Publication forthcoming in Jean Kalicki and Mohamed Abdel Raouf, eds., *Evolution and Adaptation: The Future of International Arbitration*, ICCA Congress Series No. 20 (Kluwer 2019).

Cyber Intrusion as the Guerrilla Tactic: An Appraisal of Historical Challenges in an Age of Technology and Big Data

By Edna Sussman

ABSTRACT

Cyber intrusion and hacking are in the news almost daily with damaging invasions of law firms, corporations, governmental agencies, and political entities. "Security breaches are becoming so prevalent that there is a new mantra in cybersecurity today: 'It's when not if,' a law firm or other entity will suffer a breach." While guerrilla tactics in arbitration such as fabricated or illegally obtained evidence are not new, cyber intrusion requires a review of pertinent issues that might arise in the course of a proceeding where fabricated or illegally obtained evidence is made possible by virtue of cyber intrusion. This article seeks to flag for further analysis: (a) the issues that may arise and that may require consideration by arbitrators in instances in which evidence is introduced at the hearing which is, or is claimed to be, hacked or fabricated through cyber manipulation; (b) unconscious influences that can impact decisions where such evidence is an issue; and (c) the arbitrator's duties when confronted with such evidence. The discussion will provide an overview of the admissibility of illegally obtained documents, authentication of documents, sanctions, the psychological impact on decision-making of inadmissible evidence, the influence of one's native legal culture on decision-making and the arbitrator's duty to report.

"There is a new mantra in cybersecurity today, *"it's when not if."*[1]

INTRODUCTION

Cyber intrusion and hacking are in the news almost daily with damaging invasions of law firms, corporations, governmental agencies, and political entities. "Security breaches are becoming so

[1] David Reis, *ABA Tech Report 2017*, A.B.A., https://www.americanbar.org/groups/law_practice/publications/techreport/2017/security.html (last visited May 23, 2018).

prevalent that there is a new mantra in cybersecurity today: 'It's when not if,' a law firm or other entity will suffer a breach."[2] Those who monitor IT systems report dozens of attempted attacks on a daily basis. Arbitration participants have not been immune.[3]

At the ICCA Conference in 2018, a consultation draft of the Cybersecurity Protocol For International Arbitration was circulated for comment.[4] The Protocol is "intended to encourage participants in international arbitration to become more aware of cybersecurity risks in arbitration and to provide guidance that will facilitate collaboration in individual matters about the cybersecurity measures that should reasonably be taken, in light of those risks and the individualized circumstances of the case to protect information exchange and the arbitral process."[5] It is hoped that adherence to the Protocols coupled with adherence to practical guidance on how to protect against cyber intrusion[6] will diminish the number of incidents in international arbitration.

---

[2] *Id.*

[3] *See*, *e.g.*, Allison Ross, *Cybersecurity and Confidentiality Shocks for the PCA,* GLOB. ARB. REV. (Jul. 23, 2015), https://globalarbitrationreview.com/article/1034637/cybersecurity-and-confidentiality-shocks-for-the-pca (reporting on an attempted hack of the PCA website during the hearing of the maritime border dispute between the Philippines and China); Zachary Zagger, *Hackers Target Anti-Doping, Appeals Bodies Amid Olympics*, LAW360.COM (Aug. 12, 2016, 5:00 PM) https://www.law360.com/articles/827962/hackers-target-anti-doping-appeals-bodies-amid-olympics (A group of hackers attempted to infiltrate the website of the Court of Arbitration for Sports during the Rio Olympic Games.).

[4] *Cybersecurity in International Arbitration ICCA-NYC Bar-CPR Working Group*, ARBITRATION-ICCA.ORG, http://www.arbitration-icca.org/projects/Cybersecurity-in-International-Arbitration.html (last visited May 23, 2018).

[5] *Draft Cybersecurity Protocol for International Arbitration – Consultation Draft*, ICCA-NYC Bar-CPR, http://www.arbitration-icca.org/media/10/43322709923070/draft_cybersecurity_protocol_final_10_april.pdf at p.5 (last visited May 23, 2018).

[6] Following are some of the currently available sources that address cybersecurity measures, but technology is constantly evolving and hackers are increasingly sophisticated and developing new cyber weapons. Thus, keeping up to date on the latest guidance is essential. *See*, *e.g.*, Stephanie Cohen & Mark Morril, *A Call to Cyber Arms: the International Arbitrators Duty to Avoid Digital Intrusion*, 40 FORDHAM INT'L. L. J., 981, 1012–1018 (2017); Jill D. RHODES & ROBERT S. LITT, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS (2d ed. 2018); ARBITRATION IN THE DIGITAL AGE: THE BRAVE NEW

While guerrilla tactics such as fabricated or illegally obtained evidence are not new, cyber intrusion requires a review of pertinent issues that might arise where fabricated or illegally obtained evidence is made possible by virtue of cyber intrusion. This article seeks to flag for further analysis: (a) the issues that may arise and that may require consideration by arbitrators in instances in which evidence is introduced at the hearing which is, or is claimed to be, hacked or fabricated through cyber manipulation; (b) unconscious influences that can impact decisions where such evidence is an issue; and (c) the arbitrator's duties when confronted with such evidence. The discussion will provide an overview of the admissibility of illegally obtained documents, authentication of documents, sanctions, the psychological impact on decision-making of inadmissible evidence, the influence of one's native legal culture on decision-making and the arbitrator's duty to report.

Admissibility

Arbitrators have broad discretion in dealing with evidence. They may admit or reject evidence and have full discretion in evaluating and weighing the evidence in determining what weight, if any, the evidence should be given. Article 19(2) of the UNCITRAL Model Law on International Commercial Arbitration provides that "[t]he power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence." National laws governing the arbitration provide similar powers to the arbitrators.[7]

The IBA rules and various institutional rules grant broad discretion to the arbitral tribunal in the taking of evidence. Article 9(1) of the 2010 IBA Rules on the Taking of Evidence in International Arbitration provides that "[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence." Article 20(6) of the 2014 ICDR International Arbitration Rules provides that "[t]he tribunal shall determine the admissibility, relevance, materiality and weight of the evidence." Rule 34(a) of the 2013 AAA Commercial Arbitration Rules provides that "[C]onformity to legal rules of evidence shall not be necessary." Rule 22.1(vi) of the 2014 LCIA Arbitration Rules provide that the tribunal "shall have the power … to

---

WORLD OF ARBITRATION (Maud Piers & Christian Aschauer eds., 2018); ARIAS•U.S, PRACTICAL GUIDE FOR INFORMATION SECURITY IN ARBITRATION (2017), https://www.arias-us.org/wp-content/uploads/2017/08/ARIAS-US-Practical-Guide-for-Information-Security-in-Arbitration_6.6.17.pdf; PHILIP DOYLE GRAY, THE PILLARS OF DIGITAL SECURITY: HOW TO ETHICALLY USE TECHNOLOGY IN LEGAL PRACTICE (2017).

[7] *See*, GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2d ed. 2014) § 15.09(A) (citing the U.S. Revised Uniform Arbitration Act; the English Arbitration Act; the French Code of Civil Procedure; German ZPO; Austrian ZPOO; Hong Kong Arbitration Ordinance; Japanese Arbitration Law; Korean Arbitration Act; and Costa Rica Arbitration law).

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 …."

