Admissibility of unlawfully obtained evidence in international arbitration in Switzerland

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I. Introduction

1. A 2010 survey conducted among international arbitration practitioners showed that fifty-five out of eighty-one respondents had witnessed the use of so called "guerrilla tactics" in cases in which they were involved[1]. Be it defined as "*strategies employed by parties to arbitration proceedings that are ethical violations, involve criminal acts or are ethically borderline practice*"[2] or as "*strategies, methods and tactics, ranging from poor behaviour to egregious and even criminal conduct*"[3], such conducts are reported to be on the rise and having triggered a call for action which ultimately led to the adoption of the IBA Guidelines on Party Representation in International Arbitration[4].

2. Despite the high ethical standards that counsels strive to uphold, one can fear that the growing popularity of international arbitration as a dispute resolution will cause such tactics to be increasingly used by parties in arbitral proceedings. Under the premise in a majority of international arbitration proceedings (reportedly 60-70%), the outcome hinge on the facts rather than on the application of the relevant principles of law[5], one can assume that occurrences of unlawful acts committed in order to obtain evidence and adduce it in international arbitration proceedings are not likely to decrease in the future.

3. In the face of possibly unlawfully obtained evidence, how is the arbitral tribunal meant to react and decide on the issue, what are the applicable principles (if any), what is the standard of proof and how the adduced evidence should be dealt with? These are some of the issues that this contribution will endeavour to tackle.

4. It will be submitted that, as far as international commercial arbitration in Switzerland is concerned, there are some principles which can be identified in international precedents and used to outline a rational method to address the issue. Starting with an overview of the rules governing the taking of evidence in international arbitration (cf. below II/A), we will then review of the (few) published international decisions and awards on the issue (cf. below II/B) and cover the national procedural principles addressing the admissibility of unlawfully obtained evidence (cf. below II/C) in order to see whether there exists generally accepted principle on how to address the issue. On this basis, we will try and propose a method to conduct the reasoning when a party claims that evidence was unlawfully obtained (cf. below II/D) and finally examine some remedies available to the arbitral tribunal should it comes to the conclusion that the unlawfully obtained evidence is inadmissible.

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1 Edna SUSSMAN, All's Fair in Love and War – Or is it ? The Call for Ethical Standards for Counsel in International Arbitration, Transnational Dispute Management 7, issue 2 (2010).

2 Idem.

3 Günther J. HORVATH, Guerrilla Tactics in Arbitration, an Ethical Battle: Is There Need for a Universal Code of Ethics?, *in* Austrian Yearbook on International Arbitration, ed. Christian Klausegger et al., 2011, p. 297.

4 William J. ROWLEY, Guerilla tactics and developing issues, in HORVATH/WILSKE (Ed.), Guerilla tactics in international arbitration, WoltersKluwer 2013, p. 20 et seq.

5 REDFERN/HUNTER, Redfern And Hunter on International Arbitration, 6th edition, Oxford University press, 2015, Digital, §6.75.

II. The principles governing the taking of evidence in international arbitration

A. The taking of evidence and the assessment of evidence

5. The success of a claim or defence most often depends on whether the facts alleged in support of that claim or defence can be established[6]. The purpose of taking of evidence is to assist the arbitral tribunal in determining disputed issues of fact[7].

6. The evidence presented to arbitral tribunals on disputed issues of fact may be divided into four categories: (1) production of contemporaneous documents; (2) testimony of witnesses of fact (written and/ or oral); (3) opinions of expert witnesses (written and/ or oral); and (4) inspection of the subject matter of the dispute[8].

7. The taking of evidence could hence be defined as the process, conducted under the rules agreed upon by the parties or set by the arbitral tribunal, by which a piece of evidence is formally incorporated into arbitral proceedings in order to be assessed by the arbitral tribunal during the deliberations with a view to rendering the award.

8. It should not be confused with the assessment of evidence which is the process by which the arbitral tribunal weight the evidence and determines whether it contributes to establishing a relevant fact and judges its persuasiveness in the context of the case[9]. Logically, the taking of evidence precedes its assessment by the arbitral tribunal.

9. Deciding on the admissibility of the evidence is deciding whether or not a piece of evidence can be presented before the trier of fact (i.e. the arbitral tribunal) to consider in deciding the case. The challenge of the admissibility of an allegedly unlawfully obtained evidence must also be distinguished from the challenge of the evidence on the ground of inauthenticity (e.g.: the evidence is a forgery or has been tampered with) or lack of materiality (the evidence is not relevant to the case) which do not address the issue of the unlawful origin of said evidence and will not be discussed in the present contribution.

B. The legal framework

1. Party autonomy supplemented by the arbitral tribunal's discretion

10. Article II of the New York convention on the recognition and enforcement of foreign arbitral awards (the "New York Convention") requires courts to recognize valid arbitrations agreements and refer the parties to arbitration pursuant to such agreements. This obligation extends to all material terms of an agreement to arbitrate, including an agreement governing the arbitral procedure[10]. The principle of party autonomy is hence a cornerstone of the procedural framework of the arbitral proceedings and of the taking of evidence[11]. The issue of the admissibility of evidence is under the prevailing international view a matter of procedure governed by the *lex arbitri* and the procedural rules applicable to the arbitral proceedings[12].

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6 Daniel GIRSBERGER/Nathalie VOSER, International abitration, Zurich Basel Geneva, 2016, p. 237 Nr. 977.

7 Julian D. M. LEW/Loukas A. MISTELIS/Stefan M. KRÖLL, Comparative International Commercial Arbitration, The Hague 2003, Para 22-7.

8 REDFERN/HUNTER, Redfern And Hunter on International Arbitration, 6th edition, Oxford University press, 2015, Digital, §6.89.

9 Nathan D. O'MALLEY, Rules of evidence in international arbitration, an annotated guide, 2nd edition, Informa law 2019, Digital, §7.11; for a (non-exhaustive) list of the principles applicable in weighing the evidence cf. O'MALLEY, §7.13; see. also art. 9.1 of the 2010 IBA rules on the Taking of evidence in international arbitration ("*The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence*").

10 See Gary B. BORN, International arbitration: law and practice, 2nd edition, Wolters Kluwer,2016, p. 156 §8.02/A.

11 Art. V(1)d of the New York Convention provides that recognition of an arbitral award can be refused if the arbitral procedure was not in accordance with the agreement of the parties.

12 LEW/MISTELIS/KRÖLL, Para 22-29, quoted in GIRSBERGER/VOSER, p. 239, Nr. 984.

11. In Switzerland, the taking of evidence in international arbitration is a matter of procedure governed by the relevant provisions of the Swiss *lex arbitri*, contained in chapter 12 (art. 176 to 194) of the Private International Law Act ("PILA")[13]. Art. 182(1) PILA provides that "*the parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice*". The issue of admissibility of evidence is regarded as a procedure-related issue[14] and is thus also governed either by the rules determined by the parties or by the arbitral tribunal[15].

12. If the parties have agreed that the arbitral proceedings are to be conducted under the auspices of an institution, the applicable institutional rules also frequently contain different provisions which are applicable to the taking of evidence: art. 17 and 27 UNCITRAL Arbitration rules, art. 19 ICC Rules, art. 15 and 24 Swiss Rules, art. 14 and 22.1 (vi) LCIA (2014) Rules, art. 28 and 29 VIAC (2018) Rules, art. 31 SCC (2017) Rules; art. 19, 22 and 29 ISTAC Rules, art. 13 and 22 2018 HKIAC Administered Arbitration Rules and 19 SIAC (2016) Rules are some examples.

13. The parties are also free to agree, already in the arbitration agreement – although it is scarcely the case in practice – or later on during the arbitral proceedings, on a predefined set of procedural rules, such as the IBA Rules on the Taking of Evidence ("IBA Rules of Evidence")[16] or the Prague rules[17]. Unless expressly agreed upon, these rules are not binding on the parties nor the arbitral tribunal[18]. The parties can agree on some aspects of the procedure only or on guidelines that the arbitral tribunal is to follow when deciding upon more specific procedural rules as the proceedings progress[19].

14. In the absence of an agreement between the parties, the rules governing the taking of evidence are, under most *lex arbitri*, determined by the arbitral tribunal itself[20]. Art. 19(2) of the UNCITRAL Model Law on International Commercial Arbitration follows this approach[21]. Many institutional arbitration rules provide for the same mechanism[22]. In Switzerland, art. 182(2) PILA provides that if the parties have not determined the arbitral procedure, the arbitral tribunal shall "*determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration*", or by a combination of both[23]. In any event, the arbitral tribunal is not bound by any national procedural law[24] nor any restrictions on evidence which may arise from applicable substantive law[25].

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13 For the unofficial translation in English of PILA see: https://www.swissarbitration.org/files/34/Swiss%20International%20Arbitration%20Law/IPRG_english.pdf - All URL quotes of this contribution have been last visited on August 21st, 2020.

14 Marc D. VEIT, Article 182 PILA, in Manuel ARROYO (Ed.) International arbitration in Switzerland, 2nd edition, Wolters Kluwer, 2018; p. 171, Nr. 14 *ad* art. 184 PILA, citing POUDRET/BESSON and BERGER/KELLERHALS.

15 The arbitral tribunal will generally not rely on any specific rules on how the evidence is to be weighed, as is reflected in art. 9(1) of the International Bar Association (IBA) Rules on the taking of evidence in international arbitration; in Switzerland, failing a specific agreement between the parties on this issue, the Supreme court has retained that this approach is also to be followed, see the decision of the Swiss supreme court "DSC" of August 5th 2013, 4A_214/2013, reason 4.3.1.

16 The International Bar Association's efforts to establish an international standard on the taking of evidence led to the adoption, in 1999, of the Rules on the Taking of Evidence, subsequently updated in 2010 (available at www.ibanet.org).

17 The Prague Rules were drafted by a Working Group formed of representatives from predominantly civil law-based jurisdictions; they seek to promote procedural efficiency in international arbitration by adopting procedures closer to a civil law inquisitorial style (available at https://praguerules.com/).

18 Art. 1(1) of the IBA Rules of Evidence.

19 Joachim KNOLL, Article 182 PILA, in Manuel ARROYO (Ed.) International arbitration in Switzerland, 2nd edition, Wolters Kluwer, 2018; p. 134, Nr. 5 ad art. 182 PILA.

20 LEW/MISTELIS/KRÖLL, Para 22-16 to 22-17, quoted in GIRSBERGER/VOSER, p. 238, Nr. 981.

21 Art. 19(2) of the UNCITRAL Model Law on International Commercial Arbitration provides that "*failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence*".

22 E.g.: art. 25 of the ICC Rules of arbitration and art. 21 of the London Court of International Arbitration (LCIA) Rules.

23 KNOLL, Article 182 PILA, p. 139, Nr. 19 ad art. 182 PILA.

24 POUDRET/BESSON, Comparative law of international arbitration, 2nd ed., Zurich/London, 2007, par. 532, quoted in KNOLL, Article 182 PILA, p. 139, Nr. 19 ad art. 182 PILA.

25 VEIT, Nr. 14 *ad* art. 184 PILA, p. 171.

15. Pursuant to most modern arbitration laws, the freedom of both the parties and the arbitral tribunal to determine the arbitral procedure finds its limits in the fundamental procedural guarantee such as the principle of equality of arms and the right to be heard as well as the mandatory provisions of the *lex arbitri*[26]. The same applies in Switzerland: art. 182(3) PILA provides that *"regardless of the procedure chosen, the arbitral tribunal shall ensure equal treatment of the parties and their right to be heard in adversarial proceedings*".

2. The principle of equal treatment

16. Equality of treatment is also a cardinal principle in international arbitration, since the concept of treating the parties with equality is fundamental in all civilised systems of civil justice[27].

17. This principle is given recognition in the UNCITRAL Model Law on International Commercial Arbitration[28], article 18 of which provides that "*the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case*".

18. The right to equal treatment requires the arbitral tribunal to apply the same procedural rules and requirements to all parties in the arbitration; yet it is not absolute and only requires the arbitral tribunal to treat similar situations in a similar manner[29]. There are circumstances where it may be justified to grant a different treatment to a party in a different situation; what ultimately matters is that none of the parties is put at a disadvantage as a result of the manner in which the proceedings are conducted[30].

19. In Switzerland, the principle of equal treatment is anchored in the *lex arbitri* at art. 182(3) PILA and must be heeded irrespective of whether the arbitral procedure has been agreed upon by the parties or determined by the arbitral tribunal. The failure to comply with this fundamental principle constitutes a ground for setting aside the award pursuant to art 190(2)(d) PILA and for refusing of the recognition and enforcement of the award, pursuant to art. V(1)(d) of the New York Convention.

20. The Swiss supreme court has held that "*the equality of the parties, guaranteed by Art. 182(3) and 190(2)(d) PILA, means that the procedure is organized and conducted in such a way that each party has the same opportunity to make use of its means*"[31]" and they must be "*treated identically in procedural situations which are comparable*"[32].

21. As pointed out below[33], article 9(2)(g) of the IBA Rules of Evidence mentions the possibility to take in consideration the principle of equal treatment (equality of the parties) to decide on the admissibility of evidence:

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26 GIRSBERGER/VOSER, p. 219, Nr. 899 and 901.
27 REDFERN/HUNTER, 6.10.
28 The UNCITRAL Model Law on International Commercial Arbitration was prepared by UNCITRAL, and adopted by the United Nations Commission on International Trade Law on 21 June 1985 and amended in 2006. The model law is not binding, but individual states may adopt the model law by incorporating it into their domestic law. Switzerland's PILA section on international arbitration has not been adopted on the basis of the Model Law.
29 Elliott GEISINGER/Pierre DUCRET, The Arbitral Procedure, in GEISINGER /VOSER, Digital, §5.04/C.
30 Gabrielle KAUFMANN-KOHLER/Antonio RIGOZZI (ed.), International arbitration – Law and practice in Switzerland, Oxford University press, 2015, §6.25.
31 DSC of 24th July 2017, 4A_668/2016, reason 3.1.
32 DSC of 10th December 2002, 4P.207/2002, reason 3.
33 Cf. infra p. 27.

