



**Evidence obtained through corruption  
or other illegality:  
*What's a tribunal (or counsel) to do?***

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*Kyiv Arbitration Days*  
**Kyiv, 5 November 2015**

# Overview

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- Tribunals and evidence obtained unlawfully
  - Tribunals' discretion to determine admissibility and weight
  - Case examples applying principles of good faith and fairness
- Ethical obligations for lawyers
  - Few ethical rules directly address unlawfully obtained evidence
  - Ethical opinions and decisions identify certain principles that apply

# Tribunals' discretion on admissibility and weight

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## IBA Rules on Taking of Evidence

*“The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.”* (Art. 9)

## UNCITRAL Model Law

*“The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”* (Art. 19(2))

# Principles Relevant to Tribunals' Discretion

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## IBA Rules on Taking of Evidence

### Recital 3

*“The taking of evidence shall be conducted on the principles that each Party shall act in **good faith**...”*

### Article 9(2)

*“The Arbitral Tribunal **shall** ... **exclude from evidence** or production ... for any of the following reasons ...*

- (b) **legal impediment** or privilege **under the legal or ethical rules** ...*
- (f) grounds of **special political or institutional sensitivity** (including evidence that has been classified as secret by a government or a public international institution) ...; or*
- (g) considerations of procedural economy, proportionality, **fairness or equality of the Parties** ... ”*

# Case 1: *Methanex v United States*

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- Documents “*illegally fished out of another man’s trash*” were held to be inadmissible:

*“In all the circumstances, the Tribunal decided that this documentation was procured by Methanex unlawfully; and 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, indeed, incumbent on all who participate in international arbitration, without which it cannot operate. [. . .]*

*Methanex’s conduct, committed during these arbitration proceedings, offended basic principles of justice and fairness required of all parties in every international arbitration”*

## Case 2: *Libananco v Turkey*

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- Claimant alleged a sustained campaign of interception of the e-mail communications with counsel

*“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)....*

*If ... the Respondent has used, in any way, privileged or confidential information obtained during the surveillance ... the Tribunal **may consider other remedies available apart from the exclusion of improperly obtained evidence** or information.”*

# Ethical Considerations for Counsel

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- Most ethical rules do not directly address unlawfully obtained evidence
- Other ethical obligations may apply, such as:
  - Duty of candour to the tribunal
  - Duty to refrain from conduct prejudicial to the administration of justice
  - Duty to refrain from conduct (or assisting a client in conduct) involving dishonesty, fraud, bribery, deceit
  - Duty to refrain from violating the rights of third parties
  - Duty of confidentiality to client
  - Duty to zealously represent the client

# American Bar Association Model Rules

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- ABA Model Rules distinguish lawyer conduct from client conduct
  - “... a lawyer shall not ... use methods of obtaining evidence that violate the legal rights of [a third] person.” (Rule 4.4(a))
  - “[i]t is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation [or ] conduct that is prejudicial to the administration of justice” (Rule 8.4)
  - “A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” (Rule 3.3)
- But:
  - “... an attorney may not do indirectly that which is prohibited directly, and consequently the lawyer cannot be involved in the subsequent review of evidence obtained improperly by the client.” (New Jersey Opinion 680 (1995))



# Other jurisdictions mostly silent, except...

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- Brussels (Flemish section)

*“[t]he attorney may not make use of documents that have been obtained by the client in a deceitful way, even when those documents would reveal irregularities”.*

- Singapore

*A lawyer “shall cease to act for a client if ... having come into possession of a document belonging to another party by some means other than the normal and proper channels and having read it, he would thereby be embarrassed in the discharge of his duties by the knowledge of the contents of the document”.*

# U.S. State Bar Ethics Opinions\*

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- Scenarios involving intercepted communications or documents obtained through theft.
- The lawyer :
  - must inform the client that the materials cannot be retained, reviewed or used without informing the opposing party;
  - must seek the client’s consent to such disclosure prior to making it;
  - must withdraw from representation if the client refuses consent;
  - should advise the client that courts may disqualify lawyers who receive and review materials improperly obtained from the other side; and
  - may advise the client to seek advice from a criminal defense attorney if the client possibly committed a criminal act.

\* *Florida Opinion 07-1, New Jersey Opinion 680 (1995), New York City Opinion 1989-1*

# Netherlands ethics case: facebook messages

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- 22 April 2014 Disciplinary Court decision

- Lawyer given a warning for using facebook messages:

*“In certain circumstances, the presentation of unlawfully obtained evidence can be subject to disciplinary sanction. ... The Facebook messages are personal and only accessible by using the username and password. Such messages are meant exclusively for those with authorised access to the account. ... The lawyer should have asked his client about the origins of the information. By failing to do so, the lawyer has not acted in a proper way.”*

# Concluding observations

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- Tribunals may
  - exclude or give no weight evidence obtained unlawfully
  - impose other sanctions
  - Form a negative view of a party and/or counsel presenting such evidence
- Ethical challenges for lawyers
  - Finding out how evidence was obtained
  - Understanding whether and when disclosure is required
  - Weighing potential benefits and risks of seeking to use doubtful documents

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*Thank you*

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