The courts recognize the discretion afforded to arbitrators, and consistent with the deference courts generally give arbitral decisions, courts have confirmed that arbitral tribunals are not bound by domestic rules of evidence.[8] "In practice, international arbitral tribunals typically do not apply strict rules of evidence, particularly rules of evidence applicable in domestic litigations."[9]

Given this wide discretion and the binding nature of arbitral awards, tribunals generally admit evidence to avoid risking vacatur for failure to provide a full and fair opportunity to present the case, and then consider its credibility, weight and value.[10] However, on a proper showing evidence may be excluded by the arbitral tribunal. Where it is demonstrated that evidence has been obtained illegally the arbitral tribunal is faced with a difficult choice. With the prevalence of cyber intrusions in today's world, it is inevitable that tribunals will be increasingly required to address the question of whether or not they should admit illegally obtained evidence. Reporting on a dispute before a federal court in New York, an aptly named article in The Wall Street Journal was titled "Hackers for Hire are Easy to Find."[11] As described, hundreds of personal emails of a Kuwaiti billionaire were posted online and available to all. It was reported that the cost for the hackers was $400, demonstrating the low cost and ease with which computer hacking can be accomplished.

However, no clear line of authority has developed to guide tribunals as to how they should treat illegally obtained evidence. Tribunals have arrived at different conclusions on the question.[12]

---

[8] *See*, *e.g.*, Bell Aerospace Co. Div. of Textron, Inc. v. Int'l Union, United Auto., etc., 500 F.2d 921, 923 (2d Cir. 1974) ("In handling evidence an arbitrator need not follow all the niceties observed by the federal courts.").

[9] BORN, *supra* note 7, at 2310.

[10] Edna Sussman, *The Arbitrator Survey – Practices, Preferences and Changes on the Horizon*, 26 AM. REV. INT'L ARB. 517, 521 (2015) (survey results demonstrated that only 11% of arbitrators excluded evidence that would not be admissible under national evidentiary standards more than 75% of the time).

[11] Cassell Bryan-Low, *Hackers for Hire Are Easy to Find*, THE WALL STREET JOURNAL (Jan. 23, 2012), https://www.wsj.com/articles/SB10001424052970203471004577145140543496380.

[12] *See generally*, Cherie Blair & Ema Vidak Gojković, *WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence*, 22(1) ICSID Rev. – For. Inv. L. J. 1 (2018); J. H. Boykin & M. Havalic, *Fruits of the Poisonous Tree: The*

The *Corfu Channel* case, heard before the International Court of Justice between 1947 and 1949 was an early instance in which the tribunal dealt with illegally obtained evidence.[13] The United Kingdom in violation of Albania's sovereignty conducted a mine sweeping operation in Albanian waters to find evidence in support of its case that Albania had failed to give warning to the United Kingdom about mines in the channel as was required by international law, which caused several British warships to be struck by submerged mines. While the court found that the United Kingdom's actions were unlawful, the court did not exclude the evidence and did not apply any material sanctions against the United Kingdom.

Taking a different position in the prominent arbitration decision in *Methanex v. United States* (*Methanex*), long before WikiLeaks, the tribunal declined to admit the wrongfully obtained evidence.[14] Methanex attempted to rely on documents obtained by going through wastepaper and rubbish in support of its position. The tribunal stressed the general duty of good faith and the fundamental principles of justice and fairness:

> "[I]t would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of its general duty of good faith and, moreover, that Methanex's conduct, committed during these arbitration proceedings, offended basic principles of justice and fairness required of all parties in every international arbitration."[15]

The *Methanex* tribunal, however, also considered the question of materiality of the evidence and concluded that it was only of "marginal evidential significance."[16]

In the well-known Yukos award which granted $50 billion in damages, the tribunal relied extensively on confidential diplomatic cables from the United States Department of State that

---

Admissibility of Unlawfully Obtained Evidence in International Arbitration, 5 TRANSNAT'L DISP. MGMT. J. (2015); Jessica O. Ireton, *The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of Wikileaks Cables as Evidence*, 30(1) ICSID REV. – FOR. INV. L. J. 231 (2015).

[13] Corfu Channel (Merits) (U.K. v. Alb.), 1949 I.C.J. Rep. 4 (Apr. 9).

[14] NAFTA Chapter Eleven Arbitral Tribunal: Methanex Corporation v. United States of America, Final Award on Jurisdiction and Merits - August 3, 2005 - Text of Decision, 44 I.L.M. 1345 (2005).

[15] *Id.*, at ¶ 59.

[16] *Id.*, at ¶ 56.

had been illegally obtained and published on WikiLeaks.[17] The tribunal specifically referenced the views expressed by officials in the U.S. Embassy's cables published by WikiLeaks in support of its decision stating that the cables revealed the "candid" and "unguarded" views of PwC's senior management, an important issue in the case.[18] The tribunal provided no analysis of whether evidence illegally obtained should be admitted.

In *Libananco v. Turkey* (*Libananco*),[19] while the arbitration was in progress, Turkish authorities were intercepting electronic communications, including between Libananco and its legal counsel, and obtained 2,000 legally privileged and confidential emails. Turkey maintained that the surveillance activities had nothing to do with the arbitration and the files intercepted were not shared with the department that was handling the arbitration. The tribunal referenced as having been affected: basic procedural fairness, respect for confidentiality and legal privilege, the right of parties to advance their respective cases freely and without interference, and respect for the tribunal itself. The tribunal expressed the principle that "[p]arties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with."[20] The tribunal directed that any document which had been intercepted which related to the arbitration be destroyed and held that any privileged documents or information which may be introduced in the future, as well as any evidence derived from possession of such documents or information, would be excluded from evidence.

In *Caratube v. Kazakhstan*,[21] Caratube attempted to introduce 11 documents that had been made publicly available on the Internet as a consequence of a hacking of Kazakhstan government's IT

---

[17] Hulley Enters. Ltd. (Cyprus) v. Russian Fed'n, PCA Case No. AA 226, Final Award, 1185–86 (Jul. 18, 2014) [hereinafter Hulley]. The District Court of The Hague quashed the final award from Hulley on other grounds on April 20, 2016. *See* Rechtbank Den Haag, Pronunciations, DE RECHTSPRAAK (Apr. 20, 2016) http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2016:4230 [https://perma.cc/4RHA-YHZ5]. As of this writing the appeal is pending.

[18] Hulley, *supra* note 17, at 1189.

[19] Libananco Holdings Co. Ltd. v. Republic of Turkey, ICSID Case No. ARB/06/8, Decision on Preliminary Issues (Jun. 23, 2008) [hereinafter Libananco].

[20] *Id.*, at ¶ 78.

[21] Caratube Int'l Oil Co. LLP & Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Award of the Tribunal, ¶¶ 150–166 (Sep. 27, 2017) [hereinafter Caratube] (summary of the decision on the claimants' request for the production of "leaked documents"). *See also,* Alison Ross, *Tribunal Rules on Admissibility of Hacked Kazakh Emails*, GLOB. ARB.

system. Hackers had uploaded about 60,000 documents onto a website known as "Kazakhleaks." The tribunal allowed the admission of all non-privileged leaked documents but excluded from the record all illegally leaked privileged documents finding that the tribunal must afford privileged documents the utmost protection.[22]

The application for reconsideration of an interim decision in *Conoco Phillips v. Venezuela* provides an example of the potential for flashpoints between the search for truth and other values.[23] Venezuela, in an application for reconsideration of an interim decision, relied on U.S. Embassy cables made available on WikiLeaks which showed that Venezuela had attempted to negotiate in good faith with the claimant, Conoco Phillips, including about compensation for the expropriation and which directly contradicted previous factual findings of the tribunal. The challenge was rejected based on the tribunal's analysis of the right to reconsider a prior decision under the ICSID rules, concluding that its prior decision had *res judicata* effect and could not be reconsidered. In a strong dissent Professor George Abi-Saab, concluding that the revelations of the WikiLeaks cables, which he found to be reliable, radically contradicted the factual analysis of the prior decision, stated:

> "In the circumstances, I don't think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of seeking the truth and dispensing justice according to the law on that basis, can pass over such evidence, close its blinkers and proceed to build on its now severely contestable findings, ignoring the existence and the relevance of such glaring evidence.
>
> It would be shutting itself off by an epistemic closure into a subjective make-believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration, but of the very idea of adjudication."[24]

REV. (Sep. 22, 2015), https://globalarbitrationreview.com/article/1034787/tribunal-rules-on-admissibility-of-hacked-kazakh-emails (discussing the parties' positions and the decision).