3. The right to be heard

22. The principle of due process, described by some as a "*bedrock rules of procedural fairness*"[34], comprises three fundamental principles: the right *audi alteram partem* – that is to say the right to be made aware of an opponent's case and be allowed to rebut it –, the right to be treated alike and the right to be heard[35]. The latter guarantees each party the right to submit relevant statements of fact, to present legal arguments and to request that evidentiary measures be taken before an award is rendered[36]. A party must further be given the right to participate in the evidentiary proceedings, to examine and challenge allegations made and evidences adduced by the opposing party and to bring rebuttal evidence of its own[37].

23. These principles are reflected at article 18 of the UNCITRAL Model Law, the purpose of which is to ensure a "*right to be heard fundamental in nature*" and reflect a "*basic notions of fairness*"[38].

24. Art. 182(3) PILA provides that the parties' freedom to agree on the procedure is limited by the right to be heard. The Swiss supreme court has held that the right to be heard encompasses notably the following elements: the right of the parties to express themselves on all facts that may be relevant to the outcome of the case, to make legal arguments, to adduce evidence to support their relevant factual allegations in the appropriate and timely form[39], and to have the opportunity to express itself on the arguments of its opponent, to examine, debate and rebut with its own evidence the evidence adduced by the opposing party [40]. However, parties cannot draw from the right to be heard the right to have evidence admitted which was not submitted in compliance with the applicable procedural rules[41]. In particular, the Swiss supreme court has held that an entitlement to evidence exists only to the extent that the evidential submission took place timely and in compliance with formal requirements[42].

25. The right to be heard also lays down requirements on the arbitral tribunal: it has to take into account the parties' arguments that are relevant for reaching their decision and an award that is entirely silent concerning a pertinent argument may violate the parties' right to be heard[43], provided the arbitral tribunal or the opposing party cannot demonstrate that the elements omitted were not pertinent to decide the case, or, if they were, that they were implicitly rebutted by the arbitral tribunal[44]. The right to be heard is not violated if the award is not accurate, but there is a minimal duty on the part of arbitrators to review and deal with the issues that are material to their decision[45]. That duty is violated where the arbitral tribunal, due to an oversight or misunderstanding, overlooks some legally pertinent allegations, arguments, evidence or offers of evidence from a party[46]. However, this does not mean that the arbitral tribunal is compelled to address each and every submission of the parties[47]. The arbitral tribunal must also give the parties adequate advance notice not only of the date, time and place of the hearings but also of their aim and agenda, including a specification as to what evidence will be taken[48].

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34 Jeffrey WAINCYMER, Procedure and evidence in international arbitration, Wolters Kluwer, 2012, §2.7.5.

35 Piero BERNARDINI, International Arbitration and A-National Rules of Law, ICC International Court of Arbitration Bulletin 15, no. 2 (2004): 58, 117 cited in WAINCYMER, §2.7.5.

36 Gary B. BORN, International commercial arbitration, Three-volumes set; Wolters Kluwer, 2nd ed. 2014, Digital, §15.04/B/3, GEISINGER/DUCRET in GEISINGER /VOSER, §5.04/B.

37 Idem.

38 UNCITRAL, Report of the Secretary-General on the Analytical Commentary on Draft Text of A Model Law on International Commercial Arbitration, 1985, U.N. Doc. A/ CN. 9/ 264, Art. 19, §7.

39 DSC of 2nd June 2004, 4P.64/2004, reason 3.1.

40 DSC 133 III 139 reason 6.1, DSC 130 III 35 reason 5.

41 DSC of 5th August 2013, 4A_274/2013 reason 3 ; DSC of 20th July 2011, 4A_161/2011 reason 2.3.

42 Idem.

43 DSC 133 III 235, reason 5.2.

44 DSC of 26th May 2010, 4A_433/2009, reason 4.3.1.

45 DSC of 6th March 2017, 4A_490/2016 reason 3.1.1; DSC 142 III 360 at 4.1.1; 133 III 235 at 5.2, with references).

46 Idem.

47 Idem.

48 KNOLL, Article 182 PILA, p. 145, Nr. 35 *ad* art. 182 PILA.

4. The principle of fairness

26. Procedural fairness in arbitration is defined as a mandatory fundamental principle and requires that each party be afforded a reasonable opportunity to present their evidence and arguments; this is generally fulfilled by the equitable administration of the procedural rules[49].

27. The "equality of arms" inherently implies "fairness"[50] and one could say that the latter merely covers a variety of aspects of both the principles of equality and due process mentioned above.

28. Fairness is not expressly mentioned in the PILA, since 182(3) PILA only refers to the principles of equal treatment and right to be heard. These principles however contain sub-aspects which, in our view, reflect and materialize the principle of procedural fairness.

29. As mentioned below[51], article 9(2)(g) of the IBA Rules of Evidence mentions the possibility to take in consideration the principle of fairness to decide on the admissibility of evidence:

5. The principle of good faith

30. According to scholars, the duty to participate in good faith and cooperatively in the arbitral process stems from the agreement to arbitrate[52].

31. The duty to act in good faith in the arbitral proceedings would follows both from the nature of the arbitral process and from the general rule of *pacta sunt servanda*[53].

32. Neither the UNCITRAL Model Law nor most of the sets of well-known institutional arbitral rules include an express obligation to arbitrate in good faith. Two notable exceptions are Article 15.6 of the Swiss Rules which provides that "*[a]ll participants in the proceedings shall act in accordance with the requirements of good faith*", and, to a lesser degree, Rule 34(3) of the ICSID Arbitration Rules which provides that "*[t]he parties shall cooperate with the Tribunal in the production of the evidence*".

33. Preamble 3 to the IBA Rules of Evidence 2010 provides that "*the taking of evidence shall be conducted on the principle that each party shall act in good faith*".

34. Good faith is difficult to define in the abstract and is highly fact-dependent in its application; hence it will be a matter for arbitral tribunals to consider on a case by case basis[54]. Of all the interpretations of "good faith" it is suggested that the "*observance of reasonable commercial standards of fair dealing*" may be a useful yardstick against which conduct can be measured[55].

35. It is also submitted that a violation in bad faith of any positive obligation provided for under the IBA Rules of Evidence 2010 could amount to a corresponding lack of good faith[56], which is however debatable in the event that the parties have not expressly agreed on said rules.

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49 O'MALLEY, §9.115.
50 O'MALLEY, §9.116.
51 Cf. infra p. 27.
52 BORN, International Commercial Arbitration, §8.02/B and WAINCYMER, 10.3.3 p. 753.
53 BORN, International Commercial Arbitration, §8.02/B.
54 Peter ASHFORD, IBA Rules on the taking of evidence international arbitration, Cambridge University press, 2013, Digital, P-11.
55 ASHFORD, P-38.
56 ASHFORD, P-18.

36. The Swiss *lex arbitri* does not mention the principle of good faith. Scholars however regard it as "*one of the fundamental principles in arbitration*"[57].

37. The Swiss supreme court has held that arbitration fundamentally stems from the agreement between the parties and that the principle of good faith is applicable to the interpretation of said agreement and as to how the parties' respective declarations as to the content of the arbitration agreement are to be understood[58].

38. The Swiss supreme court has also decided that the compliance with the rules of good faith – without particularizing the content of said rules – is a component of the material public policy[59].

6. Procedural public policy

39. Pursuant to art. 34(2) of the UNCITRAL Model Law, an award can be set aside if it is in contradiction with the public policy of the State of the seat of the arbitral tribunal.

40. Although Switzerland has not chosen to follow the Model law in drafting the section governing international arbitration of its act on private international law, art. 190(2)(e) PILA provides that an award can be set aside if it is incompatible with public policy.

41. The Swiss supreme court has held that[60]:

> "*An award is inconsistent with public policy if it disregards the essential and broadly recognized values which, according to prevailing Swiss theories, should constitute the basis of any legal order (ATF 132 III 389 at 2.2.3). Substantive public policy is distinct from procedural public policy.*
>
> *Procedural public policy within the meaning of Art. 190(2)(e) PILA is only a subsidiary guarantee (ATF 138 III 27018at 2.3), and provides the parties with the right to an independent judgment as to the submissions and facts submitted to the arbitral tribunal in conformity with applicable procedural law; procedural public policy is violated when some fundamental and generally recognized principles were violated, leading to an insufferable contradiction with notions of justice, such that the decision appears incompatible with the values recognized in a state under the rule of law (ATF 132 III 389 at 2.2.1).*
>
> *An award is contrary to substantive public policy when it violates some fundamental principles of substantive law and therefore becomes no longer consistent with the determining legal order and system of values; among such principles are in particular the sanctity of contracts, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discrimination, or expropriation without compensation, and the protection of incapable persons (same judgment, ibid.)*.[61]"

42. Given its narrowly defined scope, one could wonder whether the public policy finds any concrete application in the arbitral procedural rules, let alone the taking of evidence. Its content as defined by the Swiss supreme court however tends to point out that extreme violations of procedural guarantees or gross disregard of universally accepted principles (e.g. the admission as evidence of admissions obtained under torture) could lead to a successful setting aside of the award on the ground of violation of Swiss procedural public policy.

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57 Michael LAZOPOULOS, art. 15 of the Swiss Rules, in Manuel ARROYO (Ed.) International arbitration in Switzerland, 2nd edition, Wolters Kluwer, 2018, p. 613 N°41 *ad* art. 15 of the Swiss Rules.

58 DSC of 16th April 2002, 4P.40/2002, reason 2b.

59 DSC 132 III 389 reason 2.2.1; scholars are of the opinion that this principle is a component of both material and procedural public policy, cf. LAZOPOULOS, *op. cit.*, p. 613 N°41 *ad* art. 15 of the Swiss Rules.

60 DSC of 27th March 2014, 4A_342/2015 dated 26 April 2016, reason 5.1.

61 Translation is provided by courtesy of www.swissarbitrationdecisions.com.

C. Synthesis

43. Under Swiss law, the legal framework of the taking of evidence in international arbitration is characterized by party autonomy. The parties are hence free to decide on the rules applicable to the taking of evidence and how a purported unlawfully obtained evidence should be dealt with.

44. Absent specific rules chosen by the parties the arbitral tribunal can exert its discretionary power to suggest to the parties to agree on a set of rules or directly decide which rules are applicable.

45. In any event, the rules selected to govern the taking of evidence must comply with the principle of equal treatment and uphold the parties' right to be heard.

46. Compliance with the principles of fairness, good faith and the necessity to consider the procedural public policy should also guide the parties and the tribunal.

III. Unlawfully obtained evidence: international decisions and awards

47. One could speculate that international judicial and arbitral precedents offer a valuable source of inspiration for identifying guiding principles.

48. Surprisingly, the subject matter of evidence unlawfully obtained is rather scarce in international dispute case law. Yet, a review of the few international decisions and scarce published awards on the issue offers a finer view on some trends and pattens in dealing with such issue.

A. Corfu Channel Case (UK v. Alb.), 1949 ICJ REP. 4 (Judgment of April 9)[62]

49. In 1949, British ships transiting the Straits of Corfu struck mines the presence of which had not been made known by the Albanian Government. Afterwards, British minesweeping boats swept the Channel without securing Albanian permission first. The United Kingdom brought suit before the International Court of Justice ("ICJ") seeking reparations and contended that the mines that had been collected in the sweeping operation was an evidence of Albania's liability for the incident. Albania, for its part, submitted a counter-claim against the United Kingdom, accusing the latter of having violated Albanian sovereignty by sending warships into Albanian territorial waters and of carrying out minesweeping operations in Albanian waters after the explosions.

50. On the issue of the subsequent minesweeping operations United Kingdom argued that it was of utmost necessity to secure the "*corpora delicti*" as soon as possible which would legitimate securing possession of evidence in the territory of another State, in order to submit it to an international tribunal and facilitate its task[63]. The United Kingdom also justified the unauthorized minesweeping operation as a method of self-protection and self-help[64].

51. The court rejected the excuses raised by the United-Kingdom to justify the unlawful obtaining of the evidence and held that such right of intervention or methods could in no way justify a violation of territorial sovereignty as an essential foundation of international relations. The court hence declared that United Kingdom had violated Albania's territorial sovereignty.

52. The court however indirectly took in consideration the mines illicitly swept as a piece of the circumstantial evidence which pointed to the conclusion that the mines could not have been laid

62 https://www.icj-cij.org/files/case-related/1/001-19490409-JUD-01-00-EN.pdf
63 Corfu Channel Case (UK v. Alb.), 1949 ICJ REP. 4 (Judgment of April 9, p. 34
64 Corfu Channel Case (UK v. Alb.), 1949 ICJ REP. 4 (Judgment of April 9, p. 35.

without the knowledge of the Albanian Government who did nothing to prevent the disaster, thus triggering Albania's liability[65].

53. By declaring an unlawful collection of evidence to be a violation of international law, yet not imposing any sanction on the gatherer, nor holding the evidence as inadmissible[66], the ICJ adopted a middle-of-the-road stance.

54. Without being clearly formulated, the ICJ seems to have endorsed the principle that the mere fact that evidence is obtained unlawfully is not *per se* an obstacle to its admissibility and taking in consideration in the decision to be rendered, a standpoint taken up by arbitral tribunals in their awards[67].

B. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 1 (Judgment of May 24th)[68].

55. On November 1979 the United States' Embassy in Tehran was occupied by Iranian militants, as hostages of its diplomatic and consular staff were arrested and detained. The United States requested that the court declares that Iran had been in breach of its international duties and that it be held liable to reparation.

56. The Court found that Iran had violated and was still violating obligations owed by it to the United States under conventions in force between the two countries and rules of general international law. It reaffirmed the cardinal importance of the principles of international law governing diplomatic and consular relations. It also considered that Iran disposed of licit alternative counter-measures to diplomatic abuses under the Vienna Convention. Iran was hence ordered to "*immediately place in the hands of the protecting Power the premises, property, archives and documents of the United States Embassy in Tehran and of its Consulates in Iran*"[69].

