HACKED EVIDENCE - NOW WHAT?

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This article is more than **1 year old**

Deloitte hit by cyber-attack revealing clients' secret emails

Exclusive: hackers may have accessed usernames, passwords and personal details of top accountancy firm's blue-chip clients

Deloitte provides auditing, tax consultancy and cybersecurity advice to banks, multinational companies and government agencies. Photograph: Alamy Stock Photo

Nick Hopkins

Mon 25 Sep 2017 13.00 BST

One of the world's "big four" accountancy firms
hack that compromised the confidential emails a
clients, the Guardian can reveal.

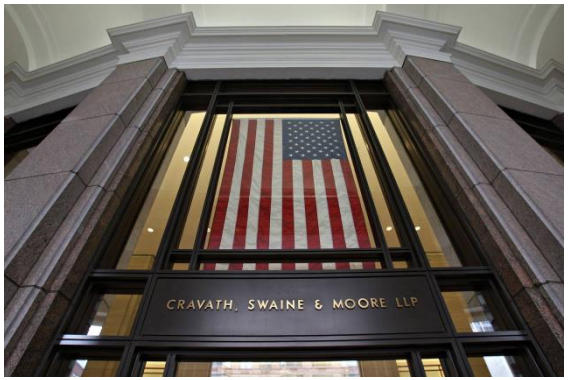
THE WALL STREET JOURNAL.

https://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504

MARKETS

Hackers Breach Law Firms, Including Cravath and Weil Gotshal

Investigators explore whether cybercriminals wanted information for insider trading



It isn't clear what information, if any, hackers stole from Cravath Swaine & Moore, Weil Gotshal & Manges and other law firms. PHOTO: DANIEL ACKER/BLOOMBERG NEWS

By Nicole Hong and Robin Sidel

Updated March 29, 2016 9:14 pm ET

Hackers broke into the computer networks at some of the country's most prestigious

DLA Piper hack could cost 'millions', brokers say

Insurance experts discuss fallout from DLA hack as firm continues to feel ef ects of attack

By **James Booth** | July 07, 2017 at 06:04 AM

HACKING IS ILLEGAL…

1. **2001 Budapest Convention on Cybercrime**

Establish as criminal offence under national law
- Illegal access to data & computer systems
- Illegal interception of computer data

2. **Directive 2013/40/EU on attacks against information systems**

3. **National criminal laws**

Article 323-1 French Criminal Code: Le fait d'accéder ou de se maintenir, frauduleusement, dans tout ou partie d'un système de traitement automatisé de données est puni de deux ans d'emprisonnement et de 30 000 euros d'amende. **...**

Article 323-3 French Criminal Code: Le fait d'introduire frauduleusement des données dans un système de traitement automatisé, d'extraire, de détenir, de reproduire, de transmettre, de supprimer ou de modifier frauduleusement les données qu'il contient est puni de cinq ans d'emprisonnement et de 150 000 € d'amende. …

…WITH EXCEPTIONS

1. **Criminal investigation & prosecution**

2. **State surveillance?**

2015 French Intelligence Act: authorizes extra-judicial surveillance via specific intelligence-gathering techniques incl. hacking for certain objectives:
- national independence, territorial integrity and national defense
- prevention of terrorism
- prevention of proliferation of weapons of mass destruction
- prevention of organized crime and delinquency
- major economic, industrial and scientific interests of France

Hacked evidence admissible

Hacked evidence inadmissible

Search for the truth

HACKED EVIDENCE – NOW WHAT?

Disincentivise illegal behaviour

ARBITRATION RULES

Rule 34(1) ICSID Arbitration Rules: The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

Article 27(4) UNCITRAL Arbitration Rules: The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

Article 22(1)(vi) LCIA Arbitration Rules: to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion.

SOFT LAW

Article 9 IBA Rules: The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence. 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 any of the following reasons:

(a) lack of sufficient relevance to the case or materiality to its outcome;

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or

(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.

NATIONAL LAWS

Article 19(2) UNCITRAL Model Law: … The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

WIKILEAKS & KAZAHLEAKS

- Yukos v Russia
- Kilic v Turkmenistan
- OPIC Karimum v Venezuela
- Gambrinus v Venezuela

- Caratube II v Kazahstan: Tribunal authorizes submission by Claimant of non-privileged Kazahleaks documents

- ConcoPhillips v Venezuela: request to reconsider Decision on Jurisdiction and Merits rejected despite new & relevant Wikileaks evidence

HACKED EVIDENCE PROCURED BY PARTY FROM OTHER PARTY

- Libananco v Turkey

78. The Tribunal would express the principle as being that 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, including investment arbitration, and to all parties, including States (even in the exercise of their sovereign powers).

80. The Tribunal attributes great importance to privilege and confidentiality, and if instructions have been given with the benefit of improperly obtained privileged or confidential information, severe prejudice may result. If that event arises, the Tribunal may consider other remedies available apart from the exclusion of improperly obtained evidence or information.

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Boykin & Havalic (TDM 2014)

1. Did the party seeking to introduce the evidence participate in the unlawful activity that led to its disclosure?
2. Is the evidence material to an issue in the case which the tribunal is required to decide?
3. Was the evidence unlawfully obtained from the files of a party to the arbitration, although at no fault of the party seeking to introduce the evidence?

Blair & Gojkovic (ICSID Review 2018)

1. Has the evidence been obtained unlawfully by a party who seeks to benefit from it?
2. Does public interest favour rejecting the wrongfully disclosed document as inadmissible?
3. Does the interest of justice favour the admission of the wrongfully disclosed document?

- Too much emphasis on producing party's clean hands?
- Is the evidence relevant & material?
- Could the evidence have been obtained in a lawful manner?
- Is the evidence privileged?
- Does the other party have adequate ability to comment on the evidence?

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