[22] Caratube, *supra* note 21, at ¶ 166..

[23] ConocoPhillips Petrozuata, ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration (Mar. 10, 2014).

[24] ConocoPhillips Petrozuata, ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Respondent's Request for Reconsideration – Dissenting Opinion of Georges Abi-Saab, ¶ 66 (Mar. 10, 2014).

That the discretion afforded to arbitrators calls upon them to balance the search for truth and other values is not new. It is just being presented in a new context in our digital world. As William Park said, "Nothing new resides in balancing truth-seeking against values that further public goals rather than adjudicatory precision."[25] As William Park elaborated:

> "Arbitrators are supposed to arrive at some understanding of what actually happened and what legal norms determine the parties' claims and defenses. In finding facts and applying law, arbitrators should aim at getting as near as reasonably possible to a correct view of the events giving rise to the controversy, and to consider legal norms applied in other disputes that raise similar questions.
>
> This does not mean that arbitrators do not balance truth-seeking against other goals. Indeed, they do so all the time, notably in connection with document production (which competes with economy and speed), and attorney-client privilege (which inhibits attempts to get at what corporate officers really knew). However, such balancing of interests does not require abandonment of truth taking as an aspiration."[26]

In short, there are no bright lines that govern the admissibility of illegally obtained evidence, as is the case with many of the instances in which the tribunal is called upon to balance competing values. The decisions appear to emphasize who committed the wrongful act, whether the documents are privileged, and whether the information revealed was material to the decision on the merits.

Cherie Blair and Ema Gojković, in their comprehensive article analyzing the existing jurisprudence, conclude that a trend may be discerned based on existing case law. They posit that the "legal and policy elements which have been taken into account when deciding admissibility of illegally obtained evidence include:[27]

(i) Has the evidence been obtained unlawfully by a party who seeks to benefit from it?

(ii) Does the public interest favour rejecting the evidence as inadmissible?

---

[25] William W. Park, *Truth Seeking in International Arbitration*, in THE SEARCH FOR "TRUTH" IN ARBITRATION: IS FINDING THE TRUTH WHAT DISPUTE RESOLUTION IS ABOUT? 1, 10 (Markus Wirth et al. eds., 2011).

[26] William W. Park, *Arbitrator Integrity: The Transient and the Permanent,* 46 SAN DIEGO L. REV. 629, 695 (2009).

[27] Blair & Gojković, *supra* note 12, at 25. *See also*, Boyken & Havalic, *supra* note 12 (distilling the decisions to provide a roadmap for analysis of admissibility).

(iii)Do the interests of justice favour the admission of evidence?

As decisions continue to explicate the question of admissibility of evidence that is the fruit of a cyber intrusion, other issues and concerns present themselves that bear analysis.

Authentication

While this discussion focuses on emails, similar issues can arise with text messages,[28] Facebook entries and postings on other social media outlets,[29] and evidence from the "internet of things."[30] Litigation positions taken by parties with the ascendance of cyber intrusion are presented in a variety of ways. A party may contend that the documents were "stolen" by hacking into his or her IT system; thus, illegally obtained.[31] That contention raises questions of admissibility discussed above. A party may contend that it no longer has the documents available for production because it was hacked.[32] That contention raises questions of proof as with any assertion that documents no longer exist, although a forensic examination may be required for the production of such proof in the context of digital evidence. Or illegally hacked emails might be posted publicly on WikiLeaks or some other platform on the web that is publicly available.[33]

---

[28] *See* Rena Andoh & James Salem, *Text Messages as Evidence: The Current State of Affairs in New York State Courts*, N.Y.L. J. (Feb. 9, 2018, 3:00 PM), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/02/09/text-messages-as-evidence-the-current-state-of-affairs-in-new-york-state-courts/?slreturn=20180428133423; Sara E. Costello, *Establishing That Text Messages Are Admissible*, A.B.A. (Apr. 1, 2013), http://apps.americanbar.org/litigation/litigationnews/top_stories/040113-text-message-admissible.html; Grimm et al., *infra* note 37, at 19.

[29] *See* Siri Carlson, *When is a Tweet not an Admissible Tweet? Closing the Authentication Gap in the Federal Rules of Evidence*, 164 U. PA. L. REV. 1033 (2016); John G. Browning, *Introducing Social Media Evidence*, 74 THE ADVOC. (TEXAS) 112 (2016); Honorable Paul W. Grimm et al., *Authentication of Social Media Evidence*, 36 AM. J. TRIAL ADVOC. 433 (2013).

[30] Ronald J. Hedges & Kevin F. Ryan, *The Internet of Things: What is it, What can Happen With it, and What can be Done When Something Happens*, N.Y.S. BAR ASS., http://www.nysba.org/Journal/2018/Apr/What_Is_It,_What_Can_Happen_With_It,_and_What_Can_Be_Done_When_Something_Happens/ (last visited May 23, 2018).

[31] *See* discussion on *Caratube v. Kazakhstan* above.

[32] *See*, *e.g.*, Ousterhout v. Zukowski, No. 11 CV 9136, 2016 WL 3675564 (N.D. Ill. Apr. 5, 2016); DeCastro v. Kavadia, 309 F.R.D. 167 (S.D.N.Y. 2015).

[33] *See*, *e.g.*, Republic of Kazakhstan v. Ketebaev, No. 17-CV-00246-LHK, 2017 WL 6539897 (N.D. Cal. Dec. 21, 2017) (describing a hacking of emails of Kazakh government employees,

Again, that raises a question of admissibility discussed above. The party may contend that the emails were fabricated by a hacker and that they did not write it. That contention raises questions of authenticity discussed in this section.

Authentication is not an issue frequently encountered in international arbitration. However, it is likely that with the prevalence of cyber intrusions and the ease with which it seems to be possible to intrude, arbitrators will likely be required to review an increasing number of objections to admissibility based on lack of authenticity.

In the famous case of *Ceglia v. Zuckerberg*,[34] plaintiff, Paul Ceglia, alleged that while he was at Harvard, Facebook's CEO, Mark Zuckerberg, entered into a "work-for-hire" contract pursuant to which the plaintiff helped fund the development of Facebook in exchange for a one-half interest in Facebook. The authenticity of the purported contract and of several related emails was challenged. Given the magnitude of what was at stake, a variety of forensic examination tools were employed, including a review of the metadata, backdating anomalies, formatting anomalies, and a linguistic analysis. Each of these forensic tests is discussed by the court at length in its decision. Based on its conclusion that the purported contract and the emails were not authentic but a recently created fabrications, the court relying on its inherent authority concluded that the case could not go to the jury and dismissed.[35]

In the United States, Rule 902 of the Federal Rules of Civil Procedure was recently amended to provide for self-authentication of digital evidence. A record generated by an electronic process, or system that produces an accurate result and data copied from an electronic device, storage medium, or file if authenticated by a process of digital identification, as shown by a certification of a qualified person is self-authenticating, without the need for a testifying witness.[36] However, as the comments to the new rule note, authenticity does not preclude other grounds for objection and parties remain free to object on other grounds including that the digital evidence was not

---

which were posted on a website and posted on personal Facebook pages and newspaper websites, and included attorney-client communications between Kazakh officials and their attorneys; the case was dismissed for lack of personal jurisdiction).