57. Although the ICJ did not actually dwelled on the issue of the admissibility of evidence, some scholars submit that the line of argument developed by Iran amounted to contending that it was in state of necessity in face of the United States' unremitting intervention and unlawful influence in Iranian affairs for a quarter of a century[70]. Evidence that would permit Iranian Government to prove this relentless unlawful influence was located in the United States and was classified and securely kept. Hence the only way Iranian Government could establish its claim was by a type of international discovery through self-help: precipitous entry into the U.S. facilities, sequestration of the documents there, their examination and filtering, and then their submission in an international process. To these scholars, the Court's operative part of its decision suggests that, should Iran had adduced in a claim the evidence unlawfully obtained by raiding the United States' embassy, the principle of proportionality would have impeded the admissibility of such evidence[71].

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65 Corfu Channel Case (UK v. Alb.), 1949 ICJ REP. 4 (Judgment of April 9, p. 17 to 23.

66 Michael REISMANN/Eric E. FREEDMAN, The plaintiff's dilemma: illegally obtained evidence and admissibility in international adjudication, in The American Journal of International Law, vol. 76 (1982) p. 737, 745 to 748.

67 See below the awards reviewed under C to G.

68 https://www.icj-cij.org/files/case-related/64/064-19800524-JUD-01-00-EN.pdf

69 Case concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 1 (Judgment of May 24), p. 45.

70 REISMANN /FREEDMAN, p. 749.

71 REISMANN /FREEDMAN, p. 751; *contra* Grégoire BERTROU/Sergey ALEKHIN, The Admissibility of Unlawfully Obtained Evidence in International Arbitration: Does the End Justify the Means?, *in* Cahiers de l'Arbitrage 2018-4, pages 20 and 21.

C. Methanex Corporation v. United States of America[72]

58. In this dispute, the claimant, Methanex Corporation ("Methanex"), initiated an arbitration against the United States of America (the "USA") under Chapter 11 of the North American Free Trade Agreement ("NAFTA"), as a Canadian investor. Methanex claimed compensation from the USA resulting from losses caused by the State of California's ban on the sale and use of the gasoline additive known as "MTBE". Methanex was the world's largest producer of methanol, a feedstock for MTBE.

59. Methanex brought forward different arguments and notably tried to demonstrate that the State of California's ban on methanol was the outcome of a secret agreement between Richard Vind (the President and CEO of two California-based ethanol companies, Regent International and Western Ethanol), representatives from Archer Daniels Midland (the principal U.S. producer of ethanol), and Californian government officials. The purpose of that agreement was to allegedly take Methanex, who was perceived as a foreign actor, out of the competition to the advantage of local producers of ethanol such as Mr. Vind's companies.

60. To support its theory, Methanex adduced as evidence several personal work documents ("the Vind Documents") relating to Mr. Vind and his companies or mentioning the latter, which purportedly demonstrated the conspiracy.

61. The United States of America complained that these documents had been stolen from Mr. Vind's offices. In response, Methanex admitted that it hired private investigators to perform searches in an area open to the public, used as a dumpster, in the vicinity of Mr. Vind's office. The Vind Documents had been found by the investigators while rummaging the bins. In response, the United States of America argued that the Vind Documents had been obtained by trespassing a private property and were hence to be held as unlawfully obtained. Therefore, pursuant to art. 25 of the UNCITRAL Arbitration Rules and 4 and 5 of the IBA Rules (which had been agreed upon by the parties), the Vind Documents were to be excluded from the evidentiary record. Methanex responded by arguing that under the laws of the State of California, the investigators did not commit any trespass by entering in an open area and searching in bins for disposed documents. Methanex also submitted that, even if the Vind Documents had been obtained unlawfully, it would nonetheless be appropriate for the Tribunal to allow them into the proceedings and that in U.S. civil cases a court could still admit illegally obtained evidence if it was relevant and probative.

62. In its final award[73], the arbitral tribunal held the following:

> "*In the Tribunal's view, the Disputing Parties each owed in this arbitration a general legal duty to the other and to the Tribunal to conduct themselves in good faith during these arbitration proceedings and to respect the equality of arms between them, the principles of "equal treatment" and procedural fairness being also required by Article 15(1) of the UNCITRAL Rules. As a general principle, therefore, just as it would be wrong for the USA ex hypothesi to misuse its intelligence assets to spy on Methanex (and its witnesses) and to introduce into evidence the resulting materials into this arbitration, so too would it be wrong for Methanex to introduce evidential materials obtained by Methanex unlawfully*.[74]"

63. On the standard and burden of proof of the evidence of the unlawful collection, the arbitral tribunal held:

> "*Once the USA demonstrated prima facie that the evidence which Methanex was proffering had been secured unlawfully, if not criminally, the burden of proof with respect to its*

[72] https://www.italaw.com/cases/683
[73] https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf
[74] Final award, Part II – Chapter I – p. 26, Nr. 54.

admissibility shifted to Methanex, yet Methanex elected not to call the relevant partners of the unnamed law firm, whose testimony might have clarified the issue. The Tribunal is unable to see why these partners could not have testified before it. On the materials before the Tribunal, the evidence shows beyond any reasonable doubt that Methanex unlawfully committed multiple acts of trespass over many months in surreptitiously procuring the Vind Documents." [75]

64. As regards materiality, the arbitral tribunal held that the Vind Documents were "*of only marginal evidential significance*" in support of Methanex's case[76].

65. The arbitral tribunal further made a distinction in that some of the Vind Documents had been collected before the commencement of the arbitral proceedings by Methanex and the rest during the arbitral proceedings. Referring to art. 25(6) of the UNCITRAL Arbitration Rules, the arbitral tribunal held that "*it would be wrong to allow Methanex to introduce this documentation into these proceedings in violation of a general duty of good faith imposed by the UNCITRAL Rules and […] incumbent on all who participate in international arbitration, without which it cannot operate*".[77] As regards the Vind Documents which were found to be collected after the commencement of the arbitral proceedings, the he arbitral tribunal held that "*it 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*".[78]

66. This award brought several welcome clarifications on the treatment of unlawfully obtained evidence in international arbitration which can be summarized as follows:

- The parties owe to each other and to the tribunal a duty to act in good faith and to respect the principle of equality of arms, principles which are harmed by the adducing of unlawfully obtained evidence;

- The principles of "fairness" and "equal treatment", especially when they are mentioned in the institutional rules, are basic procedural principles which underpin any arbitral proceedings and are obstacles to the adducing of such evidence;

- The party who opposes the admission of evidence by arguing that the latter was obtained unlawfully must only bring *prima facie* evidence that it was indeed obtained unlawfully. The burden of proof with respect to the admissibility of the evidence then shifts to the other party.

- Materiality is a criterion to examine the admissibility of the unlawfully obtained evidence: lack of materiality will weigh in favour of the inadmissibility of the evidence. Conversely, the award seems to imply that a high degree of materiality could weigh in favour of the admissibility.

- The admissibility of evidence unlawfully collected during arbitration proceedings must be examined with increased severity given the basic principles of fairness imposed on all parties in any international arbitration.

- Implicitly, the award also recognized (i) that an evidence is not inadmissible only because it has been unlawfully obtained and (ii) that the fact that an evidence was unlawfully

[75] Final award, Part II – Chapter I – p. 27, Nr. 55.
[76] Final award, Part II – Chapter I – p. 27, Nr. 56.
[77] Final award, Part II – Chapter I – p. 27, Nr. 57 and 58.
[78] Final award, Part II – Chapter I – pages 28 and 29, Nr. 59.

collected by a third party to the arbitration proceedings (*in casu* the private investigators) is not relevant for the test of admissibility.

D. Libananco Holdings Co. Limited v. Republic of Turkey (ICSIS Case No. ARB/06/8)[79], Decision on Preliminary Issues, June 23rd, 2008[80]

67. In this ICSID arbitration, the defendant, the Republic of Turkey, adduced as evidence thousands of privileged or confidential communications relating to the arbitration – including communications between the claimant and its counsels – which had been intercepted in a court-ordered surveillance in the context of a nation-wide Turkish financial criminal investigation against third-parties. In response, the claimant did not challenge the admissibility of the evidence but requested, as a relief, that the Republic of Turkey be excluded from the current phase of arbitration so that the arbitral tribunal could decide on the jurisdiction and merits "*on the record as it currently stands*"[81].

68. The arbitral tribunal did not grant the relief sought but rendered procedural orders to place the arbitration proceedings back on tracks. It instructed the Republic of Turkey not to make any interception relating to the communication between the claimant and its counsel and to destroy all communication already intercepted "*which in any way may relate to this arbitration*"[82]. The Republic of Turkey was further instructed to "*take step to ensure that its criminal investigators and others having access to or knowledge of intercepted emails and other communications […] do not provide copies or communicate the contents of (or information deriving from) such documents to any persons having any role in the defence of this arbitration*".[83]

69. In the procedural orders, the arbitral tribunal proceeded with the following balancing of interests. On one hand, it held that, pursuant to art. 21 and 22 of the ICSID Convention, the parties and their counsel were entitled to "*immunity from legal process with respect to acts performed by them in the exercise of their functions*"[84] as well as the *"fundamental principles"* that *"lie at the very heart of the ICSID arbitral process, including basic procedural fairness, respect for confidentiality and legal privilege, and an obligation on the parties to arbitrate fairly and in good faith"*[85]*.* On the other hand, the arbitral tribunal recognized that the Republic of Turkey could "*legitimately exercise its sovereign powers [to] conduct investigations into suspected criminal activities in Turkey*" further holding that pursuing the commission of a serious crime was a right of a sovereign State, that "*cannot be affected by the existence of an ICSID arbitration against it*."[86]

70. Interestingly, the arbitral tribunal did not seek to examine whether the Republic of Turkey's surveillance amounted to an unlawful act (for it was not, a least under Turkish criminal procedural law) but focused on the State's legitimacy of conducting criminal investigation during an ICSID arbitration. As some authors also pointed out, the arbitral tribunal treated privileged and confidential information identically, while the two categories obviously differ in their nature and procedural consequences; furthermore, what constitutes a privileged communication obviously needed to be determined on a case-by-case basis, a daunting task that the arbitral tribunal

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79 https://www.italaw.com/cases/626
80 https://www.italaw.com/sites/default/files/case-documents/ita0465.pdf
81 Libananco Holdings Co. Limited v. Republic of Turkey (ICSIS Case No. ARB/06/8), Decision on Preliminary issues, June 23rd, 2008 ("Libananco Decision on Preliminary Issues"), §44, 48, 73
82 Ibidem §82 – 1.1.1 and 1.1.2.
83 Ibidem §82 – 1.1.4.
84 Ibidem §78 and §22.
85 Ibidem §78.
86 Ibidem §79 and §82.

carefully avoided[87]. This award also endorsed the balancing of interests approach, which has then been used in subsequent ICSID awards[88].

E. EDF (Services) Limited v Romania (ICSID Case No. ARB/13/13)[89], Procedural Order No. 3, dated August 29th, 2008

71. In this ICSID case, the claimant argued that its investment had been confiscated by the State of Romania as part of an orchestrated action in retaliation for its refusal to pay bribes solicited by Romanian officials. The claimant sought to prove his case by adducing a secret tape recording of a conversation between one of its agents and the then State Secretary. The State of Romania challenged the admissibility of such evidence by arguing that "*a recording of a private conversation made without the consent of the speaker is unlawful and violates Article 26(1) of the Constitution of Romania, Article 12 of the Universal Declaration of Human Rights, and Article 8 of the European Convention on Human Rights*"[90]. On his side, the claimant emphasised the "*crucial importance to its case of the audio recording of a conversation between [its agent] and [the then State Secretary]*", which proved that the paying of a bribe was set as a condition for claimant to be permitted to continue its business in Romania.[91]

72. In its third procedural order[92], the arbitral tribunal reminded that, pursuant to ICSID Arbitration Rule 34 (7), it is "*the judge of the admissibility of any evidence adduced*" and that, consequently, the parties agreed that it had discretion to decide on the admissibility of evidence[93]. It further held that the principles of good faith and procedural fairness are limits to the "liberal approach" of international tribunals to admit unlawfully obtained evidence and that a tribunal should refuse to admit evidence into the proceedings if, depending on the circumstances under which it was obtained and tendered to the other party and the tribunal, there are good reasons to believe that those principles have not been respected[94]. The arbitral tribunal further referred to the possibility to exclude evidence in the presence of considerations of fairness or equality of the parties provided for at article 9(2)(g) of IBA Rules of Evidence, "*to which reference may be made as guidelines*".[95]

73. The arbitral tribunal came to the conclusion that the evidence had been taken in violation of Romanian law, since made without consent and in violation of the individual right to privacy. Referring to the principles laid down in the *Corfu Channel* and *Methanex* cases it held that "*admissibility of unlawfully obtained evidence is to be evaluated in the light of the particular circumstances of the case*" and that consequently "*admitting the evidence represented by the audio recording of the conversation held in [the then State Secretary]'s home, without her consent in breach of her right to privacy, would be contrary to the principles of good faith and fair dealing required in international arbitration*".[96]

74. A noteworthy point is that the tribunal did not use the balancing of interests to decide on the admissibility of the unlawfully obtained evidence but rather skipped to an overall assessment of the impact of such evidence on the fairness of the proceedings. This is possibly because the tribunal also found that the recording had been "heavily manipulated" and that the claimant

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87 BERTROU/ALEKHIN, p. 11, 28.

88 Cf. below, Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (ICSID Case No. ARB/13/13), Award, September 27, 2017 ("Caratube II Award"), ¶62, citing the tribunal's Procedural Order No. 4, and in particular §5.2, endorsing the findings of the Libananco tribunal.

89 Cf. https://www.italaw.com/cases/375

90 EDF (Services) Limited v Romania (ICSID Case No. ARB/13/13), Procedural Order No. 3, dated August 29th, 2008, p. 5 Nr. 9.

91 Ibidem, p. 9, Nr. 17.

92 https://www.italaw.com/sites/default/files/case-documents/ita0264.pdf

93 Ibidem, p. 25, Nr. 47.

94 Ibidem, p. 26, Nr. 47.

95 Idem.

96 Ibidem, p. 21, Nr. 38.

withheld the recording for over eight years, until only twelve days before the hearing[97], what would have outweighed any possible interest of the claimant to see the evidence held as admissible.

F. Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (ICSID Case No. ARB/13/13)[98], (Decision on Claimants' Request for the Production of "Leaked Documents", dated July 27th, 2015)[99]

75. In that case, the arbitral tribunal had to decide on the admissibility of documents leaked and published online further to the hacking of the email accounts of Kazakh government officials. The claimants requested to be allowed to adduce eleven leaked documents, including four documents apparently covered by legal privilege, arguing that the arbitral tribunal could not be "*placed in a sterile environment or a bubble detached from the real world and ignore these documents or pretend they don't exist*" and that the production of legally privileged documents was justified[100].

76. The respondent opposed to the admissibility of these documents, raising notably their unlawful provenance, the legal privilege and a breach of the principle of equality of arms that this would create, since Kazakhstan did not have access to claimants' internal emails.

77. The tribunal held that the non-privileged documents were to be admitted, considering that that the risk of an award that would be "*artificial and factually wrong when considered in light of the publicly available information*" outbalanced the right to be protected against cybercrime and the potential unfairness that the admission could result in.

78. The arbitral tribunal however decided on the inadmissibility of the subset of the leaked document covered by attorney-client privilege, holding that the "*utmost protection*" due to them pleaded against the admissibility of the leaked documents even though this could create a "*regrettable but inescapable and acceptable*" risk of an ultimate decision "*inconsistent with the privileged leaked documents in the public domain*". The tribunal also highlighted that admitting legally privileged documents would require "*rather extreme circumstances*".

79. This arbitral award is remarkable insofar as it put the interest in finding the truth above the fundamental right to privacy. One could however wonder if the tribunal would have come to the same decision had the result of the hacking not been published and attracted significant public attention. In our opinion, the mere fact that an information unlawfully obtained is subsequently published does not reinforce the interest in finding the truth, since the publishing of an information does not make the latter more truthful.

G. CAS Arbitration 2009/A/1879 Alejandro Valverde Belmonte v/ Comitato Olimpico Nazionale Italiano (CONI)& Agence Mondiale Antidopage (AMA) & Union Cycliste Internationale (UCI), award dated March 16th, 2010[101]

80. In this case, the Court of Arbitration for Sport ("CAS") had to deal with a blood sample ("the Bloodbag Nr. 18") purportedly belonging to Alejandro Valverde Belmonte, a renowned Spanish cyclist, and which had been seized in the course of an anti-doping campaign led by the Spanish

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97 Ibidem, p. 18 Nr. 35 and p. 26, Nr. 48.

98 Cf. https://www.italaw.com/cases/2131, Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (ICSID Case No. ARB/13/13), ("Caratube II").

99 The decision is not public but has been reported in Global Arbitration Review and summarized by the tribunal in the final award. See Global Arbitration Review, Tribunal Rules on Admissibility of Hacked Kazakh Emails (September 22nd, 2015), available at https://globalarbitrationreview.com/article/1034787/tribunal-rules-on-admissibility-of-hacked-kazakh-emails and Caratube II Award, §150-180.

100 See the summary reported in Global Arbitration Review, Tribunal Rules on Admissibility of Hacked Kazakh Emails and Caratube II Award, §150-156, 1259, 1261.

101 http://jurisprudence.tas-cas.org/Shared%20Documents/1879.pdf

criminal authorities. The doping-test results from the blood sample came back positive. The Spanish criminal authorities ultimately closed the case, on the ground that the doping by an athlete did not constituted an offence under Spanish law at the time.

81. Although the Spanish national association for cycling (RFEC) decided not to open a disciplinary file against Valverde, the Italian Anti-Doping Tribunal (TNA) successfully – although in breach of the principles governing the international assistance in criminal matters due to a procedural flaw on the Spanish authorities' side – secured a sample of the Bloodbag Nr. 18 from the evidentiary record of the closed Spanish criminal proceedings. TNA found that the collected sampled matched Valverde's DNA and that he was indeed in breach of the applicable anti-doping rules and issued a two-year ban from participating in events organized by the Italian Olympic Committee (CONI).

82. Both the Spanish and the Italian decisions were appealed before CAS by Valverde, who challenged the admissibility of the evidence secured by TNA.

83. On the admissibility of the evidence, the CAS made reference to the Swiss national jurisprudence[102]. Reminding the necessity to distinguish between "irregular evidence" and "illicit evidence", the CAS further pointed out that according to the standing jurisprudence of the Swiss supreme court, a decision regarding the admissibility of unlawfully obtained evidence "*must be the result of a balancing of various juridical interests"*, notably the "*the nature of the violation, the interest in discerning the truth, the difficulty of adducing evidence for the concerned party, the conduct of the victim, the legitimate interests of the parties, and the possibility of acquiring the (same) evidence in a legitimate manner* »[103]. The CAS further held that "*any prohibition on relying on illicit evidence in a national procedure does not in itself bind an arbitration tribunal*" since an arbitral tribunal is not bound by the rules applicable to the administration of evidence before national civil courts of the seat of the arbitration[104]. According to the CAS, "*the discretionary power of the arbitrator to rule on the admissibility of evidence is limited only by procedural public order*" which, in Switzerland is only violated "*in the situation of an untenable contradiction with the sentiment of justice, of such sort that the decision appears incompatible with the recognized values of a State governed by law*".

84. *In casu*, the CAS held that although the evidence had been obtained further to a violation of the provisions of the international assistance in criminal matters, it did not amount to a breach of the Swiss procedural order. The evidence was hence admissible and all the more given that the Italian authorities, on their side, had requested and secure the Bloodbag Nr. 18 from the Spanish authorities in compliance with the Italian law[105].

H. CAS Arbitration 2011/A/2425 Ahongalu Fusimalohi v/ FIFA, award dated March 8th, 2012[106]

85. In this award, the CAS had to decide on the admissibility of a conversation secretly recorded by an undercover Sunday Times' journalist during a conference in Auckland, New Zealand, with a member of the FIFA's Executive Committee, Mr. Fusimalohi. During the conversation, Mr. Fusimalohi reported acts of corruption in the FIFA World Cup bidding process, as well as his involvement therein.

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102 CAS Arbitration 2009/A/1879 Alejandro Valverde Belmonte c. Comitato Olimpico Nazionale Italiano (CONI)& Agence Mondiale Antidopage (AMA) & Union Cycliste Internationale (UCI), award dated March 16th, 2010 ("Valverde award"), p. 25, *Nr. 67 et seq.*

103 Valverde award, p. 26, Nr. 69

104 Valverde award, p. 26, Nr. 70

105 Valverde award, p. 27, Nr. 71.

106 See, CAS bulletin 2/2012, pp. 33 et seq. (cf. https://www.tas-cas.org/fileadmin/user_upload/Bulletin202012_2.pdf) as well as http://www.centrostudisport.it/PDF/TAS_CAS_ULTIMO/97.pdf

86. In reaction to a subsequent Sunday Times article covering the matter, the FIFA Ethics Committee secured a copy of the secret recording and initiated disciplinary proceedings against Mr. Fusimalohi, ultimately dismissing him and issuing a global football ban. Mr. Fusimalohi's unsuccessfully appealed to the FIFA Appeal Committee, and then sought to annul FIFA's sanctions before the CAS, arguing, in particular, that the secret recording was inadmissible evidence.

87. The CAS firstly noted, with reference to the *Methanex* and *Libananco* cases, that "*pursuant to the general duties of good faith and respect for the arbitral process a party to an arbitration may not cheat the other party and illegally obtain some evidence. Should that happen, the evidentiary materials thus obtained may be deemed as inadmissible by the arbitral tribunal*"[107].

88. The CAS held *in casu* that FIFA did not violate its duties of good faith and respect for the arbitral process. It went on further and considered that with regard to the right of respect of one's private life and liberty of expression protected by art. 8.2 and 10.2 of the European Convention on Human Rights, neither rights were absolute and that in light of the recent European Court of Human Rights case law and the "*the vital role of the press in informing the public and being a 'public watchdog'*", it was not self-evident that the reporter's conduct, albeit sneaky, was unlawful[108].

89. The CAS, with reference to the *Valverde* case, further pointed out that an international arbitral tribunal sitting in Switzerland is not bound to follow the rules of procedure, and thus the rules of evidence, applicable before Swiss civil courts, or even less before Swiss criminal courts[109].

90. Referring to art. 182(1) PILA, the CAS then decided that the admissibility of evidence was to be addressed pursuant to the procedural principles agreed upon by the parties, for instance the FIFA evidentiary rules contained in the FIFA Disciplinary Code and notably its art. 96[110]. The CAS found that the evidence did not violate "human dignity" as construed under Swiss law[111].

91. The CAS also assessed the compliance of the secret video recording with the principle of the protection of personality rights under Swiss substantive civil law, which contains the right to privacy, and which can be superseded, *inter alia*, by an overriding private or public interest[112]. The CAS distinguished between the violation of personality rights by making the secret recording, and by its use as evidence in the arbitration. *In casu*, the latter was justified by the overriding interests of (i) the general public to discover illegal and unethical conduct (ii) FIFA to verify the assertions made by the Sunday Times and to sanction the wrongful acts of its officials and (iii) the national football associations[113].

92. Finally, the panel held that the admission of the secret recordings was not violating Swiss procedural public policy[114].

93. Strikingly, although the CAS clearly pointed out that it was not bound by the case law of the seat as regard admissibility unlawfully obtained evidence, it still quite extensively made reference to principles of Swiss substantive civil law in its reasoning, without clearly nor convincingly exposing the underlying reasons. One also finds hard to understand why would the provisions of Swiss substantive civil law concerning the protection of the personality be of any relevance to examine the unlawfulness or admissibility of a secret recording made in New Zealand. The stages of the

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107 CAS Arbitration 2011/A/2425 Ahongalu Fusimalohi v/ FIFA, award dated March 8th, 2012 ("Fusimalohi award"), p. 46, Nr. 73.
108 Fusimalohi award, pages 47 and 48, Nr. 75 to 78.
109 Fusimalohi award, p. 48, Nr. 79.
110 Art. 96 of the FIFA Disciplinary Code provided the following: "*1.Any type of proof may be produced.2.Proof that violates human dignity or obviously does not serve to establish relevant facts shall be rejected.3.The following are, in particular, admissible: reports from referees, assistant referees, match commissioners and referee inspectors, declarations from the parties and witnesses, material evidence, expert opinions and audio or video recordings.*"
111 Fusimalohi award, pages 54 and 55, Nr. 94 to 97.
112 Fusimalohi award, pages 55 and 56, Nr. 98 to 102.
113 Fusimalohi award, pages 57 and 58, Nr. 103 to 105.
114 Fusimalohi award, p. 59, Nr. 108.

assessment of the unlawful character of the evidence and of the balancing of interests are also not clearly separated in the reasoning of the CAS.

I. CAS Arbitration 2011/A/2426 Amos Adamu v. FIFA, award dated 24th February, 2012[115]

94. In this case, another member of FIFA's Executive Committee made admissions similar to the *Fusimalohi* case, during meetings in Cairo and London with undercover journalists. The content of the discussions were later reported in the media. As in the case of Mr. Fusimalohi, the FIFA Ethics Committee initiated disciplinary proceedings which resulted in a fine and a ban of Mr. Adamu, and the FIFA Appeal Committee upheld the decision. In his appeal to the CAS, Mr. Adamu challenged the admissibility of the evidence, arguing that it constituted a criminal offense under the Swiss criminal code and also a violation of the Swiss civil law provision on the "right to personality".

95. The CAS proceeded with the same reasoning as Fusimalohi and admitted the secret recording into evidence.

J. CAS Award - FC Metalist v. Football Federation of Ukraine

96. The admissibility of secret video and audio recordings was also discussed before CAS in the FC Metalist v. Football Federation of Ukraine proceedings. Although the Award is not publicly available, FC Metalist attempted to set it aside before the Swiss supreme court[116].

97. The CAS appears to have balanced the interests at hand and admitted only the video recordings, as both parties relied on them in their pleadings. The Supreme court also pointed out the two-year inaction of the appellant before raising the inadmissibility of the secret video recordings as an element to be taken in consideration. The secret audio recordings were held inadmissible as they were "*illegally recorded*," likely with the assistance of one of the parties. Which specific legal principles the CAS applied when balancing the interests to decide on the admissibility of the recordings remains however unfortunately unknown.

98. This decision rendered by the Swiss supreme court is remarkable insofar as it held that the admission of an unlawfully obtained evidence does not materialize a breach of Swiss procedural public policy, provided that the arbitral tribunal has admitted the evidence further to a balancing of the interest which can be ,"*on the one hand, the interest in finding the truth and, on the other hand, the interest in protecting the legal protection infringed upon by the gathering of the evidence*"[117].

99. Scholars also commented (rightly in our opinion) that a criterion which arbitrators must not use for its assessment is whether the unlawful evidence was procured by the other party itself or a third party, since such circumstances do not have an influence on the pursuit of truth or the legally protected interests[118].

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115 https://arbitrationlaw.com/sites/default/files/free_pdfs/cas_2011.a.2426_aa_v_fifa.pdf

116 Cf. http://www.swissarbitrationdecisions.com/sites/default/files/27%20mars%202014%204A%20362%202013.pdf

117 DSC of 27th March 2014, 4A_362/2013, reasoning 3.2.2.

118 See Georg VON SEGESSER /Elisabeth LEIMBACHER/Katherine BELL, Admitting illegally obtained evidence in CAS proceedings – Swiss Federal Supreme Court Shows Match-Fixing the Red Card, Kluwer Arbitration Blog, October 17th 2014 (http://arbitrationblog.kluwerarbitration.com/2014/10/17/admitting-illegally-obtained-evidence-in-cas-proceedings-swiss-federal-supreme-court-shows-match-fixing-the-red-card/).

K. CAS Arbitration 2014/A/3625 Sivasspor Kulübü v. Union of European Football Association (UEFA), award dated 3rd November 2014[119]

100. In this case, the CAS panel was confronted with communications intercepted by the Turkish authorities during a match-fixing investigation between Turkish football clubs, including Sivasspor.

