Kluwer Arbitration Blog

Same Proposition, Different Outcome? Need for Harmonization for Evidentiary Standards

Justin M. Loveland, Michael A. Fernández (Rivero Mestre LLP), and Kabir A.N. Duggal (Columbia Law School) · Tuesday, September 13th, 2022

As set out in our last blog post on evidentiary issues in international arbitrations, the treatment of evidence within the field of international arbitration is oftentimes inconsistent and even unpredictable from one arbitral tribunal to another, a divide which becomes even more pronounced when considering the different approaches that may be adopted due to a decisionmaker's backgrounds in common law versus civil law. Our blog post argued that more uniformity in evidentiary rules—and ultimately in the interpretation of admissible evidence—in international arbitrations would reduce the subjectivity and seeming randomness of evidentiary decisions and in outcomes in different cases, leading to less arbitrariness in the system as a whole.

In this post, we highlight three evidentiary issues—the matters of legal privilege, hearsay, and illegally obtained evidence—on which there is significant divergence between (and even within) the common law and civil law traditions. In light of these variations across jurisdictions, we recommend that arbitral centers devise their own set of optional evidentiary rules bridging the evidentiary differences between civil law and common law traditions and reducing arbitrator discretion. The authors' expectation is that this would ultimately increase predictability for parties that opt to use such rules.

Legal Privilege or Impediment

It is a maxim in most jurisdictions that relevant evidence is admissible unless it falls into an exception or exclusion. One exclusionary ground common in both civil law and common law systems is that of privilege, arising, like its twin concept of confidentiality, from the inherent need for open and frank communication and trust between clients and their attorneys.

In civil law systems, this link between privilege and confidentiality is very close. Both concepts are regularly treated in tandem, encapsulated in secrecy obligations imposed on lawyers to ensure that their clients' communications or documents are safe from disclosure to third parties, and are usually regulated by ethical codes and/or national

criminal laws. (*See* French National Internal Regs., art. 2; Deontological Code of the Spanish Legal Profession, art. 5.) There is, thus, often no delineation among different types of privilege; rather, civil law jurisdictions tend to focus on the role or activity of the lawyer as to when their professional obligation to keep secrets can act as a privilege against producing certain documents. For instance, Switzerland protects "typical professional activities" of an attorney, *i.e.*, legal counsel or legal representation (Swiss Civ. Pro. Code, arts. 160-163), and does not protect, *e.g.*, commercial activities such as corporate administration, brokerage, or asset management, as those are activities deemed not to be typical for an attorney. While Swiss secrecy protections belong to the client, who may release the lawyer to disclose information (BGFA, art. 13), secrecy obligations remain in perpetuity for a Swiss attorney, so the attorney may refuse to disclose such information despite a release or waiver by the client.

It must also be recognized that in the civil law inquisitorial system, a party's obligation to disclose documents during litigation is itself limited, drastically reducing if not eliminating discovery proceedings, so there is already a comparatively low risk of publicly disclosing confidential information. Professional secrecy obligations, exercised by a simple refusal to produce documents or refusal to testify, are thus understood to be sufficient protection in civil law jurisdictions.

In common law jurisdictions, the concept of privilege is often bifurcated into litigation privilege or work-product privilege on the one hand, and legal advice privilege or attorney-client privilege on the other. When so bifurcated, the former generally excludes from discovery documents and "tangible things" prepared in anticipation or reasonable contemplation of adversarial litigation or for trial by a party or its representative. The attorney-client privilege under the common law generally extends to confidential communications between a client and their lawyer sent for the purpose of giving or procuring legal advice. (*See* NY CPLR § 4503; *R. v. Derby Magistrates' Court*, [1996] A.C. 487 (H.L.).)

On the international level, while specific rules will always depend on the arbitration in question, legal impediment or privilege is a recognized basis for the exclusion of a document before an arbitral body under the IBA Rules on the Taking of Evidence. (IBA Rules, art. 9(2)(b).) The UNCITRAL Model Law, ICC Rules, LCIA Rules, and Prague Rules (which generally avoid document production, *see* art. 4.2) are all silent as to privilege. None of these rules, including the IBA Rules, specify what is to happen when party expectations, or those of their counsel, as to privilege diverge; when certain evidence may be admissible in one jurisdiction but privileged and withheld in another; or when there are generally conflicting legal or ethical rules on a state level.

The most-favored-nation approach of the ICDR Rules may be among the sounder solutions available considering the potentially substantial divergence in the domestic approaches to privilege. Under Article 22 of the ICDR Rules, the arbitral tribunal is to take into account "applicable principles of privilege," and when differences in the rules arise, the tribunal should "apply the same rule to all parties, giving preference to the rule that provides the highest level of protection." This has been understood to uphold a tribunal's duty to treat parties fairly and equally and, if this rule were adopted wide-scale as a baseline, it would provide greater predictability and ideally

less tribunal discretion in international arbitrations.

Hearsay

The divergence between the evidentiary approaches of common law and civil law systems becomes perhaps most apparent—and thus disputes are likely to arise—on the subject of hearsay. In the United States and many common law systems, hearsay is an out-of-court statement offered to prove the truth of the matter asserted. (NY Rules of Evidence, art. 8; US Fed. Rules of Evidence, Rule 801 et seq.). Hearsay is generally inadmissible in the US and other common law courts (*see e.g.*, Singapore Evidence Act rev. 1997), though the Civil Evidence Act of 1995 in the UK changed its rules to allow the admission of hearsay evidence provided it conforms to the other rules of admissibility. Due to the many exceptions to the rule against hearsay and exclusions as to what does and does not constitute hearsay, common law hearsay rules often appear intricate and daunting to navigate for both the foreign-trained lawyer and law student alike.