[34] Ceglia v. Zuckerberg, No. 10-CV-00569-A, 2014 WL 1224574 (W.D.N.Y. Mar. 25, 2014), aff'd, 600 F. App'x 34 (2d Cir. 2015).

[35] *Id.*

[36] Carl A. Aveni, *New Federal Evidence Rules Changes Reflect Modern World*, A.B.A. LITIGATION NEWS (Apr. 23, 2018), https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2018/new-federal-evidence-rule-changes-reflect-modern-world.html.

placed there by them. Thus, while self-authentication does relieve one aspect of proof, it does not, and is not intended to, resolve claims that the computer was hacked and false evidence was introduced.

For arbitrators faced with determining authenticity, a review of factors which had been considered under earlier versions of the U.S. Federal Rules of Evidence to test authenticity may be instructive in determining authenticity. In addition to evidence as to digital hash values and testimony from a forensic witness as to when the email issued and from which device based on the metadata and other features, Hon. Paul W. Grimm, Daniel J. Capra, and Gregory P. Joseph, Esq. identify a variety of circumstantial factors that may be considered and could be useful to arbitrators confronted with this issue.[37]

They conclude that "[w]hile it is true that an email may be sent by anyone who, with a password, gained access to another's email account, similar questions could be raised with traditional documents … The mere fact that hacking, etc., is possible is not enough to exclude an email or any other form of digital evidence …. If the mere possibility of electronic alteration were enough to exclude the evidence, then no digital evidence could ever be authenticated."[38]

Sanctions

The question of what sanctions a tribunal has authority to impose, and when and how sanctions should be imposed has been the subject of extensive discussion in recent years in the wake of the issuance of the 2013 International Bar Association Guidelines on Party Representation in International Arbitration (IBA Guidelines).[39] Various proposals have been made as to who

[37] Hon. Paul W. Grimm et al., *Authenticating Digital Evidence*, 69 BAYLOR L. REV. 1, 9 (2017). *See also,* Hon. Paul W. Grimm, *Authenticating Digital Evidence*, 31(5) GP SOLO – LITIGATION 46 (2014), https://www.americanbar.org/content/dam/aba/publications/gp_solo_magazine/september_october_2014/gpsm_v031n05_14sep_oct.authcheckdam.pdf; Robert Morgester, *Introducing Digital Evidence in California State Courts* (N. AM. & CARIBBEAN CONF., 2016), http://www.iap-association.org/getattachment/Conferences/Regional-Conferences/North-America-and-Caribbean/4th-North-American-and-Caribbean-Conference/Conference-Documentation/4NACC_Jamaica_WS1B_Morgester_CA-Digital-Evidence.pdf.aspx (last visited May 23, 2018).

[38] Grimm et al., *supra* note 37.

[39] INTERNATIONAL BAR ASSOCIATION, IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION (2013) [hereinafter IBA Guidelines].

should be responsible for sanctioning counsels.[40] Guerrilla tactics, including cyber intrusion, bring that issue to the fore.

Tribunals are appropriately concerned about guerrilla tactics, and consideration of remedies beyond the exclusion of evidence may be appropriate in cases of cyber intrusion. As the tribunal stated in *Libananco*:[41] "The Tribunal attributes great importance to privilege and confidentiality, and if instructions have been given with the benefit of improperly obtained privileged or confidential information, severe prejudice may result. If that event arises the Tribunal may consider other remedies available apart from the exclusion of improperly obtained evidence or information."

The IBA Guidelines empower the tribunal to address "misconduct" by a party representative after giving the parties notice and a reasonable opportunity to be heard. Misconduct is broadly defined by the IBA Guidelines to include "breach of the present guidelines, or any other conduct

[40] *See*, *e.g.*, Elliott Geisinger, *"Soft Law" and Hard Questions: ASA's Initiative in the Debate on Counsel Ethics in International Arbitration*, *in* SENSE AND NON-SENSE OF GUIDELINES, RULES AND OTHER PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION, 17 (2015) (proposing a global arbitration ethics council); Tom Jones & Alison Ross, *Mourre Calls for Institutions to Join Forces*, GLOB. ARB. REV. (Mar. 9, 2018), https://globalarbitrationreview.com/article/1166513/mourre-calls-for-institutions-to-join-forces (noting that ASA's proposal did not attract international consensus because important institutions took the view that counsel misconduct is for the arbitrators to deal with, along with the support of the institutions.); Carlos A. Carmona, Considerations on the IBA Guidelines on Party Representation in International Arbitration: A Brazilian Point of View, 1 LES CAHIERS DE L'ARBITRAGE 29, 44 (2014); Felix Dasser, *A Critical Analysis of the IBA Guidelines on Party Representation*, *in* SENSE AND NON-SENSE OF GUIDELINES, RULES AND OTHER PARA-REGULATORY TEXTS IN INTERNATIONAL ARBITRATION 33, 47 (2015); Jarred Pinkston, *The Case for Arbitral Institutions to Play a Role in Mitigating Unethical Conduct by Party Counsel in International Arbitration*, 32 CONN. J. INT'L L. 177, 201 (2017); Vincent S. Dattilo, *Ethics in International Arbitration: A Critical Examination of the LCIA General Guidelines for the Parties' Legal Representatives*, 44 GA. J. INT'L & COMP. L. 637, 645 (2016) (By incorporating ethical standards arbitral rules, the arbitrators themselves would become the enforcers of these rules, therefore, empowered to sanction attorneys for applicable misconduct). *See also*, William W. Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30(3) ARB. INT'L 409 (2014).

[41] Libananco, *supra* note 19, at ¶ 80.

that the arbitral tribunal determines to be contrary to the duties of a party representative."[42] The nature of the "misconduct" intended to be covered has not been established but, certainly, cyber intrusion would fall into that category. The guidelines give the tribunal power to respond and specifically identify admonishing the party representative, drawing inferences, apportioning costs, and taking other "appropriate measures in order to preserve the fairness and integrity of the proceeding." In determining the remedy, the tribunal is to consider the nature and gravity of the misconduct, the good faith of the party representative, the extent to which the party representative knows about or participated in the misconduct, the potential impact of a ruling on the rights of the parties, the need to preserve the integrity and fairness of the arbitral proceedings, and the enforceability of the award.[43] These considerations clearly outline the matters to be considered in deciding whether or not to impose a sanction on a party for cyber intrusions, if it is concluded that the tribunal has authority to do so. Others have added disqualification of counsel, and even in particularly egregious cases, a dismissal of the entire case with prejudice as possible sanctions.[44]

On must start with the question of whether there is authority to impose the sanction. Authority for sanctions might be found in institutional rules, party adoption of the IBA Guidelines, party agreement, and perhaps even the tribunal's inherent power.[45] Much has been written about the

[42] IBA Guidelines, *supra* note 39, at 3.

[43] IBA Guidelines, *supra* note 39, at 16 (Guidelines 26 and 27 on remedies for misconduct). *See also,* Edna Sussman, *Can Counsel Ethics Beat Guerrilla Tactics?: Background and Impact of the New IBA Guidelines on Party Representation in International Arbitration*, N.Y. DISP. RESOL. LAW., Fall 2013, at 47.

[44] *See generally*, Abba Kolo, Witness Intimidation, Tampering, and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal, 26(1) ARB. INT'L 43 (2010).

