

The Admissibility of Illegally Obtained Evidence¹

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Abstract

With the prevalence of WikiLeaks and similar websites, there has been a marked increase in parties seeking to adduce evidence that has been illegally obtained. The problem is not, however, new. This article considers the approach of the criminal and civil courts in the UK to illegally obtained evidence and the approach of arbitral tribunals. Necessarily, because of the confidentiality of commercial arbitration, the latter is mainly a survey of ICSID cases. The UK is consistent across criminal and civil courts generally favouring the admission of the disputed evidence, albeit with sanctions. In the arbitration cases, however, exclusion is more common generally based on the obligation to arbitrate in good faith.

1. Introduction

In general, there is no rule of law that evidence obtained illegally (or improperly) must, for the purpose of proving a civil claim, be excluded. The courts have made it clear that they are more concerned with establishing the truth rather than applying a mechanistic rule. If, therefore, a document is relevant,² it will usually be admitted in evidence, however it was obtained (except confessions obtained by torture). The appropriate sanction will often be in costs rather than the exclusion of the evidence although case law makes it clear that in the most egregious cases, the appropriate sanction might be to strike out the claim, or defence, as the case may be. The court might also compel wider disclosure of documents relating to the gathering of evidence.

The Human Rights Act 1998 may well also feature as tapping phones, hacking emails and privacy issues may well infringe article rights (see eg *Jones v University of Warwick* (below) where an enquiry agent trespassed into the claimant's home and it was alleged that that had infringed the claimant's art 8 rights).

Seeking to have tainted evidence admitted may carry risks in itself. There may be civil liability for breach of privacy or unlawful means conspiracy. Criminal liability might also arise, eg under the Data Protection Act 1998 and Data Protection Act 2018 if personal data evidence was unlawfully obtained by a hacker or under the Computer Misuse Act 1990 if a hacker was assisted, encouraged or conspired with.

In the US, illegally obtained evidence is generally excluded in criminal proceedings—the so-called “exclusionary rule” emanating from the Fourth Amendment which prohibits “unreasonable searches and seizures”. It is not an absolute rule and applies only where its deterrence benefits outweigh its substantial social costs. Generally, the exclusionary rule does not apply in civil claims but given the deterrence goal its limit remains unclear. French civil courts do not generally admit evidence obtained by illicit means. The Supreme Court of the Russian Federation does not admit illegally obtained evidence as the constitution

¹ On the Occasion of the Fox Williams 4th Pre-Moot Panel Debate (in association with the CI Arb).

² See eg *XXX v YYY* [2004] EWCA Civ 231; [2004] IRLR 471: X was employed by Mr Y and Ms Z as a nanny. X claimed constructive dismissal and discrimination in that Y had made unwanted sexual advances to her. X sought to adduce a covert video. The Employment Tribunal viewed the video and determined that it was irrelevant because it was not disputed that X and Y had had a sexual relationship. Subsequent appeals (where the EAT and CA did not view the video) did not change that result.

provides at art 50 that “in administering justice it shall not be allowed to use evidence received by violating the federal law”.³

2. Criminal proceedings

The statutory provision which governs the exclusion of evidence in crime is the Police and Criminal Evidence Act 1984 (PACE) s 78. This permits the court to exclude evidence on which the prosecution intends to rely if it appears to the court, having regard to all the circumstances, that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

In the criminal field, the courts have considered the application of PACE s 78 in relation to improperly obtained evidence in a number of cases.

- *R. v Khan (Sultan)*⁴
This case involved an admission of guilt obtained by means of an electronic covert listening device installed by police. The defendant’s appeal was dismissed as there was no right of privacy in English law and relevant evidence remained admissible, despite being obtained improperly or unlawfully, subject to the court’s discretion to exclude it.
- *R. v P*⁵
This case involved intercepted calls by the police who tapped the phone of a suspected drug offender. The court held that the fair use of intercept evidence at a trial, even where such evidence was unlawfully gained, did not breach the European Convention on Human Rights 1950 art 6, but that the defendants did have a right to challenge the evidence.
- *R. v SL*⁶
Covert surveillance recordings were made by the police with approval under the Police Act 1997 Pt III. The Act was deemed compliant with the Human Rights Act 1998 but the judge did limit the extent of the “highly sensitive” material that would be revealed to the jury; admitting only that which assisted with the essential function of providing a fair trial.