101. The admissibility of these interceptions was not challenged but the CAS deemed it necessary to mention, with reference to the *Valverde* and *Metalist* awards, that the inadmissibility of evidence in a civil or criminal state court "*does not automatically prevent […] an arbitration tribunal from taking such evidence into account*".[120]

102. The CAS further held that "*steps must be taken, in regard to the public interest in finding the truth in match-fixing cases and also in regard to the sport federations' and arbitration tribunals' limited means to secure evidence, to open up the possibility of including evidence in the case although such evidence could potentially have been secured in an inappropriate manner so long as the inclusion of such evidence in the case does not infringe any fundamental values reflected in Swiss procedural public policy*"[121].

103. The CAS held that the intercepts were admissible evidence[122].

L. Arbitration CAS 2016/O/4504 International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) & Vladimir Mokhnev, award dated 23rd December 2016[123]

104. In this case, the CAS had to deal with secret recordings made by a Russian athlete of conversations she had with other Russian athletes and athletes' support personnel, including a coach, with a view to exposing the widespread doping practices within Russian athletics. The athlete subsequently made the recordings available to a German journalist, who used extracts from the recordings to produce a documentary which triggered an investigation ultimately leading to the suspension of the coach. The suspension decision has then been challenged before the CAS by the coach.

105. The CAS held that article 184(1) PILA provides arbitral tribunals in international arbitration proceedings seated in Switzerland with ample latitude in the taking of evidence[124] and that, as a consequence, it disposed of a certain discretion to determine the admissibility or inadmissibility of evidence.

106. The CAS further reasoned that according to the Swiss case law on civil national procedure, if evidence is illegally obtained, it is only admissible if the interest to find the truth prevails over the private interest[125]. The CAS then held that the fight against doping was not only of a private interest, but also of a public interest. In a situation where widespread doping in a particular country was notorious and had been systematically supported by coaches, clubs and government-affiliated organisations, the interest in finding the truth was to prevail over a possible reliance on the principle of good faith as a defence against gathering illegally obtained evidence[126].

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119 http://jurisprudence.tas-cas.org/Shared%20Documents/3625.pdf

120 CAS Arbitration 2014/A/3625 Sivasspor Kulübü v. Union of European Football Association (UEFA), award dated 3rd November 2014 ("Sivasspor award, p. 35, Nr. 142.

121 Ibidem, pages 35 and 36, Nr. 142.

122 Idem.

123 http://jurisprudence.tas-cas.org/Shared%20Documents/4504.pdf

124 Arbitration CAS 2016/O/4504 International Association of Athletics Federations (IAAF) v. All Russia Athletics Federation (ARAF) & Vladimir Mokhnev, award dated 23rd December 2016, ("Mokhnev award"), p. 12 Nr. 52 to 78.

125 Mokhnev award, pages 14 and 15, Nr. 66 to 68.

126 Mokhnev award, p. 16, Nr. 72 to 76.

107. The CAS hence held that the interest in discerning the truth was to prevail over the interest of the coach and the secret recording was admitted into evidence.

M. Yukos cases, final awards dated 18th July, 2014[127]

108. In the awards Yukos Universal v. Russian Federation, Hulley Enterprises v. Russian Federation and Veteran Petroleum v. Russian Federation, which are historically the three largest investment arbitration awards, the arbitral tribunal relied on a number of leaked U.S. diplomatic cables adduced as evidence by the claimants.

109. The admissibility of the leaked cables was not challenged by the Russian Federation nor examined on its own motion by the arbitral tribunal, which was criticized by some scholars[128].

IV. The admissibility of unlawfully obtained evidence under national procedural systems

110. As seen above, the parties' procedural autonomy allows them to determine the applicable procedural rules in arbitration proceedings. Failing an agreement between them, the arbitral tribunal's procedural discretion allows the latter to select the appropriate procedural rules. The modern view is that national procedural rules are not suitable for international arbitration since, in agreeing on arbitration as the mean to resolve their dispute, they precisely chose to avoid a national approach; therefore, the wholesale adoption of the civil procedure code of a legal system should be avoided[129].

111. In Switzerland, the arbitral tribunal is not bound to follow any national procedural law[130]. According to scholars, it is furthermore *"now widely accepted that the procedure before international arbitral tribunals is governed by the lex arbitri and that the law of civil procedure at the place of arbitration is applicable neither by analogy nor subsidiarily*" but that "*there are rules and principles in civil procedure which can serve as a useful and relevant source of inspiration for international arbitrators"*, bearing in mind that *"their application is not automatic and such application should be justified in each case*"[131].

112. The national procedural treatment of unlawfully obtained evidence is thus uncoupled from the principles that an arbitral tribunal should apply to the issue. The consequence is that an arbitral tribunal should not feel compelled, nor be over-influenced, by the procedural treatment of unlawfully obtained evidence by the national courts of its seat.

113. Nevertheless, the different applicable principles contained in national procedural systems provide a valuable basis to determine whether some form of supra-national consensus exists on the matter. Moreover, the national procedural principles can be a source of inspiration for the arbitral tribunal in determining the procedural rules.

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127 Cf. https://www.italaw.com/cases/1175 - https://www.italaw.com/cases/544 - https://www.italaw.com/cases/1151.

128 J.H. BOYKIN/M. HAVALIC, Fruits of the Poisonous Tree: The Admissibility of Unlawfully Obtained Evidence in International Arbitration, in www.transnational-dispute-management.com, October 2014 issue as well as Jessica O IRETON., The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence, in ICSID Review, Vol. 30, No. 1 (2015), pp. 231–242, p. 239, footnote 66.

129 BORN, International arbitration, Law and Practice, p. 160, §8.03[C].

130 POUDRET/BESSON, par. 532, quoted in KNOLL, p.139, Nr. 19 *ad* art. 182 PILA.

131 Michael E. SCHNEIDER, Non-Monetary Relief in International Arbitration: Principles and Arbitration Practice, in SCHNEIDER/KNOLL, ASA special bulletin Nr. 30, Performance as a Remedy: Non-Monetary Relief in International Arbitration, ed. JurisNet LLC 2011, p. 30.

A. Switzerland

114. The Swiss civil procedure code ("SCPC") was enacted in 2011 and unified the civil procedure in Switzerland. The issue of admissibility of unlawfully obtained evidence is addressed at art. 152 SCPC:

> "*Art. 152 Right to evidence*
>
> *1 Each party is entitled to have the court accept the evidence that he or she offers in the required form and time.*
> *2 Illegally obtained evidence shall be considered only if there is an overriding interest in finding the truth."*

115. The Swiss lawmaker has codified the principles that (i) an unlawfully obtained evidence is not *per* se inadmissible and (ii) that in order to determine its admissibility, the court must weigh the interest in the protection of the right infringed by the unlawful act against the interest in ascertaining the truth. According to the Federal council's commentary on the draft law, "*a title obtained by threat or violence cannot be used, because personal integrity - especially in civil proceedings - is in principle more important than the interest in the truth".* On the other hand, a "*simply*" stolen document may be used if the interest in finding the truth so requires[132].

116. Given the rather recent enactment of the unified SCPC in Switzerland, the Supreme court has only rendered a couple of cases so far on this topic.

117. In a 2013[133] case, the Supreme court has addressed the issue of adducing attorney-client privileged communications as evidence. It held that the failure to comply with a confidentiality clause and the use of the content of settlement discussions in the proceedings constitute a breach of the obligation under art. 12 let. a LLCA[134] and that, therefore, a letter containing communications exchanged between attorneys in the course of a negotiation is deemed confidential and cannot be filed in court, even if redacted - and even with the authorisation of the President of the Bar -, unless it is obvious that only part of the text is of a confidential nature. The Supreme court further reasoned that "*in patrimonial disputes where the parties must present the court with the facts in support of their case and submit the related evidence, the interest in discovering the material truth, allegedly resulting from the illicit means of proof, cannot prevail over the public interest in strict observance of the rule of confidentiality*".

118. Scholarly writings also provide valuable insights on the issue which can be summarized as follows.

- The obtaining of the evidence must be unlawful, that is to say amount to an infringement of a legal provision of substantive law. The unlawful character of the taking of evidence exists provided that the act of taking the evidence infringes a provision of substantive law which prohibits such infringement and if there is no justification provided by substantive law for such infringement. Infringements of procedural law are hence excluded from the scope of art. 152 al. 2 SCPC[135]. Unlawfully taken evidence typically result from a behaviour infringing a substantive provision of the law which aims at protecting public interest or rights; any act amounting to a criminal offense would fall under this definition[136]. The

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132 Federal gazette (*Feuille fédérale*) 2006, p. 6922; https://www.admin.ch/opc/fr/federal-gazette/2006/6841.pdf

133 DSC 140 III 6.

134 LLCA stands for "*Loi sur la libre circulation des avocats*", a Swiss federal act containing the core deontology rules applicable to attorneys in Switzerland.

135 Christian LEU, Art. 152 Recht auf Beweis *in* Alexander BRUNNER/Dominik GASSER/Ivo SCHWANDER, *ZPO-Schweizerische Zivilprozessordnung Kommentar*, Dike Verlag, 2016, p. 1151, Nr. 77 ad art. 152 ZPO.

136 LEU, p. 1151, Nr. 78.

question as to who infringed the provision of substantive law by obtaining the evidence is irrelevant: hence it can be a party to the proceedings or a third party[137].

- There must be a causal link between the initial act amounting to an infringement of substantive law and the obtaining of the evidence; said act must appear as the *condictio sine qua non* for obtaining the evidence[138]. The length of the causal chain is however irrelevant[139]. The licit transcript of an unlawfully recorded telephone conversation will hence still be deemed as an unlawful obtaining of evidence[140].

- As concerns the balancing of interests, the judge must weigh the interests in finding the truth on the one side, against the interest in protection of the legal right infringed by obtaining the evidence on the other side[141]. The amount at stake in the dispute weighs in on the side of the interest in finding the truth[142]. The position in the legal hierarchy of the right infringed by obtaining the evidence will weigh in on the other side: an evidence obtained by the use of violence or threat will score at the highest level of the legal hierarchy and will probably be inadmissible in any instance, whereas a breach of a third party's property could in some case still allow the evidence to be held admissible[143]. The intensity of the infringement is also a criterion which weighs in on the same side of the scale: the theft of a personal diary will amount to a severe infringement of its author's rights[144]. It must also be taken in consideration whether the party opposing to the admissibility of the problematical evidence or the person aggrieved by the unlawful act has a duty of cooperation in the proceedings which would have imposed a procedural obligation to provide the evidence obtained by unlawful means. If it is the case, the interest in the protection of the legal right infringed by obtaining the evidence will be lower. Conversely, if the third party had a procedural right to refuse its cooperation (for instance by opposing their duty of medical, ecclesiastical or notarial secrecy) the interest in the protection of the legal right infringed will be significantly raised[145].

- The assessment of the admissibility of an unlawfully obtained evidence must be performed *ex officio* by the court[146];

- If the unlawfully obtained evidence has been held inadmissible, it should, in order for the issue to be examined by the higher court in case of appeal, remain in the evidentiary record but be separated (e.g. put under seals) from the other admissible evidence, the rationale being that the tribunal must not be influenced by the inadmissible evidence[147].

B. France[148]

119. Art. 9 of the French civil procedure code[149] provides for the principle of "loyalty" in the adducing of evidence (« *il incombe à chaque partie de prouver conformément à la loi les faits nécessaires au succès de sa prétention ».* The logical consequence is that any evidence adduced in infringement of the law will be deemed inadmissible.

137 LEU, p. 1152, Nr. 78.
138 LEU, p. 1151, Nr. 74 and 75.
139 LEU, p. 1151.
140 LEU, p. 1151, Nr. 76.
141 LEU, p. 1152, Nr. 81.
142 LEU, p. 1155, Nr. 92.
143 LEU, p. 1153, Nr. 83 to 88.
144 LEU, p. 1153, Nr. 89.
145 LEU, p. 1154, Nr. 90.
146 LEU, p. 1149, Nr. 67.
147 LEU, p. 1156, Nr. 98.
148 See also the comparative chart appended in BERTROU/ALEKHIN, p. 61.
149 Cf. https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070716

120. The French Cour de cassation has followed this view in multiple cases and notably decided that the use of telephone eavesdropping was not permissible[150] as well as the audio or video recordings performed secretly[151]. It has also held that the unlawful trespassing of the tenant's property by the landlord to collect evidence led to the inadmissibility of such evidence[152].

121. The severity of the loyalty principle is however mitigated depending on the area of civil law considered[153]. When infringing on a right to privacy, a piece of evidence can be admitted on the basis of a proportionality test between the possibly contradicting interests at hand[154]. The breach of attorney-client privilege seems to be a critical impediment to the adducing of evidence[155], similarly the breach of other privilege (notary-client privilege, accountant-client privilege and medical privilege)[156] renders the evidence gathering unfair and the evidence inadmissible, whereas business secrecy is not *per se* an obstacle, at least as far as pretrial provisional measures (art. 145 of the French civil procedure code) are concerned[157].

C. Germany

122. The German civil procedure code (*Zivilprozessordnung*[158]) does not contain any provision governing the issue of unlawfully obtained evidence.

123. The topic is disputed among scholars: one part contends that pursuant to the principle of good faith (*Treu und Glaube*) an unlawfully obtained evidence should not be allowed to be adduced in proceedings while the other part raises the interests in finding the truth as a legitimate excuse to allow such evidence.

124. The courts have taken a middle stance and proceed by weighing up the interests[159]. Having a witness secretly hearing a telephone call with a counterpart in order to bring the latter to the admission that he is liable to the repayment of a loan and then summon said witness to testify thereon has been held as an inadmissible manner of obtaining evidence, notably given that a lender has other means of proving the existence of a loan, for instance by requesting the borrower to sign a receipt upon remittance of the lent sum[160]. Courts have also held that the covert video monitoring of the leased premises by the landlord in order to prove that the tenant damaged the landlord's property (for instance a washing machine) was not admissible; the court held that the landlord could also protect its property by using a mean less intrusive in the tenant's rights, for example an apparent video monitoring system[161].

125. By contrast, the courts tend to admit unlawfully taken evidence provided the party adducing such evidence can demonstrate being in a "case of need", where such evidence would be the sole possibility to counter ongoing or imminent criminal activities against the party's business[162].