[45] Pinkston, *supra* note 40; Philip D. O'Neill, *The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse*, DISP. RESOL. J., Nov. 2005–Jan. 2006, at 60 (discussing the different approaches courts have taken to potential sources of authority for this power); Sarah Whittington, *Timor-Leste v. Australia: "Guerrilla Tactics" and Schoolyard Bullies in State Arbitration*, 6 Y.B. ON ARB. & MEDIATION 429, 437 (2014) ("Recent studies of 'guerrilla tactics' in arbitration present divergent views on how to effectively sanction or prevent these actions."); Pedro J. Martinez-Fraga, *Good Faith, Bad Faith, but Not Losing Faith: A Commentary on the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 43 GEO. J. INT'L L. 387, 421 (2012) (discussing inherent authority of arbitrators to impose sanctions).

inherent powers of arbitrators but the scope of the tribunal's inherent power is an unresolved question and a continuing subject of debate.[46]

Drawing negative inferences, often cited and on occasion applied, raises less serious questions about the authority of the tribunal. But depending on the circumstances and the relationship of the inference to the wrongful conduct even that may raise questions of punitive measures in violation of due process and risk vacatur.[47]

The question of whether the tribunal has the power to impose cost sanctions on the parties—and even more questionably, on the counsel—has not been firmly settled.[48] Pierre Mayer opined that "punishing a counsel, or a party through a decision on costs is an abuse of the power to sanction. This is because an arbitrator is not allowed to impose a penalty without a basis in law: '[W]ithout a power specifically conferred either by the law or by the parties ... an arbitrator is not allowed to impose a penalty.'"[49] Others have taken a different view.[50] Yet, others have suggested that the

[46] *See* Margaret L. Moses, *Inherent Powers of Arbitrators to Deal with Ethical Issues*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION, THE FORDHAM PAPERS 93 (Arthur Rovine ed., 2014); Andrea Bjorklund & Jonathan Brosseau, *Sources of Inherent Powers in International Adjudication*, 6(2) EUR. INT'L ARB. J. 1 (2018).; 76 INT'L L. ASS'N REP. CONF. 823–851 (2014) (International Law Association's report on the inherent and implied powers of arbitrators in international commercial arbitration); Martins Paparinskis, *Inherent Powers of ICSID Tribunals: Broad and Rightly So*, in VOLUME 5: INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 9 (Ian A. Laird & Todd J. Weiler eds., 2011);

[47] Park, *supra* note 40, at 422; Menalco J. Solis, *Adverse Inferences in Investor–State Arbitration*, 34(1) ARB. INT'L 79 (2018).

[48] BORN, *supra* note 7, at § 15.10.

[49] *Mayer on Arbitrators' Powers and Limits,* GLOB. ARB. REV. (Oct. 25, 2017), https://globalarbitrationreview.com/article/1149346/mayer-on-arbitrators-powers-and-limits.

[50] Richard Kreindler & Mariel Dimsey, *Sanctioning of Party Conduct Through Costs: A Reconsideration of Scope, Timing and Content of Costs Awards*, *in* THE POWERS AND DUTIES OF AN ARBITRATOR, LIBER AMICORUM PIERRE A. KARRER201 (Patricia Shaughnessy & Sherlin Tung eds., 2d ed. 2017).

power to impose cost sanctions should be more vigorously pursued,[51] as arbitration users have urged.[52] Some courts have confirmed the tribunal's authority to impose costs as a sanction.[53]

Whether or not the tribunal has the authority to disqualify counsel in international arbitration has also not been definitively decided. The historical view has been that arbitral tribunals do not have the power to disqualify or sanction counsel.[54] However, that may be evolving. In a leading case, *Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia*, the tribunal disqualified the counsel brought into the representation shortly before the hearing, which presented a conflict with one of the arbitrators, based on the inherent power of the tribunal to take measures to "preserve the integrity of the proceedings."[55] In a subsequent case, the tribunal in *The Rompetrol Group N.V. v. Romania* declined to disqualify the counsel and, while not deciding the limits of the tribunal's powers, stated that "such powers as may exist would be one to be exercised only rarely, and in compelling circumstances."[56] Given the right of the parties in arbitration to select a representative of their choosing, any power to disqualify counsel will certainly be very sparingly exercised.[57] Some courts have found disqualification to be beyond the powers of an arbitrator.[58]

---

[51] Gunther J. Horvath et al., *Dealing with Guerrilla Tactics at Different Stages of an Arbitration*, *in* GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION 33, 48-50 (Gunther Horvath et al. eds., 2013).

[52] QUEEN MARY UNIV. OF LONDON SCH. OF INT'L ARB., INTERNATIONAL ARBITRATIONS SURVEY: CURRENT AND PREFERRED PRACTICES IN THE ARBITRAL PROCESS 41 (2012) (reporting that according to the survey, an overwhelming majority of respondents believe tribunals should take into account improper conduct by a party or its counsel when allocating costs).

[53] BORN, *supra* note 7, at 2316–17.

[54] CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 135 (2014).

[55] Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia, ICSID ARB/05/24, Tribunal's Ruling Regarding the Participation of David Mildon QC in Further Stages of the Proceeding (May 6, 2008).

[56] The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel (Jan. 14, 2010).

[57] Alan Scott Rau, *Arbitrators Without Powers? Disqualifying Counsel in Arbitral Proceedings*, 30(3) ARB. INT'L, 457, 511 (2014) ("Precisely because of their regulatory spareness, transnational rules will have the virtue of directing the attention of arbitral tribunals to the core of what alone is critical—that is, to what is minimally necessary to ensure the fairness of proceedings.").

[58] Nw. Nat. Ins. Co. v. Insco, Ltd., 866 F. Supp. 2d 214, 217 (S.D.N.Y. 2011).

Courts, however, in appropriate circumstances, have disqualified counsel who have engaged in cyber guerrilla tactics.[59]

The dismissal of the entire case with prejudice as a sanction for guerrilla tactics would be an extreme measure and not likely to be the remedy chosen by a tribunal. Gunther Horvath, Stephan Wilske, and Jeffrey Leng report that no tribunal has done so.[60] Courts have not always been so restrained and have dismissed complaints lodged by parties who have engaged in illegal conduct in the collection of evidence by cyber intrusion.[61]

The impact on decision-making of inadmissible evidence

National laws provide exclusionary evidentiary rules where the prejudicial effect of the evidence outweighs its probative value, where the nature of the evidence has limited reliability and therefore limited probative value, or where policy considerations dictate exclusion as is the case in disincentivizing illegal behavior. While these exclusionary evidentiary rules authorize and, in some cases, require the fact-finder to exclude the evidence, the fact is that the fact-finder has already seen the evidence.

Study after study has established that fact finders cannot ignore inadmissible information and are influenced in their decision-making by that information, even if it has been excluded. As Doron Teichman and Eyal Zamir sum up the literature: "[n]umerous studies have documented the effects of inadmissible evidence in … legal domains, such as hearsay evidence, pretrial media

---

[59] *See*, *e.g.*, Bona Fide Conglomerate, Inc. v. Sourceamerica, No. 314CV00751GPCDHB, 2016 WL 4361808, at *6 (S.D. Cal. Aug. 16, 2016) (where privileged documents were leaked to Wikileaks, the court disqualified the counsel overriding the magistrate's recommendation of the lesser remedy of evidence exclusion, while noting that "an order of disqualification of counsel is a drastic measure, which courts should hesitate to impose except in circumstances of absolute necessity").

[60] Horvath et al., *supra* note 49, at 51-52; Gunther J. Horvath et al., *Lessons to be Learned for International Arbitration*, *in* GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION 278-279 (Gunther Horvath et al. eds., 2013).