The following principles emerge from these authorities.

- The power to exclude evidence under PACE s 78 is at least as wide as the common law power to exclude evidence in the interests of a fair trial.
- The principle tests for admissibility of evidence are relevance and fairness.
- Relevant evidence is not excluded simply because it has been unlawfully or improperly obtained, this includes evidence obtained in breach of a person’s art 8 ECHR rights. Illegally or improperly obtained evidence does not amount to a breach of a person’s art 6 ECHR rights.
- Unlawfully or improperly obtained relevant evidence may be excluded if it would have such an adverse effect on proceedings that it would be deemed unfair. Fairness includes fairness to the prosecution and to the defendant. Trial by ambush may be unfair.
- Evidence obtained by flagrant non-use or misuse of authorised procedures may well provide grounds for exclusion because it will affect the fairness of the trial. In extreme cases where the abuse of process is of particular gravity the prosecution may be halted.

³ Constitution of the Russian Federation 1993 (as amended on 21 July 2014) art 50.

⁴ *R. v Khan (Sultan)* [1997] AC 558; [1996] 3 WLR 162.

⁵ *R. v P* [2002] 1 AC 146; [2001] 2 WLR 463.

⁶ *R. v SL* [2001] EWCA Crim 1829; [2002] Crim LR 584.

- The court must consider all the circumstances in determining whether a trial will be fair.

3. Civil proceedings

Thankfully, the courts have only rarely had to consider the more depraved aspects of illegality. In *A v Secretary of State for the Home Department (No.2)*⁷ (*Re A (No.2)*), the issue before the House of Lords was whether the Special Immigration Appeals Commission (SIAC) could admit and rely on admission evidence that was or may have been procured by torture inflicted by officials of a foreign state. The minority (Lords Bingham, Hoffmann and Nicholls) considered that such evidence should not be admitted where there was a “real risk” that it had been obtained by torture, but the majority (Lords Hope, Rodger, Carswell and Brown) held that the applicable standard of proof was the balance of probabilities. As to the weight that SIAC should attach to such evidence, once admitted, Lord Hope said⁸:

“... SIAC should not admit the evidence if it concludes on a balance of probabilities that it was obtained by torture. In other words, if SIAC is left in doubt as to whether the evidence was obtained in this way, it should admit it. *But it must bear its doubt in mind when it is evaluating the evidence ...*” (emphasis added)

In *Re B (Children) (Standard of Proof)*⁹ (*Re B*), concerned care proceedings in the High Court, in which the judge had had to decide whether the threshold criteria for the making of a care order under the Children Act 1989 s 31(2) were satisfied. Allegations of sexual abuse had been made by one of the children against the potential carer. The judge had been unable to find on the balance of probabilities that the child was telling the truth, but concluded that there was a “real possibility” that the abuse had occurred. The judge did not take this possibility into account when considering the s 31(2) criteria, and it was contended on appeal that he should have done. The appeal was dismissed by the Court of Appeal, whose decision was upheld by the House of Lords, on the basis that the trial judge’s conclusion amounted, in law, to a finding that the alleged abuse had not occurred. By way of explanation, Lord Hoffmann said that:

“If a legal rule requires a fact to be proved (a ‘fact in issue’), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.”

This reasoning was echoed by Baroness Hale, as follows:

“In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other ...

To allow the courts to make decisions about the allocation of parental responsibility for children on the basis of unproven allegations and unsubstantiated suspicions ... is to confuse the role of the local authority, in assessing and managing risk ... with the role of the court in deciding where the truth lies and what the legal consequences

⁷ *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221.