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150 Ass. Plén. C.Cas. - 07.01.2011, pourvoi n°09-14.316

151 2e Civ., 7 octobre 2004, pourvoi n° 03-12.653, Bull. 2004, II, n° 447 ; Com., 3 juin 2008, pourvoi n° 07-17.147, Bull. 2008, IV, n° 112 ; Soc., 23 mai 2007, pourvoi n° 06-43.209, Bull. 2007, V, n° 85.

152 3e Civ., 10 mars 2010, pourvoi n° 09-13.082, Bull. 2010, III, n° 62

153 See generally the 2012 report of the Cour de cassation: https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2012_4571/livre_3_etude_preuve_4578/partie_4_administration_preuve_4589/principes_gouvernant_4591/admissibilite_modes_26241.html

154 Cf. Cass. soc., 18-10-2006, n°04-47400 ; Cass. 1re civ., 25-02-2016, n°15-12403 ; Cass. civ. 1re, 05-04-2012, n°11-14177.

155 Cf. Cass. com., 03-05-2012, n°11-14008.

156 Cf. Cass. civ. 1re, 04-06-2014, n°12-21244; 296. Cass. com., 08-02-2005, n°02-11044; 297. Cass. civ. 2e, 19-02-2009, n°08-11959.

157 Cf. Cass. civ. 1re, 22-06-2017, n°15-27845.

158 https://www.gesetze-im-internet.de/zpo/

159 Cf. BALTHASAR: Beweisverwertungsverbote im Zivilprozess, JuS 2008 Heft 1, pp. 35 et seq.

160 BGH, NJW 2003, 1727; BVerfGE 106, 28 (50f.) = NJW 2002, 3619 (3624) = NVwZ 2003

161 OLG Köln, NJW 2005, 2997 = NZM 2005, 758; on the same problematic OLG Karlsruhe, NJW 2002, 2799 = NZM 2002.

162 BGH, NJW 1994, 2289 (2292f.) = GRUR 1995, 693.

D. Italy

126. The Italian *Codice di procedura civile*[163] does not contain any provision addressing the issue of unlawfully obtained evidence.

127. This recently led the Italian supreme court to hold that, by analogy to art. 191 of the criminal procedure code (which provides the inadmissibility of evidence obtained in violation of the provisions of the law), material fraudulently appropriated from the opposing party could not be used as evidence against that party in civil proceedings[164].

128. Quite interestingly, the Italian supreme court adopted the exact opposite view when it had to consider whether the Falciani list (named after a French bank officer who stole a list of client from a Swiss Bank) could be used by the Italian State as an evidence in tax matters, holding that the duty to pay taxes was overriding any other considerations[165].

E. Turkey

129. Art. 189(2) of the Turkish procedural code[166] provides that any evidence obtained in violation of the law cannot be taken in consideration to prove an asserted fact[167].

130. This provision materializes the most stringent national procedural position on adducing of unlawfully obtained evidence.

F. United Kingdom

131. The prevailing view in the UK is that there is no absolute prohibition of the use of illegal or covertly obtained evidence and that the courts will allow such evidence to be presented if it is particularly relevant to the case. English courts thus seem to take the exact opposite view of art. 189(2) of the Turkish procedural code.

132. However, the courts have discretion, pursuant to the relevant principles contained in the Civil Procedure Rules[168], to exclude evidence in order to achieve the overriding objective of ensuring cases are dealt with justly and at proportionate cost, notably by ensuring that the parties are on an equal footing and that the case is dealt with fairly and expeditiously.

133. This has been recently confirmed by the High court in a case where covert recordings of conversations between business partners were held as admissible evidence[169]. In another case[170], the claimant's home was covertly monitored in order to expose a false personal injury claim (an act of trespass). The High court admitted the evidence but ordered the defendant to pay the costs of the time spent debating the admissibility of the evidence, underlining its duty to deter further recourse by litigants to such type of evidence.

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163 https://www.gazzettaufficiale.it/sommario/codici/proceduraCivile

164 Corte di Cassazione, sez. VI Civile –1, ordinanza 1 luglio –8 novembre 2016, n. 22677.

165 Cass. (ord.) 28 aprile 2015, n. 8605, Giur. it., 2015, 1610.

166 Cf. https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6100.pdf

167 The provision reads in Turkish as follows: "*Hukuka aykırı olarak elde edilmiş olan deliller, mahkeme tarafından bir vakıanın ispatında dikkate alınamaz.* », which can translate as: "Evidence which have been obtained in a manner contrary to the law cannot be taken in consideration by the court as a proof of a fact".

168 Cf. https://www.justice.gov.uk/courts/procedure-rules/civil and http://www.legislation.gov.uk/uksi/1998/3132/contents/made

169 Singh v Singh [2016] EWHC 1432, cf. http://www.bailii.org/ew/cases/EWHC/Ch/2016/1432.html; on this occasion the High court pointed out: "*It is true to say that these [recordings] must be approached with some caution, as there is always a risk that where one party knows a conversation is being recorded but the other does not the content may be manipulated with a view to drawing the party who is unaware into some statement that can be taken out of context. But there can be great value in what is said in such circumstances, where the parties plainly know the truth of the matters they are discussing and are talking (at least on one side) freely about them*."

170 Cf. Jones v University of Warwick [2003] EWCA Civ 151, cf. https://www.bailii.org/ew/cases/EWCA/Civ/2003/151.html

V. Synthesis: What is an "unlawful obtention of evidence" in international commercial arbitration in Switzerland and how should it be addressed?

134. The international precedents and provisions of national laws reviewed above suggest that there is no standardized solution on the international level but rather trends towards some principles[171] that the arbitral tribunal can resort to in its reasoning on the admissibility of an unlawfully obtained evidence.

135. It is submitted that these principles and trends can be broken down into the following steps to achieve a systematic approach to the issue.

A. Has the evidence adduced been obtained through an unlawful act ?

136. The arbitral tribunal should firstly verify whether the problematical evidence originates from an unlawful act. In doing so, the tribunal must determine beforehand which law is applicable to this examination.

137. Pursuant to art. 187 PILA, this law must be the "*rules of law chosen by the parties*" or the law with which "*the case has the closest connection*".

138. A choice of national law generally encompasses all applicable substantive law provisions of the chosen national law, no matter they are of public or private law nature[172]. The choice of law agreed upon by the parties could hence be considered, provided the unlawful obtaining of an evidence would be an issue governed by this law. This must be determined by interpreting the choice of law agreement[173]. However, the parties scarcely ever would have specifically agreed on a rule of law to govern the commission of an unlawful act in obtaining an evidence so that unless drafted in an overly broad manner, a party could reasonably challenge that the chosen law should extend this far. Moreover, it seems difficult to consider applying the law chosen by the parties to instance of unlawful collection of evidence by unrelated third parties, and even more if the obtaining of the unlawful evidence occurs in a place without any territorial connection with the parties to the arbitration or the seat of the tribunal.

139. Failing a choice of law to govern the issue, the arbitral tribunal will be left to determine the applicable law pursuant to the "*closest connection*" test pursuant to art. 187(1) PILA. This provision does not however outline the relevant criteria or aspects for determining the closest connection, and therefore leaves the arbitral tribunal with considerable discretion[174]. This however does not mean that the arbitral tribunal is free to choose the law it sees the most appropriate or just[175], since the closest connection test provides an objective and factual criterion, leaving no room for purely subjective considerations, such as hypothetical will of the parties[176]. Furthermore, given the independent nature of the Chapter 12 of PILA provisions governing the arbitration in Switzerland, scholars are of the opinion that the arbitral tribunal cannot simply refer to other provisions providing a conflict of law rule or criterion to determine the *lex causae* absent a choice

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171 Some scholarly views consider that as opposed to courts issuing judgments that bind the lower courts, the arbitrators, whose powers are essentially based on the will of the parties, do not issue awards the solutions of which would necessarily bind another arbitral tribunal called upon to decide the same issue, so that at least theoretically, it appears difficult to consider that arbitral case law would be a source of arbitration law (Antonio RIGOZZI, L'arbitrage international en matière de sport, 2005, Nr. 432, although this writer points out that "legal practice is very different" - see same reference, Nr. 433 to 435).

172 Bernhardt BERGER/Franz KELLERHALS, International and domestic arbitration in Switzerland, 2nd edition, Bern, 2010, §1278; GIRSBERGER/VOSER, p. 342, Nr. 1358.

173 Peter BÜRCKHARDT/Raphaël MEIER, Article 187 PILA, in Manuel ARROYO (Ed.) International arbitration in Switzerland, 2nd edition, Wolters Kluwer, 2018; p. 220, Nr. 34 *ad* art. 187 PILA.

174 BÜRCKHARDT/MEIER, P. 221, N°39.

175 BÜRCKHARDT/MEIER, P. 222, N°41.

176 BÜRCKHARDT/MEIER, P. 221, N°39 and 40.

of law, such as art. 117 PILA which governs international contracts and provides a similar closest connection test[177].

140. Among the factors generally found to be applicable in the closest connection test are the following: the place of business or habitual residence of the parties – especially the party carrying out the characteristic obligation of the contract – and the place of performance of the characteristic obligation of the contract[178]. By contrast, the place of signature of the contract, the place where the negotiations were held, the nationality of the arbitrators, the seat of the arbitral tribunal and the likely place of enforcement of the arbitral award are not considered to be relevant factors[179].

141. Now considering an unlawful act from which an evidence is originating[180] the following four legal systems could be considered: (i) the substantive law of the place of business or habitual residence of one of the parties, (ii) the substantive law of the place where the evidence was obtained as a result of the unlawful act, (iii) the substantive law of the place where the allegedly unlawful act has been committed and and (iv) the law that the tribunal found (absent a choice of law) governing the contractual relations between the parties (*lex causae*).

142. The choice of the parties to adjudicate their dispute through arbitration militates against the law of the place of business or habitual residence of the parties (i), since the arbitral tribunal will fall back on the application of a national substantive law that the parties have sought to avoid in agreeing upon arbitration nor have referred to in their arbitration agreement.

143. It is also submitted that the substantive law of the place of the materialization of the resulting evidence (ii) should also be ruled out since the initial unlawful act could have led to a material outcome in more than one State and given that this choice could lead to undesired “forum shopping” behaviours such as conducting evidence-gathering from the territory of States who have more permissive legal systems.

144. The *lex causae* (iv) should also be ruled out given that the unlawful acts can also be committed in obtaining evidence by third parties not related to the parties to the arbitral proceedings or the agreement at the basis of the dispute.

145. The automatic “fallback” choice of the substantive law of the seat of the arbitral tribunal, that is to say Swiss substantive law, should not be an option either given that it generally has only a remote connection with the dispute[181].

146. The substantive law of the place where the allegedly unlawful act has been committed (iii) hence appeared to be preferred.

147. Supranational rules could also be taken in consideration, provided they are sufficiently specific. For instance, the relevant provisions of the Budapest Convention on cybercrime[182] could be used in examining whether evidence has been collected unlawfully, provided however that the problematic evidence has been gathered through acts committed on the territory of a contracting State.

148. Once the applicable legal system has been identified, the arbitral tribunal should try and determine the relevant provisions of substantive law governing the initial “unlawful act”.

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177 BERGER/KELLERHALS, N° 1293; GIRSBERGER/VOSER, p. 359, Nr. 1417, *contra* Tarkan GÖKSÜ, Schiedsgerichtbarkeit, Dike Verlag, 2014, p. 532, N° 1750.

178 GIRSBERGER/VOSER, p. 359, Nr. 1417

179 BERGER/KELLERHALS, N° 1417; GIRSBERGER/VOSER, p. 360, Nr. 1418.

180 GIRSBERGER/VOSER, p. 359, Nr. 1417.

181 GIRSBERGER/VOSER, p. 356, Nr. 1414.

182 https://www.europarl.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_conv_budapest_/7_conv_budapest_en.pdf

149. In order to constitute an "unlawful act", logic dictates that that there should be, in the legal system to be considered, a provision setting forth a general prohibition applying to anyone (*erga omnes*) and not only to one or both parties to the arbitral proceedings. It appears hence dubious that the mere breach of a contract could constitute an unlawful act. For instance, absent any other general prohibition contained in an *erga omnes* provision of the law, the breach of a mere confidentiality agreement could only give rise to contractual liability but not to an unlawful act to be taken in consideration to assess the admissibility of the material gathered through this confidentiality breach and adduced as evidence.

150. Furthermore, as implicitly acknowledged in the *Methanex*[183] and *FC Metalist*[184] cases, the fact the initial unlawful act was committed by a third party to the arbitration proceedings is not relevant in determining whether an unlawful act has been committed[185]. However, the fact that a party to the arbitration proceedings has been involved, assisted, incited or encouraged such act can be taken in consideration at the stage of the balancing of interests.

151. As for the standard of proof, on should consider that the unlawful origin of the evidence adduced could often result from indirect or circumstantial evidence. Demanding that the party challenging the admissibility of the evidence provides clear and convincing evidence thereof would probably set the bar too high and decrease the possibility to debate the issue of admissibility of allegedly unlawfully obtained evidence.

152. Pursuant to the arbitral tribunal's view in *Methanex*[186], the party opposing the admission of an evidence should hence only bring *prima facie* evidence of its unlawful origin and that when this condition is met, the burden of proof then shifts to the other party.
By contrast, the latter should however bring clear and convincing evidence of the lawful origin of the evidence adduced in order for the arbitral tribunal to admit the evidence at this stage without resorting to the balancing of interests.
In other words, if the obtaining of an evidence appears *prima facie* unlawful, it behoves to the party who adduced the evidence to demonstrate, under the ordinary standard of proof[187], that no unlawful act was committed or that the author of the unlawful act had a valid justification under the law applicable to such act[188]. For example, under Swiss law, a breach of the rights of personality of a person can be justified by the latter's consent (art. 28 al. 2 of the Swiss civil code).

B. Is there a causal relation between the unlawful act and the obtaining of the evidence adduced?

153. This condition derives from logic.

154. If the answer to the abovementioned question is in the negative, the evidence adduced has not been obtained unlawfully.

155. By drawing on the views of the Swiss scholars, the length of the causal chain does not seem a valid criterion to examine the causal relation[189]. There is indeed no reason to treat a secret recording of a private conversation differently from an oral testimony of a person who read the transcript of this secret recording.