In civil law systems, generally, the opposite is true as to hearsay: it is admissible. This is essentially a product of the trial procedure in civil systems being "far more receptive to derivative evidence … leading to a more informal trial that is less geared toward surprising or discrediting witnesses or toward dramatic rhetoric designed to impress a jury." In France, for instance, where the *juge d'instruction* (an inquisitorial judge) possesses broad discretion in both investigating and then weighing evidence, there are simply no rules, exclusionary or otherwise, as to hearsay or opinion evidence in either criminal or civil proceedings.

It is notable that the European Court of Human Rights, which itself has no formal evidentiary rules, generally "sees no fundamental objection from the perspective of the European Convention to the use of indirect evidence," including hearsay, but does "closely scrutinize" such evidence in assessing alleged violations of the right to a fair trial. The European Court has thus seemingly sought to incorporate both trends, siding with UK judges in its 2011 holding in the criminal context that hearsay evidence can be used as the sole means of securing a conviction where no other evidence is available, and then eight years later holding that Finnish national competition authorities could "use hearsay to the extent their findings do not solely depend on it". This is similar to the approach taken in many international arbitrations, where arbitral rules are generally silent but where hearsay, and double hearsay, are generally deemed to be admissible but require additional confirmatory evidence.

Illegally Obtained Evidence

Evidence obtained illegally, such as that obtained through a cyberattack or from a WikiLeaks post—commonly known in the US as the "fruit of the poisonous tree doctrine"—is also dealt with differently depending on the legal tradition in question. Here, neither the common law nor the civil law is a monolith unto itself, encapsulating just one major trend; there are clear divergences on the state level from one civil-law

country to another and from one common-law country to another. Further complexities still may arise when considering the challenges posed by hybrid evidence, such as illegally obtained evidence that is also hearsay and/or privileged.

For instance, among the civil-law countries, Spain treats illegally obtained evidence as inadmissible as a matter of law (Spanish Civil Procedure Act, arts. 283(3), 287), whereas the trend in France has been to nullify judgments in which the record has been "tainted by illegality." Germany, despite excluding statements obtained through prohibited means of interrogation (German Code of Civ. Pro., sec. 136a), focuses more on a balancing test between the individual constitutional rights at stake—human dignity, privacy, and personality rights, *e.g.*—and the interests of justice in having all available evidence. The theory there is that despite the potential unfairness to one party as to the use of evidence against it, the exclusion of any evidence at all "implies that the court must base its judgment on something less than the whole truth."

Illegally obtained evidence is admissible in UK and Indian courts: in the UK, courts have discretion on whether to admit or exclude such evidence on public interest and human rights (fair trial) grounds, though courts in England and Wales have routinely admitted a wide variety of evidence, including evidence acquired through both unlawful hacking of emails and covert recordings of medical examinations.

As can be expected, there is also no set, unified approach to illegally obtained evidence in international arbitration practices. The IBA Rules, for instance, leave it to the discretion of the tribunal to exclude evidence obtained illegally (art. 9(3)). However, if there has been one overarching trend by arbitral tribunals—albeit with some exceptions such as the *Methanex* case, where the "dumpster-diving" was yet found to be of "marginal evidential significance" ineffective in discrediting the witnesses as intended—it would mirror that seen throughout international adjudication in its various forms: tribunals have relied on illegally obtained evidence without offering guidance as to its admissibility more generally.

Concluding Thoughts

Among the evidentiary rule sets currently available in international arbitration, there are broad divergences regarding key evidentiary issues that remain. In essence, there is still not a clear consensus approach to handling evidence on the international level, which in turn invites the large degree of discretion that judges and arbitrators continue to enjoy, or are at least perceived to enjoy, across systems. The surveyed approaches above suggest that there may be areas in which these categories of rules in international arbitration can be harmonized or rendered more internally consistent.

Table 1. Summary of divergences under the common law and civil law.

Issue	"Representative" Common Law Approach	"Representative" Civil Law Approach

Privilege	Attorney-client: confidential communications between client and lawyer for purpose of legal advice are privileged. Work-product: documents prepared for litigation are privileged.	Secrecy obligations: "typical professional activities" of a lawyer are generally privileged.
Hearsay	Inadmissible in the USA and Singapore. Admissible in the UK.	Generally admissible or not subject to extensive rules.
Illegally Obtained Evidence	Admissible in the UK and India.	Spain and France: generally inadmissible. Germany: balancing approach between justice and constitutional rights.

Given the potentially unwieldy nature of yet another proposed set of (non-binding) international rules, we believe it may be worthwhile for arbitral centers to themselves proactively establish clearer standards on these evidentiary issues, bridging common-law and civil-law trends, or require that their tribunals clearly articulate the chosen standard and not simply exclude evidence on a matter which should be more broadly determined. In particular, centers could consider putting forth harmonized evidentiary rules which would be optional for parties to include in their arbitration clauses. It is the view of the authors that this would lead to increased efficiency, fairness, notice, and predictability from the parties' standpoint.

This entry was posted on Tuesday, September 13th, 2022 at 8:27 am and is filed under Civil Law, Common Law, Evidence, Hearsay, Illegally obtained evidence, Interpretation, Privilege
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.