⁸ *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71 at [118] Lords Rodger and Carswell agreed at [145] and [158], respectively.

⁹ *Re B (Children) (Standard of Proof)* [2008] UKHL 35; [2009] 1 AC 11.

should be. I do not underestimate the difficulty of deciding where the truth lies but that is what the courts are for.”

The basis for the exclusion of evidence of admission under torture or oppression was explained by Lord Bingham in *Re A (No.2)*. He said:

“It trivialises the issue ... to treat it as an argument about the law of evidence. The issue is one of constitutional principle, whether evidence obtained by torturing another human being may lawfully be admitted against a party to proceedings in a British court, irrespective of where, or by whom, or on whose authority the torture was inflicted. To that question I would give a very clear negative answer.

... The principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention [on Human Rights], which itself takes account of the all but universal consensus embodied in the [International Convention against Torture] ...”

Lord Carswell also addressed unreliability:

“The unreliability of such evidence is notorious: in most cases one cannot tell whether correct information has been wrung out of the victim of torture ... or whether, as is frequently suspected, the victim has told the torturers what they want to hear in the hope of relieving his suffering.”

And in the Court of Appeal in the same case Neuberger LJ (as he then was) observed¹⁰:

“... one of the principal reasons why a confession made by an accused is excluded from evidence unless it was voluntary is that such a confession is self evidently unreliable. That reason would apply with equal force to a statement obtained from a third party under torture.”

Dealing specifically with civil proceedings, in *Shah v Gale*¹¹ Leveson J (as he then was) said:

“... for the purposes of civil proceedings ... the most important aspect of any so-called confession must be its reliability. Torture or oppression critically affect reliability ...”

These cases focus on confessions or statements. What is unclear is the extent to which cogent documentary evidence might be excluded if it was discovered as a result of torture or oppression. If, under torture, the victim directs the interrogator to a secret stash of genuine documents would the illegal means or deception be condoned on the basis of relevance, (applying *Imerman*¹² and on the basis that the confession under torture was shown not to be unreliable: the documents were where the victim had said)? Is a distinction to be drawn between evidence created by illegal means (evidence in *Jones* that the claimant appeared to be uninjured or a confession under torture) and genuine cogent evidence that is found by the use of illegal means (or via deception) (*Imerman*)?

In *Shagang Shipping Co Ltd v HNA Group Co Ltd*,¹³ the court was faced at trial with HNA contesting liability to Shagang Shipping Co Ltd on the basis of bribery, relying on various admissions of bribery which Shagang contended had been obtained by torture. The court was asked to reconcile the apparent discrepancy between *Re A (No 2)* and *Re B*. It

¹⁰ *A v Secretary of State for the Home Department* [2004] EWCA Civ 1123; [2005] 1 WLR 414 at [414].

¹¹ *Shah v Gale* [2005] EWHC 1087 (QB).

¹² *Imerman v Imerman* [2010] EWHC 64 (Fam); [2010] 2 FLR 802.

¹³ *Shagang Shipping Co Ltd v HNA Group Co Ltd* [2018] EWCA Civ 1732; [2019] 1 Lloyd's Rep 150 (it is understood that permission to appeal has been granted by the Supreme Court).

was argued that *Re B* should be followed because it was in line with established principles of the law of evidence, whilst the unique context of *Re A (No 2)* meant that it had no wider application.

The court held that the context of *Re A (No 2)* was entirely different from the facts of *Shagang* as *Re A (No 2)* concerned a statutory tribunal, the task of which was to assess whether there were reasonable grounds for belief in the existence of a risk. That was very different to the task that faces a civil court, which is to determine whether a claim succeeds or fails based on findings of fact. Further, SIAC was subject to its own evidential rules and procedures, including that it could receive evidence which would not be admissible in a court of law. There was no hint in the judgments that the principles they articulated had any application outside SIAC. Nor was there any authority supporting the proposition that a civil court, having made a finding of fact on the balance of probabilities, may take into account a residual doubt as to that fact. Further, the court held, it would be surprising indeed if, in passages where they expressly referred to SIAC, and to SIAC alone, the House of Lords had intended to make a fundamental change to the established rules of evidence in civil proceedings.