[61] *See*, *e.g.*, Leor Expl. & Prod., LLC v. Aguiar, No. 09-60136-CIV, 2010 WL 3782195 (S.D. Fla. Sept. 28, 2010), on reconsideration in part, No. 09-60136-CIV, 2011 WL 4345294 (S.D. Fla. Sept. 15, 2011) (dismissing the case in which the party had engaged in computer hacking relying on the court's inherent power to impose sanctions for bad-faith conduct and finding that no lesser sanction would suffice under the circumstances); Salmeron v. Enter. Recovery Sys., Inc., 579 F.3d 787 (7th Cir. 2009) (dismissing the case as a sanction for the willful leak of documents which were ultimately posted on WikiLeaks).

reports, and illegally obtained evidence. These studies show that inadmissible evidence affects judicial decision-making in civil as well as criminal settings, irrespective of whether that evidence favors the prosecution or the defense. A recent meta-analysis concluded that 'inadmissible evidence produced a significant impact.'" [62]

Illustrative study outcomes include one study which demonstrated that there was a spread in finding liability as between judges who saw inadmissible privileged information damaging to the plaintiff (29% found for plaintiff) as compared to judges who did not see that information (55% found for the plaintiff). There was a spread of 25% in the damages awarded between judges who saw evidence of an unrelated criminal conviction which was suppressed as unduly prejudicial and those who were not informed of the prior criminal conviction.[63] Recognition of unconscious influence is undoubtedly the rationale for not permitting parties to introduce evidence of settlement discussions.

As the courts have found it can be "difficult to 'unring the bell.'"[64]Arbitrators should be sensitive to this unconscious influence and carefully assess the evidence upon which they rely to ensure that it supports their conclusions without reference to excluded evidence. Advocates should be sensitive to the fact that highlighting evidence to urge its exclusion may cause it to make an even deeper impression on the fact finder.

The impact on decision-making of native legal culture

At a recent conference, a well-known arbitrator suggested that looking to the law of one's own jurisdiction is very useful in considering whether the governing law makes sense. Those in attendance were surprised by that comment, but it was perhaps just a conscious recognition of the fact that at an unconscious level one's own legal culture, whether native or the one in which an individual has predominantly practiced, may influence one's analysis and decision.

Supporting this conclusion Joshua Karton found in his study of the evolution of contract law in arbitration, that tribunals considered extrinsic evidence where they were charged with applying the law of a common law jurisdiction even though the law of that jurisdiction would have

---

[62] Doron Teichman et al., *Judicial Decision-Making: A Behavioral Perspective*, *in* OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 1, 9 (Eyal Zamir et al. eds., 2014). *See also*, Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1279–81 (2005).

[63] Edna Sussman, *Arbitrator Decision-Making: Unconscious Psychological Influences and What You Can Do About Them*, 24 AM. REV. INT'L ARB. 487 (2013).

[64] N.L.R.B. v. Jackson Hosp. Corp., 257 F.R.D. 302, 307 (D.D.C. 2009).

precluded such evidence.[65] We can surmise that this outcome resulted from the influence of the arbitrators' native legal culture. As Giuditta Cordero-Moss aptly put it "the legal background of the arbitrator is recognized as playing an important role, a sort of imprinting, which will influence the approach taken …."[66] Thus, while the award may be written with reference to the applicable law, the conclusion may be driven by an arbitrator's legal culture. As Justice Scalia pointed out, quoting Chancellor James Kent who said, "I almost always found [legal] principles suited to my views of the case."[67] National laws may vary as to the admissibility of unlawfully obtained evidence and influence decisions on the admissibility of evidence obtained through cyber intrusion.[68]

A comprehensive decision reviewing prior relevant authorities was issued by the Singapore Court of Appeals in 2016, which directly addressed the question of the balance between the competing policy imperatives of truth and privilege in the context of WikiLeaks exposure.[69] A former employee sought to introduce into evidence communications of his former employer with its counsel, which had been hacked by unknown parties and uploaded onto WikiLeaks. The court concluded that even though the WikiLeaks material submitted as evidence was publicly available, because it constituted a minute fraction of the approximately 500 GB of data that had been pilfered just from the former employee's system, it was highly probable that few, if any, knew of its existence, and therefore the contents were not public knowledge and retained their confidential status. The court considered the fact that the employee had not been the perpetrator of the cyber-attack but concluded that there was little doubt that the employee knew that the emails were privileged. The court held that the confidential character the information in the emails had not been lost by its posting on WikiLeaks because to hold otherwise would be to "sanction and to encourage unauthorized access and pilferage of confidential information." The court further examined whether or not the documents supported the conclusions the employee sought to draw from them and concluded that they did not. The court concluded that "the balance between the competing imperatives of truth and privilege is … struck in favor of the latter."[70]

---

[65] JOSHUA D. H. KARTON, THE CULTURE OF INTERNATIONAL ARBITRATION AND THE EVOLUTION OF CONTRACT LAW 195-232 (2013).

[66] Giuditta Cordero-Moss, *Non-National Sources in International Commercial Arbitration and the Hidden Influenced by National Traditions*, 63 SCANDINAVIAN STUD. OF L. 22 (2017).

[67] ANTONIN SCALIA ET AL., MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 27 (2008).

[68] *See* Jane Colston, *The Fruit from a Poisoned Tree-Use of Unlawfully Obtained Evidence*, IBA INT'L LITIG. NEWSL., Sep. 2017, at 20.

[69] Wee Shuo Woon v. HT S.R.L., [2017] S.G.C.A. 23 (Sing.).

[70] *Id.*, at 29.

Historically, case law from the U.K. supported accepting evidence which had been obtained in violation of law or ethics.[71] In 1980, the High Court of Justice, Chancery Division, opined that in civil cases "the judge cannot refuse it [evidence] on the ground that it may have been unlawfully obtained in the beginning."[72] That statement of principle may be in the process of evolving,[73] and considerations of competing values are being reviewed in light of subsequent enactments. In a decision issued in 2003, the English Court of Appeal considered violations of the Human Rights Act committed by an insurer which filmed a video of the claimant in her home without her knowledge, having obtained access to the claimant's home by deception. The court weighed the circumstances against the relevance of the evidence and concluded "this is not a case where the conduct of the defendant's insurers is so outrageous that the defence should be struck out …. It would be artificial and undesirable for the actual evidence, which is relevant and admissible, not to be placed before the judge who has the task of trying the case."[74]

In an even more recent case in 2010, documents had secretly been accessed and copied for the wife from the husband's server in his office and passed on to the wife's solicitor. The English Court of Appeal narrowed the *Hildebrand* rule which was previously thought to permit access to information about the other spouse whether or not it was confidential to assist in proceedings concerning financial provision. The court held that where rights pursuant to Article 8 of the Human Rights Act and expectations of privacy are breached turnover of the documents to the husband's counsel was required, and the wife was restrained from using any information contained in the documents. The court also noted that the wife was at liberty to commence ancillary proceedings to obtain information to which she is entitled with respect to the husband's finances. The court noted that the conduct in question might also have constituted criminal offenses under the Computer Misuse Act 1990 and the Data Protection Act 1998. In rendering its decision, the court stated that it had given due regard to the competing right to a fair trial, right to preserve confidence and right to rely on evidence.[75]

In the United States, to safeguard the Fourth Amendment rights, the exclusionary rule does not permit the admission of evidence seized during an unlawful search as proof against the defendant

---

[71] Nigel Cooper, The Fruit of the Poisoned Tree – The Admissibility of Evidence in Civil Cases (unpublished manuscript) (on file with author), http://www.bgja.org.uk/wp-content/uploads/2014/02/NigelCooper.pdf (last visited May 24, 2018) (discussing the English case laws on the admissibility of evidence obtained in violation of law or ethics).

[72] Helliwell v. Piggott- Sims, [1980] F.S.R. 356 (Eng.).

[73] Cooper, *supra* note 71, at 1.

[74] Jones v. University of Warwick [2003] EWCA (Civ) 151 (Eng.).

