manifestly right decision and interests of procedural integrity and equality of arms would all need to be weighed.[52]

## CONCLUSION

The recommendations proposed by the author may not furnish clear-cut answers to the existing loopholes related to the admissibility of UOE; however, they do provide some points of guidance. Due to the lack of clear and uniform rules on the admissibility of UOE, relevant guidance can be taken from the positive attributes of the established and existing legal precedents. The author opines that there is no shortage of false news and propagandizing in

[52] Cherie Blair & EmaVidak Gojkovic (n 16)

today's digitally powered world. Consequently, the Arbitral Tribunals will likely be often called upon to appraise the authenticity and persuasiveness of a piece of evidentiary material before it. While doing so, the Tribunals need to be independent and unbiased to be persuaded and dissuaded by many contributing factors. After analyzing the contemporary trends in International Arbitration, the author concludes that a piece of evidence, courtesy of its procurement by illegal means, may not be generally and innately categorized as 'inadmissible'. The author further concludes that some common policy elements and precedents may guide the Arbitral Tribunals in framing a precise standard test for admitting Unlawfully Obtained Evidence.