The court accepted and endorsed the constitutional abhorrence for torture, but did not consider that it had any bearing on a civil judge's responsibility to decide whether something is more likely than not to have happened. In *Shagang*, the judge was unable to find on the balance of probabilities that the admissions had been obtained by torture. That was, in law, a finding that there was no torture. The court did not accept the submission that this finding should be confined to the context of admissibility of the evidence that admitted the bribery. It applied equally to the question of what weight should be attached to those admissions once held to be admissible. In *Re A (No.2)*, the very question that SIAC had to determine was whether there was a reasonable belief that the appellants' presence in the UK posed a risk to national security, and reasonably suspected them of being terrorists. The reasonableness of the belief might be directly affected by any lingering doubts that the evidence had been extracted by torture.

Once the judge had decided that torture had not been proved on the balance of probabilities, he was bound entirely to disregard the possibility that the admissions had been obtained by torture. He had decided the point, and that was the end of it. If he took his lingering doubts as to torture into account in evaluating the weight to be attached to the admissions, he made an error of law.

It thus follows that even if the area of the highest depravity, the courts will apply the conventional test resorting to relevance and reliability; there is no room for a finding that something might have happened; it either did or did not and any doubts as to whether it did or did not cannot go to weight.

4. Non-torture cases

*Jones v University of Warwick*¹⁴

In the more normal arena of civil proceedings illegally obtained evidence is, generally, admitted. The leading case is *Jones v University of Warwick*. The Court of Appeal, having made reference to a number of the above criminal cases and principles, concluded that the approach must be dictated by the over-riding objective of dealing with a case justly. The court must balance all the circumstances on a case by case basis including the relevance of the evidence and the effect of its exclusion. On that basis, there may be cases where the behaviour of the person obtaining the evidence was so outrageous that the case based on it will be struck out. If called on to make that assessment it is probable that a claim or defence

¹⁴ *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 WLR 954.

will not be struck out if a fair trial remains possible: *Arrow Nominees Inc v Blackledge*.¹⁵ It may be that improper behaviour should have costs consequences whilst the evidence is admitted.

Largely following the criminal standard, in the civil field CPR 32.1 provides that the court *may* exclude evidence which would otherwise be admissible. The admission of illegally obtained evidence does not involve the court condoning illegal activity: *Memory Corp v Sidhu (No 2)*.¹⁶

Evidence obtained illegally will not be litigation privileged: *Dubai Aluminium Co Ltd v Al-Alawi*¹⁷ and, potentially, nor will the documents concerning gathering that evidence: eg instructions to an enquiry agent and reports from the enquiry agents. In *Kuwait Airways Corp v Iraqi Airways Co (No 6)*,¹⁸ the Court of Appeal held that the principle applied equally to a claim to litigation privilege as to a claim to legal advice privilege. The principle applies because the gravity of the wrongdoing must be such as to bring the case outside of, or outweigh, the public interest underlying the privilege.

If seeking an equitable remedy, eg a freezing injunction, the applicant must have “clean hands”. That rule does not, however, apply to “general depravity”. To deprive an applicant of relief there must be an “immediate and necessary relation” between the depravity and claimed equitable relief: *Moody v Cox & Hatt*.¹⁹

In *Fiona Trust Holding Corp v Privalov*,²⁰ the claimants alleged that they were the victim of a conspiracy to defraud by the defendants. The claimants sought freezing injunctions supported by evidence from a private investigator containing private banking details (and other parts which were redacted). The defendants sought full disclosure of the investigations conducted by the investigator and the instructions he was provided. The court declined to order disclosure and, in any event, the investigator’s evidence was not central to the application for a freezing injunction and *Moody* did not prevent the grant of relief. The court would consider (at a later stage) any issues of the claimants’ conduct.