[75] Tchenguiz v. Imerman, [2010] EWCA (Civ) 908 (Eng.).

at a criminal trial. The courts have developed the "fruit of the poisonous tree" doctrine which extends the exclusionary rule to require suppression of other evidence that is derived from and is tainted by the illegal search or seizure. The doctrine is not applicable in civil cases.[76] How courts handle evidence derived through illegal or unethical means in civil cases is not uniform and is generally fact specific. Courts have said that "[g]enerally in civil cases, the manner in which evidence is obtained is irrelevant to the issue of admissibility."[77] On the other hand, the courts have noted that "courts routinely preclude [the] use of evidence obtained in violation of the ethical rules in order to appropriately remedy that violation."[78]

Addressing an application to strike references to documents that had been released by others on WikiLeaks from the complaint, a U.S. District Court declined to do so. The court found that since the "documents have been available in the public domain for more than five years, and this Court does not have the power or ability to limit its access. … '[I]t is unlikely that the court can now effectively enforce an injunction against the internet in its various manifestations, and it would constitute a dubious manifestation of public policy were it to attempt to do so.' … [The] complaint does not put this material 'in the public eye' any more than the internet has already done so."[79]

In France, views on the issue have been split between the "Civil" and the "Criminal" divisions of the French Supreme Court (*Cour de Cassation*). In civil matters, the legality of evidence has been considered through the prism of a more general notion of "fairness" (*loyauté*) in the administration of evidence, established by the decision of *Cour de Cassation* in 2011. In that case, a company produced in support of its application audio tapes containing recorded telephone conversations with representatives of two of its competitors. The Paris Court of Appeals held

[76] Lingo v. City of Salem, 832 F.3d 953, 958 (9th Cir. 2016); White v. City of Birmingham, Ala., 96 F. Supp. 3d 1260, 1271 (N.D. Ala. 2015), as amended (May 27, 2015) (noting that the Supreme Court has "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials" and permitted the evidence, noting its immense probative value); United States v. Janis, 428 U.S. 433, 460 (1976).

[77] Carr v. Ferrell-Duncan OBGYN Clinic, 538 S.W.3d 360, 363 (Mo. Ct. App. 2018); *accord,* Radder v. CSX Transp., Inc., 68 A.D.3d 1743, 1744–45 (2009).

[78] Scranton Prod., Inc. v. Bobrick Washroom Equip., Inc., 190 F. Supp. 3d 419, 434 (M.D. Pa. 2016), reconsideration denied, No. 3:14-CV-00853, 2016 WL 7173786 (M.D. Pa. Dec. 8, 2016).

[79] Bible v. United Student Aid Funds, Inc., No. 1:13-CV-00575-TWP, 2014 WL 1048807, at *4 (S.D. Ind. Mar. 14, 2014), rev'd and remanded on other gds., 799 F.3d 633 (7th Cir. 2015).

that while the recordings were obtained in an unfair manner, they could not be completely excluded from the debate by the mere application of an "abstract principle" of fairness, without showing that production of such evidence had a specific impact on the right to a fair trial of the parties in question. The *Cour de Cassation* disagreed and held that the recordings, made unbeknownst to their subjects, were not admissible as evidence.[80] In its decision, the Court relied on Article 9 of the French Civil Procedure Code, Section 1 of Article 6 of the European Convention on Human Rights, and the "principle of fairness in the administration of evidence."

Yet, the prohibition is not absolute. For example, the *Cour de Cassation* admitted findings, derived from the surveillance by a bailiff of a person, when such surveillance was made in public, holding that "any harm caused to the privacy of Mr. Z., in public spaces or places open to public, without any incitement to go there […] were not disproportionate."[81] In a more recent decision, the court has further clarified that "the right to prove one's case can only justify the production of evidence which causes harm to privacy, where such production is indispensable to the exercise of that right, and where the harm was proportionate to the aim pursued."[82]

The Criminal Division of the *Cour de Cassation*, on the other hand, is less concerned with the principle of *loyauté*. It relies in particular on Article 427, paragraph 1 of the Criminal Procedure Code, which states that "[e]xcept where the law provides otherwise, offenses may be established by any means of evidence and the judge shall rule based on his personal conviction," to admit evidence obtained in an illegal or unfair way.[83] In general, the Criminal Division admits a victim's use of unfairly obtained evidence, if it is a condition for her access to justice, as well as where admission of such evidence is a condition to establish the innocence of the person. It also rules on a regular basis that there is no legal provision allowing criminal judges to exclude evidence submitted by an individual to the investigative authorities on the sole basis that such evidence would have been obtained illegally or unfairly, and that it is only up to the judges, pursuant to Article 427 of the Criminal Procedure Code, to assess the probative value of such evidence, having submitted it to an adversarial debate. This includes, notably, cases where the

[80] Ass. plén., 7 January 2011, Bull. 2011, Ass. plén., No. 1. *See also*, Com., 13 October 2009, n°08-19.525 (barring transcript of a telephone conversation overheard unbeknownst to the interlocutor).

[81] Civ. 1ère, 31 October 2012, Bull. 2012, I, No. 226.

[82] Civ. 1ère, 25 February 2016, n°15-12.403.

[83] Notably, and contrary to the stance of the civil division of *Cour de Cassation*, the criminal division has recognized as admissible recordings of private telephone conversations. *See* Crim., 31 January 2007, Bull. crim. 2007, No. 27, p. 100.

illegally obtained evidence includes the content of a person's communications with her lawyers.[84]

In light of the unconscious influence of one's native legal culture, there may be situations where counsel would wish to consider emphasizing differences, if there are any, between the applicable law and the native legal culture of the arbitrators.

Duty to report

Cyber intrusion is a crime in jurisdictions around the world.[85] Violations of privacy laws is also implicated. What, if any, is the arbitrator's duty to report a cybercrime? And to whom? Local authorities? Counsel's bar association? The administering institution? While arbitrators must first consider whether they are under any legal or ethical obligation that requires them to take action,[86] the resolution of the question presents the tension between reporting wrongdoing and the confidentiality of the arbitration proceeding. [87]

---

[84] Crim., 11 June 2002, Bull. crim. 2002, No. 131; Crim., 31 January 2007, Bull. crim., No. 27, p. 100; Crim., 27 January 2010, Bull. crim. 2010, No. 16; Crim., 7 March 2012, Bull. crim. 2012, No. 64; Crim., 31 January 2012, Bull. crim. 2012, No. 27.

[85] *See*, *e.g.*, Directive 2013/40/EU, of the European Parliament and of the Council of 12 August 2013 on Attacks Against Information Systems and Replacing Council Framework Decision 2005/222/JHA; Tony Krone, *Hacking Offences*, AUSTL. INST. CRIM., https://aic.gov.au/publications/htcb/htcb005 (last visited May 24, 2018) (describing how computer hacking crimes are defined in Australia); *Computer Crime Statutes*, NAT'L CONF. ON ST. LEGIS. (May 12, 2016), http://www.ncsl.org/research/telecommunications-and-information-technology/computer-hacking-and-unauthorized-access-laws.aspx (All 50 U.S. states have computer crime laws; most address unauthorized access or computer trespass. Some state laws also directly address other specific types of computer crime, such as spyware, phishing, denial of service attacks, and ransomware); Computer Fraud and Abuse Act, 18 U.S.C. § 1001 (1986); Computer Misuse and Cybersecurity Act, No. 19, c. 50A, 1993 (Sing.); The Information Technology Act, No. 21, Acts of Parliament, 2000 (Ind.).

[86] ROGERS, *supra* note 54, at 97; Alexis Mourre, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22(1) ARB. INT'L 95 (2006).