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183 Cf. above, p. 9.
184 Cf. above, p. 16.
185 VON SEGESSER/LEIMBACHER/BELL are of the same opinion.
186 See above, pages 10 and 11.
187 On this issue in international arbitration, see WAINCYMER, §10.4.3.
188 A similar method is reported to have been applied by arbitral tribunals in instances of allegations of corruption, see ICSID review, Foreign Investment Law Journal, Vol. 24 Nr. 1, 2009 p. 122 citing ICC case Nr. 6497, Award (1994), available (excerpts) at https://www.trans-lex.org/206497/_/icc-award-no-6497-yca-1999-at-71-et-seq/ as well as Noradèle RADJAI, Where there's smoke, there's fire? Proving illegality in international arbitration, Newsletter of the International Bar Association Legal Practice Division, March 2010, p. 139.
189 Cf. above, pages 19 and 20.

156. Drawing on Swiss scholarly views, it seems justified to admit that each link of the causal chain, from the unlawful act until the evidence adduced, must be the "*sine qua non*" condition of the lower link down the chain. Otherwise the possibility to challenge the admissibility of evidence would become too broad. By contrast, the mere contention that the commission of an unlawful act has facilitated the obtaining of an evidence adduced does not seem sufficient to meet the *sine qua non* condition.

C. Has the opposing party challenged the admissibility of the evidence brought forward?

157. If the opposing party has challenged the admissibility of an allegedly unlawfully obtained evidence, there is no question that the arbitral tribunal must address the issue.

158. However, what if such evidence remains unchallenged? Must the arbitral tribunal raise the subject *sua sponte*? These questions remain largely unanswered[190] but it is worth pointing out that pursuant art. 9(2)(g) of the IBA Rules of Evidence the arbitral tribunal can exclude an evidence on its own motion, particularly for "*considerations of […], fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling*". One could at least safely assume that when the parties have agreed on these rules, the arbitral tribunal retains discretion to address the issue on its own motion[191]. Most institutional rules as well as the UNCITRAL Arbitration Rules provide for wide discretion of the arbitral tribunal to decide on the admissibility of the evidence offered by the parties. This militates in favour of a possibility of the arbitral tribunal, facing a possibly unlawful evidence, to raise on its own motion the issue with the parties, gather their views and decide. However, we have seen that in the Yukos award, the arbitral tribunal relied on the *Wiikileaks* cable several times without examining their admissibility and despite their obvious unlawful origin.

159. One should also bear in mind that further to the *receptum arbitri*, the parties can legitimately expect from the arbitral tribunal that it conducts the proceedings in such a way that it renders a valid award[192]. Therefore, the arbitral tribunal would probably have a duty to raise *ex officio* the issue in presence of evidence obtained unlawfully to such an extent that the award itself could appear contrary to the procedural public policy and be exposed to setting aside proceedings or to be held unenforceable by national courts.

160. Although these instances should be scarce in the field of international commercial arbitration, the adducing of an evidence central to the case which *prima facie* would appear as having been obtained through physical coercion, or confessions extracted under torture, would probably enter in consideration.

D. Have the Parties agreed on specific rules governing the admissibility of unlawfully obtained evidence?

161. Pursuant to art. 182(1) PILA, the parties retain a wide autonomy to determine the procedure applicable to the arbitral proceedings. Their autonomy is limited by the principles of equal treatment and the right to be heard the content of which have been particularized above. It follows that the arbitral tribunal must apply the principles agreed upon by the parties if they have, directly in their arbitration agreement or by way of reference to a set of rules, agreed upon principles governing the admissibility of evidence. This is all the more true since the failure to conduct the

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190 Patricia ŽIVKOVIĆ, From Our Archives: Admitting Illegally Obtained Evidence in International Arbitration, Kluwer Arbitration Blog, March 28 2019, http://arbitrationblog.kluwerarbitration.com/2019/03/28/from-our-archives-admitting-illegally-obtained-evidence-in-international-arbitration/

191 On this issue, see BOYKIN/HAVALIC, p. 36 to 38.

192 GIRSBERGER/VOSER, p. 200, Nr. 835.

arbitral procedure as agreed by the parties is a ground to refuse recognition of an award under art. V(1)(d) of the New York Convention.

162. In presence of rules agreed upon by the parties addressing the issue of admissibility of unlawfully obtained evidence, the arbitral tribunal must take them in consideration in his reasoning.

163. The provisions of many institutional rules also mention the topic of admissibility of evidence, however often by merely stating that it is for the arbitral tribunal to decide on such issue[193]. Article 9(2)(g) of the IBA Rules of Evidence is more specific and provides that "*the Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling*".

164. As seen in the *Fusimalohi* and *Adamu* awards, the arbitral tribunal can also rely on procedural rules contained in codes of conduct agreed upon by the parties, such as the FIFA Disciplinary Code, to supplement their reasoning on the admissibility of unlawfully taken evidence[194].

E. Does the adducing of unlawfully obtained evidence in the case at hand appears incompatible with basic principles of justice and/or would lead to a result incompatible with the procedural public policy?

165. As seen in the *Methanex*, *Libananco* and *EDF Services v. Romania cases*, it seems that if the conduct of one party amounts to a significant breach of its duty of good faith toward the tribunal and/or the other party, it can be held as incompatible with the "*basic principles of justice and fairness required of all parties in every international arbitration*". In such an instance, the case law presented above suggests that the arbitral tribunal is not obliged to proceed with a balancing of the interests, but can exclude the problematical evidence without further consideration. The same is true if the admission of the problematical evidence would be contrary to the public procedural policy.

166. Again, this instance would require rather extreme behaviours from the parties to the arbitration, for instance – as in the Methanex case – a party to the arbitration committing or soliciting the commission of unlawful acts to obtain evidence during the arbitral proceedings.

167. The arbitral tribunal should also be wary in using this early way out since the Swiss supreme court has, up until now, repeatedly referred to the necessity to balance the interests in deciding on the admissibility of unlawfully obtained evidence[195].

F. Balancing of interests

1. The necessity to balance the interests

168. In light of the arbitral precedents presented above, the balancing of the interests at hand appears an affirmed trend, if not an essential step in dealing with the admissibility of unlawfully obtained evidence[196].

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193 E.g.: art. 27.4 UNCITRAL Arbitration Rules, art. 24.2 Swiss Rules; 22.1(vi) LCIA (2014) Rules, art. 12 (2018) VIAC Rules; 31(1) (2017) SCC Rules, art. 22.2 HKIAC (2018) Rules, art. 19.2 SIAC (2016) Rules.

194 See Fusimalohi award, p. 53, Nr. 90 et seq. and Adamu award, p. 44, Nr. 89 et seq.

195 See DSC of 27th March 2014, 4A_362/2013 and 4A_448/2013 – it is worth noting that the Supreme court referred in its reasoning to principles provided for in the Swiss civil procedure code without explaining why these principles would also be applicable to international arbitration.

196 Of the same opinion, see Antonio RIGOZZI/Brianna QUINN, Evidentiary issues before CAS, Weblaw, Bern 2014, p. 45, holding – quite arguably since the arbitral tribunal is not bound to follow any national procedural law – that the necessity to balance

169. Moreover, the Swiss supreme court is of the view that holding an unlawfully obtained evidence as admissible is not contrary to the public procedural order, provided the decision on admissibility is made further to a balancing of the interests at hand[197].

170. One could however wonder whether a balancing of interests must be made in any event of contrariety to the law. As noted above, in the *Valverde* case, the CAS distinguished between "irregular evidence" (being evidence collected in violation of a procedural rule) and "illicit evidence" (being evidence collected in violation of a substantive rule of law). This postulates that some violations, procedural in nature, are not critical enough to trigger the necessity to balance the interests. In the *Valverde* case, the CAS cited the example of a witness testifying without having been instructed about its right to refuse to testify. Another example would be documents collected in the context of a criminal investigation further to a search warrant executed outside the hours provided for by the relevant provisions of the national criminal procedural law. In such case, the flaw could be viewed as not critical enough to necessitate a balancing of the interests. One could admittedly also wonder whether such minor procedural flaws constitute an unlawful act at all, respectively prevent the legal justification to the unlawful act[198] from operating.

171. Conversely, for some specific categories of unlawful acts committed in order to obtain evidence subsequently adduced before the arbitral tribunal, the balancing of interests would (and should) systematically lead to the inadmissibility of said evidence. By drawing on the Swiss scholarly views on article 152 of the Swiss procedural code, this would be for example the case of evidence collected through the use of physical force or psychological coercion[199].

172. In light of the foregoing, the necessity to proceed with a balancing of the interests can be schematized and represented as a three-layers onion (cf. Fig. 1): the outer layer represents instances of mere "irregular evidence" and where the balancing of interests would systematically lead to the admission of the evidence. The "hard core" layer represents instances where the infringement of the rights by the gathering of the evidence is so serious that the balancing of interests would systematically lead to the exclusion of the evidence. The inner layer represents instances where the balancing of interests must be applied in order to decide on the admissibility.

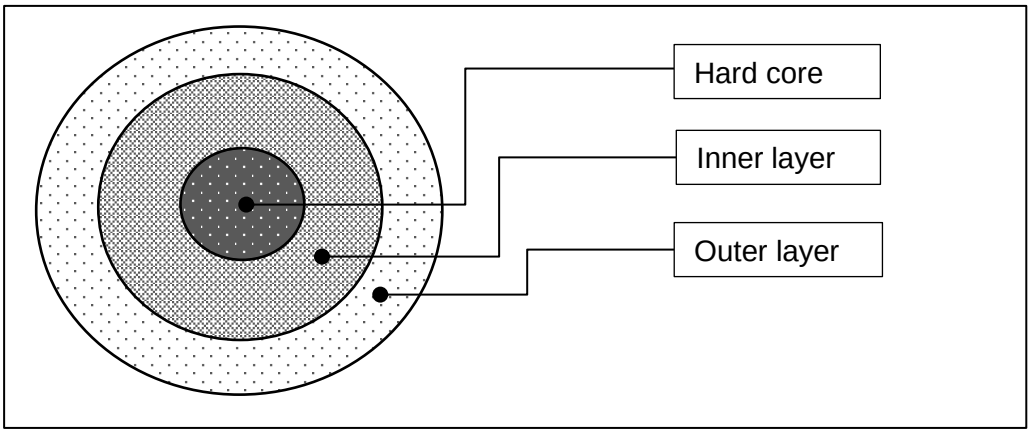

Fig. 1

the interests stems, in CAS proceedings, "*as a matter of Article 28 of the SCC if the federation is governed by Swiss law, and as a general principle of (Swiss) procedural law*".

197 DSC 4A_362/2013 reasoning 3.2.2.

198 In this example the provisions of the criminal procedural code allowing a search warrant act as a legal justification to the infringement of the right to privacy.

199 See above, pages 20 and 21.

2. The interests in the balance

173. In light of the reviewed arbitral awards, the following interests can enter in consideration in balancing the interests.

174. **The interest in finding the truth (in the dispute)**: the party who adduced the problematical evidence generally has an interest in finding the truth in the dispute brought before the arbitral tribunal. Taking inspiration from scholarly views[200] on art. 152 SCPC, the amount at stake in the dispute should weigh in on the side of the interest in finding the truth, what also appears logical[201]. This interest will not necessarily be of primary importance for the arbitral tribunal, since the latter, pursuant to its obligations derived from the *receptum arbitri,* has a primary duty to render a valid award[202] in respect of the agreements made upon by the parties on procedural matters (art. 182(1) PILA). The arbitral tribunal must hence strictly abide by the type of procedure chosen by the parties provided the equality of parties and the right to be heard are observed (art. 182(3) PILA). The mere interest in finding the truth should hence not entitle the arbitral tribunal to exercise inquisitorial powers on the issue of the problematical evidence, especially if the parties have agreed on an adversarial type of procedure.

175. **The interest in finding the truth (as a public interest)**: As we have seen in the Caratube II award, the arbitral tribunal has taken in consideration the risk that the award to be rendered would be "*artificial and factually wrong when considered in light of the publicly available information*". In a similar matter, although the issue has not been specifically addressed, the Yukos awards relied on information made publicly available through Wikileaks. This interest goes beyond the interests at stake in the dispute and extends to the general interests and repute of arbitration as a globally accepted dispute resolution mechanism. If, on the one hand, it is desirable that the arbitration tribunal rigorously sticks to the agreement entered into by the parties, especially on procedural matters, it however appears difficult to argue that it should operate in a vacuum and – as the claimants put it in the *Caratube II* case – "*be placed in a sterile environment or a bubble detached from the real world and ignore these documents or pretend they don't exist*"[203]. In the *Fusimalohi* case, the CAS also held that "*there certainly exists a general public interest in the exposure of illegal or unethical conduct, such as corruption or other forms of dishonesty in relation to the awarding of the organization of a renown sporting event*[204]" adding that "*there is an interest of the general public, and especially of the football fans and of the peoples of the unsuccessful candidate countries, in being comforted about the fact that the FIFA 2018 and 2022 World Cups were awarded in a fair, impartial and objective manner*".

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200 See above, p. 21.

201 Of the same opinion, see VON SEGESSER/LEIMBACHER/BELL.

202 GIRSBERGER/VOSER, p. 200, Nr. 835.

203 See *Caratube II* Award, §150-156, 1259, 1261. See also the dissenting arbitratior's opinion in the case ConocoPhillips Petrozuata B.V., 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, March 10, 2014, who, further to a motion to reconsider (in light of information published by Wikileaks) the award rendered, pointed out the impossibility to make abstraction of publicly available information in a particularly vivid fashion: *"In these 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 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*."