Further examples of the civil courts considering the circumstances are:

- A private inquiry agent was hired by the University of Warwick posed as market researcher and gained access to the home of Jones with the purpose of covertly obtaining video evidence to cast doubt on a personal injury claim made against them by Jones. The footage clearly showed that the extent of the injury was not as severe as had been claimed, and the evidence was deemed admissible by the court. However, serious costs sanctions were applied to the University due to this improper method of obtaining evidence. This included all costs of the application to exclude (even though unsuccessful) including two appeals as well as an indication that indemnity costs of the action might properly be ordered: *Jones v University of Warwick*.²¹
- Covert (and potentially illegal) audio recordings made for “corporate espionage” purposes admitted, even though application was made during trial and albeit under strict conditions: *Agents Mutual v Gascoigne Halman*.²²
- Covert surveillance film and photographs in a personal injury claim were refused to be admitted but not on the basis of illegality or impropriety, rather on the basis of case management, ie that it was too close to trial and amounted to ambush and could not be accommodated in the time to trial; furthermore

¹⁵ *Arrow Nominees Inc v Blackledge* [2000] CP Rep 59; [2001] BCC 591—a case concerning the destruction of evidence.

¹⁶ *Memory Corp v Sidhu (No 2)* [2000] 1 WLR 1443, [2000] CPLR 171.

¹⁷ *Dubai Aluminium Co Ltd v Al-Alawi* [1999] 1 WLR 1964; [1999] 1 All ER 703.

¹⁸ *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2005] EWHC 535 (Comm).

¹⁹ *Moody v Cox & Hatt* [1917] 2 Ch 71.

²⁰ *Fiona Trust Holding Corp v Privalov* [2007] EWHC 39 (Comm).

²¹ *Jones v University of Warwick* [2003] EWCA Civ 151; [2003] 1 WLR 954.

²² *Agents Mutual v Gascoigne Halman* [2017] CAT 5.

it would add to the length of trial such that it could not proceed: *O'Leary v Tunnelcraft Ltd.*²³

- Covert surveillance film, was not an ambush, could legitimately be disclosed after witness statements and would be admitted: *Douglas v O'Neill*.²⁴
- The family courts deciding *Imerman v Imerman*²⁵ considered a marriage which had broken down. Fearing her husband might conceal assets during divorce proceedings, Mrs Imerman instructed her brother (who shared an office with Mr Imerman) to make illegal hard copies of documents on his computer. The issues in the case surrounded whether the documents should be returned to Mr Imerman and whether the documents should be admissible by Mrs Imerman. The court held that although the documents obtained were protected by the Human Rights Act 1998 art 8, the court has discretion regarding whether illegally or irregularly obtained information or documents may be admissible for the purpose of court proceedings. Once again, the court considered the over-riding objective and whether it was in the public interest (and whether justice would be done between the parties) without it. This was, of course, balanced with Mr Imerman's right of confidentiality. The court found that the evidence was admissible, but awarded cost sanctions against Mrs Imerman.

It will be apparent from the foregoing that whether one applies PACE s 78 criteria, or that of the CPR 1 and 32, the approach is broadly the same. There is no automatic exclusion unless the circumstances reach such a high level of impropriety as to offend the court's conscience or sense of justice. The court must consider all of the circumstances on a case by case basis before deciding whether relevant evidence should be excluded so as to ensure a fair hearing.

5. Arbitration

In the arbitration arena the picture is more nuanced. The institutional rules do not address the specific situation of illegally obtained evidence and nor does the Model Law—rather they embrace broad permissive admissibility powers. However, allegations of duties of good faith may arise (eg the Third Preamble to the IBA Rules on the Taking of Evidence in International Arbitration provides that “The taking of evidence shall be conducted on the principles that each Party shall act in good faith ...”²⁶); as may an allegation that a party has not been treated fairly by having evidence admitted against it (eg Arbitration Act 1996 s 33: “The tribunal shall ... act fairly and impartially as between the parties ...”); or a party may complain that it has not been able to fully put its case if it cannot adduce the evidence that it desires to adduce (eg Arbitration Act 1996 s 33: “The tribunal shall ... [give] each party a reasonable opportunity of putting his case ...”).