[87] Steven C. Bennett, *Who Is Responsible for Ethical Behavior by Counsel in Arbitration*, DISP. RESOL. J., May-Jul. 2008, at 38, 44 (Attorneys have an obligation under the rules of professional conduct to report unethical conduct of other members of the bar. If this obligation applies to attorneys when they serve as arbitrators, the arbitrators would have conflicting ethical obligations--to maintain confidentiality and to report unethical conduct by counsel in arbitral

Elliott Geisinger and Pierre Ducret distinguish between doctored documents and witnesses lying on the stand, which they consider sufficiently dealt with by the tribunal's disregard of such evidence on the one hand and what they referred to as a "Balrog"[88] on the other hand. A Balrog is a violation of fundamental national or supranational rules close to transnational public policy. They cite as examples, money laundering, corrupt practices, gross violation of competition law, fraudulent conveyances, financing of terrorism, violation of embargoes, traffic of cultural property, and gross violations of environmental regulations.[89] If a party hacks into another parties' computer system, or worse yet, posts it publicly or provides it to others to post publicly, one might well conclude that the matter involves no ordinary doctored document, but rather rises to the level of a Balrog.

However, Geisinger and Ducret conclude that finding a reporting duty is in complete contradiction with the confidential nature of international commercial arbitration and suggest that most legal systems would not impose any such duty even with respect to Balrogs.[90] They allow for possible exceptions for extremely serious violations of fundamental legal principles such as human trafficking where the confidentiality of the arbitration becomes a "minor consideration."

---

proceedings.). *Cf.* Carrie Menkel-Meadow, Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not, 56 U. Miami L. Rev. 949, 955 (2002) (suggesting that the answer may depend on whether the arbitration process is purely private or sponsored by a court). *Also see*, Robert Blackett, *The Very Naughty List: What Happens If Arbitrators Suspect Criminal Activity by the Parties*, THE ARBITER: INT'L DISP. NEWSWIRE, Winter 2014, 6 (discussing what should an arbitrator in an English-seated arbitration do—legally and/or ethically—when they suspect one or both parties have committed, is committing, or intends to commit a criminal offence); Kristen M. Blankley, *Lying, Stealing, and Cheating: The Role of Arbitrators as Ethics Enforcers*, 52 U. LOUISVILLE L. REV. 443, 462–491 (2014) (discussing why arbitrators should be acting as ethics enforcers); Cohen & Morril, *supra* note 6; JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 105 (2012) (discussing the powers, rights and duties of arbitrators).

[88] The Balrog reference draws upon Tolkien's Lord of the Rings tale of miner dwarves who dug too deeply and unleashed "a terrible daemon from ancient times," the Balrog.

[89] Elliott Geisinger & Pierre Ducret, *The Uncomfortable Truth: Once Discovered What to do With it*, in THE SEARCH FOR "TRUTH" IN ARBITRATION: IS FINDING THE TRUTH WHAT DISPUTE RESOLUTION IS ABOUT? 113, 114 (Markus Wirth et. al. eds., 2011).

[90] *Id.*, at 128–130; *See also*, Mourre, *supra* note 86.

Two anecdotes confirm the historic general acceptance of Geisinger and Ducret's conclusion. It became clear to the tribunal in the course of one hearing some years ago, when the testimony of one witness was interrupted and both counsel requested an adjournment, that the testimony revealed a Balrog which had not previously been identified. The tribunal approached the arbitral institution and requested a formal legal opinion as to their duties. A British QC was retained to deliver an opinion virtually overnight. He opined that the tribunal did not have a duty to report the Balrog. The tribunal relied on that advice. In another case, it became apparent from the testimony that a bridge was in imminent danger of collapse because the steel that had been used in its construction was not of sufficient thickness. The tribunal advised counsel that if they did not report it to the authorities promptly the tribunal would take it upon itself to do so.

Perhaps the historic bright line between reporting a Balrog and preserving confidentiality as drawn where there is a danger to life and limb is applicable to cyber intrusion. But with the advent of criminal statutes around the globe dealing with corruption and money laundering some of which impose reporting requirements that vary across jurisdictions, coupled with the emergence of these issues in arbitration, the duty to report criminal activity has gained attention with no clear answer as to the scope of the arbitrator's duties to report.[91] Data breach notification laws and regulations have been enacted in many jurisdictions[92] making the issue of the duty to report potentially relevant to cyber-crimes as well.

The countervailing considerations of arbitrator confidentiality and the privacy of the proceedings, the obligation to make every effort to ensure that the award is enforceable, and the emerging view that arbitrators have a responsibility to uphold the international rule of law and must be concerned with international public policy will thus likely be a subject of concern not only in the context of corruption and money laundering but perhaps in the area of cyber intrusion as well.

---

[91] See. e.g., Inan Uloc, CORRUPTION IN INTERNATIONAL ARBITRATION, 192-2000 (2019); Mourre, *supra* note 86. Sara Nadeau-Seguin, *Commercial Arbitration and Corrupt Practices: Should Arbitrators be Bound by a Duty to Report Corrupt Practices?*, TRANSNAT'L DISP. MGMT. J. Vol. 10, Issue 3 (2013); A. Timothy Martin, International Arbitration and Corruption: an Evolving Standard, Vol. 1 issue 2 TRANSNAT'L DISP. MGMT. J (2006); Mourre, *supra* note 86.

[92] See, e.g., U.S.: CONF. ON ST. LEGIS. *Security Breach Notification Laws (*all fifty states have statutory breach notification laws); Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. L 119/1, Article 33.

While dealing with the obligations of lawyers with respect to the criminal act of money laundering, the bar associations which collaborated on the effort noted in their report the "essential ethical obligations of the legal profession not to support or facilitate criminal activity." The report further noted the fact that specific laws and regulations in many countries "have been extended to lawyers and require, in a formal sense, lawyers to take specific actions" including "in some jurisdictions an obligation to inform the authorities." Based on the development of these recent legal requirements the report strikes a final cautionary note.

> "The obligation by lawyers to report is highly controversial and is seen by many to endanger the independence of the legal profession and to be incompatible with a lawyer client relationship. However, in some countries lawyers can themselves be prosecuted for failure to carry out appropriate due diligence and report suspicious transactions to the authorities. It is important that lawyers in such countries are fully aware of these obligations and the actions they need to take.[93]

Arbitrators who are attorneys may or may not be bound by the duties of attorneys, and which law would apply is far from clear, but if confronted with a cyber intrusion an arbitrator might be wise to heed this admonition with respect to cyber intrusion as well and consider what obligations, if any, he or she has to report.

CONCLUSION

The ease with which it appears cyber intrusion can be accomplished and the almost daily reports of hacks suggests that arbitrators are likely to be presented with issues related to breaches of cyber security. The issues are not new. They are merely presented in a new guise. It is hoped that this article will assist arbitration practitioners in understanding the issues as presented in this context and provide guidance as to how to approach them.

Edna Sussman esussman@SussmanADR.com is a full time independent arbitrator and is the Distinguished ADR Practitioner in Residence at Fordham University School of Law. She was formerly a litigation partner at White & Case LLP and has served as an arbitrator in over 200 complex commercial arbitrations, both international and domestic, under many institutional rules and ad hoc. Ms. Sussman is a member of the panel of many of the leading dispute resolution

[93] *A Lawyer's Guide to Detecting and Preventing Money Laundering*, a collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe, at 2 (2014), https://www.anti-moneylaundering.org/AboutAML.aspx (last visited November 3, 2018).

institutions around the world and is a fellow of the Chartered Institute of Arbitrators. She sits on the Board of the American Arbitration Association, serves as the chair of the AAA-ICDR Foundation, as Chair of the New York International Arbitration Center and is a past President of the College of Commercial Arbitrators. A graduate of Barnard College and Columbia Law School, Ms. Sussman has lectured and published widely on arbitration, mediation, energy and environmental issues.