204 Fusimalohi award, p. 58, §105.

176. **The interests of third parties within a supranational organization of the trade between the parties**: When the parties evolve, with regard to their respective trade, in an environment organized and shaped according to agreements involving a plurality of other parties, the award to be rendered can obviously have significant outreaching implications extending to third parties to the arbitration proceedings. In the *Fusimalohi* case, the CAS pointed out the necessity to take in consideration "*other private or public interest*"[205] and held that "*there is also a private interest of all the national football associations which were or will be candidates to host the FIFA World Cup in being fully informed and possibly reassured about the efficacy, transparency and correctness of the bidding process*"[206]. It added that "*given the amount of public money notoriously spent by governments and public organisations to support the bids presented by their football federations and the well-known impact of the FIFA World Cup on a country's economy, there clearly is a public interest of each government pledging to support a bid (as well as of its taxpayers) to know whether the awarding of the FIFA World Cup is conditioned or altered by corrupt practices of football officials*". This suggests that the arbitral tribunal is also authorized, in very specific instances, to take in consideration interests of third parties to the arbitration proceedings who have a direct stake in their outcome, notably within the context of organized supranational trades involving a large number of actors.

177. **The interest in protecting the legal right infringed upon by the unlawful act which allowed the obtaining of the evidence**: As noted by the Swiss supreme court, the balancing of interests must take in consideration the interest in protecting the legal protection infringed upon by the gathering of the evidence[207]. It follows that this interest may not be the interest of the party challenging the admissibility of the problematical evidence. If it is however the case, we are of the opinion that the latter's interest should weigh in more significantly than in the case where the unlawful act has infringed on the rights of a third party to the arbitration. On the basis of the scholarly views on art. 152 SCPC[208], the rank of the right infringed in obtaining the evidence[209] should be a valid criterion: the higher the infringed right will score on the hierarchy of the legally protected interests, the stronger its need for protection will be[210]. This is also supported by the reference to the "*nature of the violation*" in the *Valverde* case[211]. As also stated in *Valverde*[212], the conduct of the victim, before and after the unlawful act, seems to be a valid criterion to consider. Drawing on the scholarly views on art. 152 SCPC, the procedural obligations laying on the party challenging the admissibility of the problematical evidence should be taken in consideration: if the party opposing to the admissibility has a procedural duty to adduce said evidence, the interest in protecting the legal right infringed upon by the unlawful act which allowed the obtaining of the evidence will be lower. Conversely, if the obtaining of the problematical evidence through the unlawful act has jeopardized a legal privilege which would have allowed the party who opposes to the adducing of evidence – or a third party – to refuse its cooperation before national courts and/or the arbitral tribunal[213] (e.g.: medical, ecclesiastical, notarial secrecy or attorney-client privilege), the same interest will be significantly raised. Some authors also suggest, as a valid criterion, to verify whether or not the affected party has displayed an interest in defending its legally protected interests[214]. This criterion should be considered with caution since the aggrieved

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205 Fusimalohi award, p. 57.

206 Fusimalohi award, p. 58, §105.

207 DSC of 27 march 2014, 4A_362/2013, reason 3.2.2 – for an English translation: http://www.swissarbitrationdecisions.com/sites/default/files/27%20mars%202014%204A%20362%202013.pdf

208 Cf. above, p. 21.

209 A violation of a person's physical or mental integrity would presumably rank higher than a restriction of this person's liberty, which in turn would score at a higher rank than a violation of this person's privacy or property.

210 VON SEGESSER/LEIMBACHER/BELL are of the same opinion and mention the criterion of the "*rank of the affected interest and the intensity of the impairment*".

211 *Valverde* award, p. 26, Nr. 69, although the arbitral tribunal also cautioned that "*principles of Swiss procedural law are only a weak source of inspiration for the practice of arbitral tribunals*" (Valverde award, p. 26, Nr. 70).

212 Idem.

213 Under Swiss *lex arbitri*, the arbitral tribunal has no *imperium* and must seek the assistance of the *juge d'appui* to summon uncollaborative witnesses (art. 184 SCPC). In such instances, the *juge d'appui* applies the relevant provisions of Swiss procedural law (art. 184 al. 2 SCPC in fine) and the witness can raise the same right to refuse to cooperate that he would have under the SCPC (see art. 166 SCPC in this regard).

214 See VON SEGESSER/LEIMBACHER/BELL who, referring to the FC Metalist award, point out that *"first, the Court noted that A. and X. themselves relied on the video for their defense and that they did not demand that the video be declared inadmissible. Secondly, the Supreme Court further observed that during the arbitration, A. and X. had been fully entitled to contest the*

party's conduct can also be influenced by its possible subordinate position or a concern for detrimental effects that could act as deterrents to enforce its rights.

178. **Proportionality**: Another criterion that could weigh on one side of the scale or the other is whether the party who adduced the problematical evidence had a possibility of obtaining the (same) evidence in a legitimate manner[215], that is to say without the commission of an unlawful act. This criterion should be considered with utmost caution so as not to endorse the view that the reasons justify the means. However, one probably cannot disregard the fact that in instances of bribery, cheating or corruption, the efforts made by the culprits to hide their wrongdoings greatly limit the possibility to obtain evidence through ordinary procedural means[216].

G. Does the contemplated admission of unlawfully obtained evidence in the case at hand appear compatible the Swiss procedural public policy?

179. If the arbitral tribunal comes to the conclusion that an unlawful obtained evidence can be admitted, it must finally check whether the Swiss public procedural policy would be violated.

180. This final step is logical since it is in the general interest the parties and the arbitral tribunal to obtain – respectively to render – an award that does not risk being set aside or be held unenforceable by national courts.

181. In the *Fusimalohi* case, the CAS deemed necessary to verify that the admission of the unlawfully obtained evidence did not "*lead to an "intolerable contradiction with the sentiment of justice"* and was not *"incompatible with the values recognized in a State governed by the rule of law*"[217]. In doing so, the CAS held the following elements as relevant: (i) the nature of the conduct in question and the seriousness of the allegations that have been made; (ii) the ethical need to discover the truth and to expose and sanction any wrongdoing; (iii) the accountability that in a democratic context is necessarily linked to the achievement of an elite position (iv) the general consensus among sporting and governmental institutions that corrupt practices are a growing concern in all major sports and that they strike at the heart of sport's credibility and must thus be fought with the utmost earnestness and (v) the limited investigative powers of sports governing bodies in comparison to public authorities[218].

182. The CAS also stressed, in the *Sivasspor* award, the necessity that the admission of the unlawfully obtained evidence leads to a result compatible with Swiss procedural public policy[219].

183. Although the elements to be considered by the arbitral tribunal will depend on the particulars of the case, this final step should be included in the best practice to address the issue of the admissibility of unlawfully obtained evidence.

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authenticity and/or materiality of the videotape. Their right to be heard was not violated at any stage. However A. and X. waited two years to oppose the admissibility of the videotape, which was considered to be too late."

215 Valverde award, p. 26, Nr. 69, although the arbitral tribunal also cautioned that "*principles of Swiss procedural law are only a weak source of inspiration for the practice of arbitral tribunals*" (Valverde award, p. 26, Nr. 70).

216 VON SEGESSER/LEIMBACHER/BELL are of the opinion that "*arbitrators may also take into account whether the interested party has evidentiary difficulties i.e. whether the evidence in question is the only and crucial piece of evidence for the party carrying the burden of proof with regard to their claim*".

217 Fusimalohi award, p. 59, §108.

218 Idem.

219 Sivasspor award, pages 35 and 36, Nr. 142.

VI. The sanctions in case of inadmissibility

A. The incidence of concurrent national proceedings concerning the unlawfully obtained evidence

184. The question arises as to whether a pending national criminal or civil proceedings relating to the circumstances where the problematical evidence has been gathered can impact the arbitral tribunal's decision on the issue.

185. Scholars are of the opinion that the prohibition to rely on unlawful evidence in national proceedings is not *per se* binding on an arbitral tribunal since, an arbitral tribunal is not bound to follow the rules applicable to the taking of evidence before the courts of the seat of the arbitral tribunal[220].

186. It follows that the arbitral tribunal can freely examine the admissibility of an allegedly unlawful obtained evidence even though the issue is pending before a national court or already decided upon by the latter.

187. Given the limited investigative powers of the arbitral tribunal, the latter should contemplate whether to stay the arbitral proceedings in order to potentially benefit from the evidence gathered in the parallel national proceedings, provided that said proceedings have not been initiated abusively, that a relevant outcome can be expected within a reasonable timeframe and that the evidence concerned by these parallel proceedings appears critical for the case to be decided upon by the arbitral tribunal[221].

B. The exclusion from the evidentiary record

188. In the case where the arbitral tribunal has made its decision and held that the unlawful obtained evidence is inadmissible, the question arises of what to do with the piece evidence if it has already been adduced in the evidentiary record. A radical option would be to exclude the evidence from the evidentiary record, that is to say return it to the party who adduced it or order that it be disposed of. This is the relief sought by the respondent in the *Methanex* case who requested an exclusion from the evidentiary record[222].

189. In practice however, the challenge of the admissibility of allegedly unlawfully obtained evidence will be raised early on in the proceedings so that the arbitral tribunal will have to issue a procedural order, notably to decide if the parties will remain free to rely on the problematical evidence during the further stages of the arbitral proceedings. The arbitral tribunal, as in the *Methanex* case, can elect to issue an unreasoned or summarily substantiated procedural order deciding on the issue, postponing its reasoning to the final award.

190. It happens in practice that the parties, simultaneously to the challenge of the admissibility of the allegedly unlawfully obtained evidence, raise a challenge based on the inauthenticity of the evidence and/or the lack of materiality. This militates for a liberty of the arbitral tribunal to keep the evidence in the record in order to be able to further reflect on the issues at the stage of the deliberations.

191. Furthermore, should the award face setting aside proceedings, although the Swiss supreme court is bound by the factual findings of the arbitral tribunal and that the grounds for challenge are

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220 POUDRET/BESSON, op. cit., no. 644: "*The arbitral tribunal is not bound to follow the rules applicable to the taking of evidence before the courts of the seat*".

221 Cf. KNOLL, Article 182 PILA, N° 60 and 61.

222 Cf. U.S. Motion to Exclude Certain of Methanex's Evidence dated 18th May, 2004, pages 4 and 15: https://www.italaw.com/sites/default/files/case-documents/italaw9162_1.pdf

strictly limited to those (exhaustively listed) at art. 190(2) PILA, one cannot exclude that a party raises a ground for challenge of the award by referring to the decision on the admissibility of the problematical evidence. In this case, it would probably be necessary for the Supreme court to examine said evidence in order to be able to decide.

192. The evidence should hence be kept in the evidentiary record. It would be difficult to see any convincing reason to store it apart in a "sealed container" as the scholarly writings on Swiss procedural law recommend it, all the more as the arbitral tribunal must be able to examine it during the deliberations.

C. Sanctions through allocation of costs

193. 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 settled[223].

194. The arbitral tribunal can however indirectly sanction[224] the party who adduced an unlawfully obtained evidence in allocating the costs of the arbitration proceedings.

195. Institutional rules frequently contain provisions which grant wide discretion to the arbitral tribunal in this respect[225].

196. For instance, article 9.7 of the IBA Rules of Evidence also provides that "*if the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking evidence.*"

197. According to scholars, the obligation to refrain from actions aimed at disturbing the equality of arms between the parties ties into the observance of good faith in the taking of evidence[226]. As it relates to evidence, scholarly views consider that this principle requires parties to "*refrain from acting in a way which would impede or threaten a party's access to evidence, for example where state parties have used their police powers to disrupt the investor's ability to interview witnesses or gain access to needed documents, or acts by private parties to obtain evidence that violate a criminal law or attempts to illicitly obtain privileged communications are also generally considered 'bad faith' procedural behaviour*"[227].

198. This militates in favour of the possibility for the arbitral tribunal to sanction at least the deliberate adducing of an unlawful evidence by a party through the allocation of costs.

D. Declaratory relief

199. Finally, although the jurisdiction of the arbitral tribunal would appear disputable, one could also consider the possibility of the arbitral tribunal, upon request of the aggrieved party, to grant a declaratory relief[228] declaring that an unlawful act has been committed against one party to the arbitration in obtaining the evidence adduced.

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223 See BORN, International commercial arbitration, §15.10.

224 For further development on sanctions, see Edna Sussman, Cyber Intrusion As the Guerrilla Tactic: An Appraisal of Historical Challenges in an Age of Technology and Big Data (November 4, 2018), p. 11 et seq. - https://ssrn.com/abstract=3278203

225 E.g.: Art. 42.1 of the UNCITRAL Arbitration rules, art. 40.1 of the SCAI Rules, art. 38.5 of the ICC Rules, art. 28.4 of the LCIA Rules (which specifically mention the "parties' conduct in the arbitration") and 34.3 of the HKIAC Rules.

226 O'MALLEY, §7.51

227 Idem.

228 On this issue, see SCHNEIDER, p. 24 et seq.

VII. Conclusion

200. In this contribution, the examining of the procedural framework in international arbitration proceedings showed that it is strongly influenced by party autonomy which is only restricted, under Swiss law, by the principles of equality between the parties and the right to be heard. Failing an agreement of the parties on the procedural rules, the arbitral tribunal has a wide discretion to determine the applicable principles.

201. This discretion is reflected in the variety of reasonings that the international adjudication bodies, be it international courts or arbitral tribunals, have adopted in their decisions and awards addressing the admissibility of unlawfully obtained evidence. This variety is also mirrored in the diversity of principles applicable to this issue in national procedural systems.

202. International precedents reveal a pattern and trends of principles which, when supplemented with logic and inspiration from the views of Swiss scholars addressing the issue under national procedural law, can be consistently clustered and applied through the method summarized in the appendix to this contribution.

203. Whether this method would be of any help or only blur the picture even further is a matter for the practice to decide. In any event, one cannot but reflect on BORN's view that "*there is – and should be – no 'standards' or 'usual' procedural approach in international arbitration, whether common law, civil law or something else*", since "*every case has its own need and dynamics, which produce its own procedural approach*"[229].

204. If this is to be taken as a rule – and arguably rightly so – the treatment of the admissibility of unlawfully obtained evidence should however be an exception and the rules applicable thereto should be clarified and unified by the practice.

205. Indeed, the entailments of the issue of the admissibility of unlawful evidence in arbitration outreach the mere interest of the parties to the proceedings and impact the global reputability of international arbitration as a dispute resolution mechanism.

229 BORN, International arbitration : law and practice, p. 164.

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APPENDIX

This chart is to be read top-down, each yes/no answer to the issue to consider pointing to the next step until the final conclusion on the admissibility.