The IBA Rules on the Taking of Evidence in International Arbitration, equally, does not really address illegally obtained evidence head-on. Article 9(2) provides that “... Tribunal ... shall ... exclude from evidence ... any document ... for any of the following reasons: ... (b) legal impediment ...”. In considering “legal impediment” the tribunal may take into account the expectations of the parties and fairness and equality: art 9(3)(c) and (e). As with civil proceedings, bad faith can lead to costs sanctions: art 9(7).

In international commercial arbitrations not only are awards confidential but decisions on admissibility are often taken at an interim stage and will usually be determined by order rather than award which are, of course, also confidential and which are even less likely to

²³ *O'Leary v Tunnelcraft Ltd* [2009] EWHC 3438 (QB).

²⁴ *Douglas v O'Neill* [2011] EWHC 601 (QB).

²⁵ *Imerman v Imerman* [2010] EWHC 64 (Fam), [2010] 2 FLR 802.

²⁶ And see also IBA Rules on the Taking of Evidence in International Arbitration art 9(7).

be leaked than awards. Information on how tribunals address illegally obtained evidence is, at best, therefore anecdotal rather than forensic. The preponderance of materials are, therefore, in the ICSID/treaty arena but many of the tribunals express that the stance that they have taken is equally applicable in any international arbitration.

Corfu Channel case

An early example of a Tribunal dealing with illegally obtained evidence is the *Corfu Channel* case.²⁷ The *Corfu Channel* case was the first dispute to be brought before the newly established International Court of Justice—the successor to the Permanent Court of International Justice. In 1946 in the Corfu Strait, two British destroyers struck mines in Albanian waters and suffered damage, including serious loss of life. The Government of the UK filed an application instituting proceedings against the Government of the People’s Republic of Albania seeking a decision to the effect that the Albanian Government was responsible for the consequences of the incident and must make reparation or pay compensation. Albania, for its part, had submitted a counter-claim against the UK for having violated Albanian territorial waters in 1946 when the UK swept for mines and mines of the type that caused the damage to the destroyers were found. The court found that Albania was responsible for the explosions and for the resulting damage and loss of human life suffered by the UK. The court also found that the later minesweeping by the UK had violated Albanian sovereignty and although that violation of territorial waters had enabled evidence to be collected, the evidence had been admitted. The declaration of violation was considered sufficient sanction for the violation of territorial waters and hence the obtaining of evidence illegally. The court ordered Albania to pay the UK compensation.

Iranian Hostages case

Many will remember the crisis. Iran (more strictly a dissident group of students) invaded and took 52 hostages from US embassy and seized documents. Iran failed to either prevent the incursion or remedy it. Iran sought to justify its actions in doing so on the basis that the US had improperly or unlawfully interfered in Iranian affairs and the question of the “hostages”; invasion and documents:

“represents a marginal and secondary aspect of an overall problem ... more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes ... the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years.”

Beyond two letters to the ICJ (the quote above derives from one of them) Iran neither appeared nor participated in the case.

It might be inferred that Iran speculated that the US would not voluntarily produce the documents that Iran alleged would be incriminating and supportive of its case of improper interference with its affairs—and hence inaction or self-help was justified.

The court²⁸ ordered the documents be given to the protecting Power. The court did not address specifically that the admissibility or otherwise of the documents that presumably would have been alleged to evidence the alleged US wrongdoing in the affairs of Iran, as Iran did not seek to deploy them, as it did not participate. But from the language of the decision it appears that the ICJ would not have admitted evidence obtained in violation of many international conventions.

²⁷ *UK v Albania* (1949) ICJ Rep 4.

²⁸ *US v Iran* (1980) ICJ Rep 1.

Methanex Corp v USA

The Methanex case was an investment dispute between Canada-based Methanex Corp and the US, based on the provisions in the NAFTA Ch 11 on investment. Methanex is a major producer of methanol, a key component of MTBE (methyl tertiary butyl ether), which is used to increase oxygen content and act as an octane enhancer in unleaded gasoline. Methanex launched its arbitration against the US in response to the March 1999 order by the State of California to ban the use of MTBE by the end of 2002. The tribunal undertook an extensive review of the process by which California enacted its MTBE ban. In brief, it found that the legislative process had been transparent, science-based, subject to due process and to legitimate peer review, and done in a manner that was consistent with California practice in this area. Methanex' allegations of corruption on the part of a California Governor, were determined to be unfounded, and thus were not accepted as a basis to interfere with the overall assessment of the legislative process as summarised above.

The US sought to have declared inadmissible certain evidence as having been gathered in a manner inconsistent with duties of good faith inherent in any arbitration: by trespassing in the office of the head of a lobbying organisation. The US also relied on equality of arms: both parties implicitly agreed that it would not use illegal means to gather evidence.

The documents were copies of documents contained in the files of the lobbying company including personal notes, private correspondence, materials expressly subject to legal privilege and a private address book.

Methanex contended, initially, that it had obtained the documents by "dumpster-diving" in a public area. Latterly, it contended that the dumpster might have been in a private area but the door into the private area might have been open or ajar.

The tribunal held that the documents should form no part of the record and held:

- Each party owed a duty "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 also being required by Article 15(1) of the UNCITRAL Rules".
- The evidence demonstrated "at least a reckless indifference by Methanex as to whether civil trespass was committed by its collection-agents".
- "... the evidence shows beyond any reasonable doubt that Methanex unlawfully committed multiple acts of trespass over many months ...".
- The documents were, however, "only of marginal evidential significance ... [which] could not have influenced the result of this case".
- In relation to documents gathered before the commencement of the arbitration: the documents had been obtained unlawfully and admission of that evidence would have been "in violation of a general duty of good faith imposed by the UNCITRAL Rules and, indeed, incumbent on all who participate in international arbitration, without which it cannot operate".
- In relation to documents gathered after the commencement of the arbitration: the documents had been obtained unlawfully and admission of that evidence would have been "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 parties in every international arbitration".

*Libananco Holdings v Turkey*²⁹

Libananco applied for disclosure of documents related to surveillance by Turkey of claimant's potential witnesses and counsel contending that surveillance of counsel violated

²⁹ *Libananco Holdings v Turkey* ICSID Case No ARB/06/8.

generally accepted principles of privilege and impeded the preparation of the claim. Turkey denied any surveillance and the application was considered withdrawn. Later, Libananco made a further application for production on the grounds that it had:

“recently has learned of Turkish court orders requested and obtained by [Turkey] in 2007 and 2008, expressly to conduct intercepts of emails and MSN instant messages not only sent by and to persons associated with Claimant, but also approximately 1,000 privileged, private and confidential emails sent by, to and between Claimant’s counsel of record in connection with this arbitration over the past year.”

Turkey accepted the facts but contended that the motivation was not the arbitration or targeting counsel but rather attempts to prevent money laundering, the documents had been retained by the police and not passed to the relevant ministry or Turkey’s counsel in the arbitration. Turkey had the right, indeed the duty as a sovereign state, to investigate crime. The tribunal held:

- “Among the principles affected are: basic procedural fairness, respect for confidentiality and legal privilege (and indeed for the immunities accorded to parties, their counsel, and witnesses under Articles 21 and 22 of the ICSID Convention); the right of parties both to seek advice and to advance their respective cases freely and without interference; and no doubt others as well ... It requires no further recital by the Tribunal to establish either that these are indeed fundamental principles, or why they are.”
- “... parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with; this principle applies in all arbitration ...”
- The Tribunal ordered:
 - “[Turkey] must not intercept or record communications between legal counsel for the Claimant on the one hand and representatives of the Claimant and other persons in Turkey on the other hand.”
 - “... all emails (including attachments) and communications intercepted ... which in any way relate to this arbitration ... be destroyed.”
 - “All privileged documents and information which have been tendered or disclosed to the Tribunal in connection with the Claimant’s application ... will be excluded from the evidence to be received in this arbitration.”
 - “The Tribunal recognizes that the Respondent may in the legitimate exercise of its sovereign powers conduct investigations into suspected criminal activities in Turkey. The Respondent must, however, ensure that no information or documents coming to the knowledge or into the possession of its criminal investigation authorities shall be made available to any person having any role in the defence of this arbitration.”

*Conoco Phillips Petrozuata BV v Bolivarian Republic of Venezuela*³⁰

After issuing the final award the tribunal was presented with additional information available from WikiLeaks. The case concerned the expropriation of oil and gas assets by the government. Conoco alleged that the Government had been unwilling to negotiate fair compensation. The tribunal had found that there had been a failure to negotiate in good faith. The new additional documents included diplomatic communications between the

³⁰ *Conoco Phillips Petrozuata BV v Bolivarian Republic of Venezuela* ICSID Case No ARB/07/30.

local embassy and Conoco discussing offers from the government. This was argued to be in contradiction to the tribunal's finding of lack of good faith. The issue did not progress as the majority of the tribunal ruled it had no power to open up the award, the minority considered that the material should be considered.

*Caratube v Kazakhstan*³¹

Caratube claimed breaches of the USA-Kazakhstan BIT and also breaches of contract for the exploration and production of hydrocarbons, following five years of successful operation during which time the claimant made very substantial investments, the relationship between the parties suddenly deteriorated and the Minister purported to inform Caratube that the contract was terminated. Kazakhstan contended that it had acted lawfully throughout.

Caratube contended that there had been raids of its offices by officers of the Kazakhstan's Committee of National Security (KNB) who had searched the offices and seized "voluminous records including documents, files, computer disks and hard drives, and other materials".

The Tribunal noted that:

"in view of the particular importance of procedural equality between the parties in an arbitration proceeding and that all parties can use and rely on the same evidence, the Tribunal notes with pleasure that, during the hearing, considerable progress and agreement could be reached [on preservation of, and access to, the seized documents]."

The Tribunal further noted and ordered that notwithstanding that the parties and the Tribunal agreed that the parties indeed have an obligation to conduct the procedure in good faith the Tribunal considered it necessary to formally record this duty of the parties.

In a further stage, claimants sought to rely on documents published on a website³² after the Kazakhstan Government's computer network was hacked. The tribunal agreed that the documents could be admissible.

6. Conclusion

It is clear that in England both the criminal and civil courts will generally admit illegally obtained evidence preferring to have all the evidence in order to make the correct decision rather than to exclude something that might be determinative. A plain exception is made to confessions under torture. Parties acting illegally will, however, have to expect costs and other sanctions will be imposed.

In arbitration there is, seemingly, greater scope and latitude to exclude evidence. This is primarily based on good faith arguments but also fairness (procedural and substantive), equality of arms, procedural equality and equal treatment. These are vague, and perhaps nebulous, concepts of dubious origin (at least in substantive law) but which can readily be crafted to fit particular facts. The ingenuity of the dishonest continues to confound the honest and it is clear that the law will continue to encounter new types of dishonest behaviour whether linked to new technology or otherwise. Whatever form the dishonest behaviour takes, the basic tenant of "fair play" in arbitration can, and should, prevail.

³¹ *Caratube v Kazakhstan* ICSID Case No ARB/08/12.

³² Other cases where WikiLeaks-style documents have been relied upon include *Opic Karimum Corp v Venezuela* ICSID Case No ARB/10/14 and *Kilic v Turkmenistan* is ICSID Case No ARB/10/1 but the tribunal in each case did not have to rule on admissibility as they held the documents irrelevant.