CHAPTER 5

Exclusionary Rules of Evidence in International Arbitration

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'The world isn't fair, Calvin.'
'I know Dad, but why isn't it ever unfair in my favour?'[1]

§5.01 INTRODUCTION AND BACKGROUND

The concept of 'exclusionary rules of evidence' originates from common law. It stemmed out of the need to protect the jury from inappropriate evidence, with the courts having a degree of discretion as to what evidence should be included and excluded, albeit this power is rarely exercised in practice today.[2] Although civil law jurisdictions are said not to have an equivalent concept,[3] they do have principles that yield a similar effect in practice. Take, for example, rules on legal privilege. In common law, privilege pertains to the documents themselves.[4] By contrast, in civil law systems, privilege is, first and foremost, a duty of confidentiality imposed on the lawyer not to

* I am grateful to Professor Renato Nazzini, Mel Schwing and other anonymous reviewers for their comments on earlier drafts. Any errors that remain are my own. Email: aleksander.godhe@kcl.ac.uk.

1. Bill Watterson, The Essential Calvin and Hobbes: A Calvin and Hobbes Treasury.
2. Roderick Munday, Cross & Tapper on Evidence, 194-218 (13th edition, OUP 2018).
3. Chester Brown, A Common Law of International Adjudication, 91 (OUP 2007); For example, document proof is preferred over oral witness evidence, *see* John Jolowicz, On Civil Procedure, 214 (CUP 2000).
4. For example, *see* English law in *Three Rivers District Council v. The Governor and Company of the Bank of England*, EWCA Civ 474 (2003) and EWCA Civ 218 (2004); Canadian law: *R. v. McClure*, 1 S.C.R. 445 (2001).

reveal certain evidence.[5] Therefore, although the legal systems approach the issue from different angles, the result is the same: the evidence is either directly excluded from the record or should never be there to begin with.[6]

International arbitration takes a different approach independent of common and civil law traditions.[7] Instead of being subject to strict rules of evidence, it is characterised by tribunals having far-reaching procedural discretion that gives the parties and arbitrators a considerable degree of control over how disputes are resolved. This is perceived as a strength of the system, making it particularly attractive to commercial parties.[8] Nonetheless, this procedural discretion is not endless and is limited and guided by the application of tribunal duties.[9]

The exercise of tribunal discretion and duties can have the effect of excluding evidence. Staying with the example of privileged documents, there is no single rule of law in international arbitration relating to privilege. Instead, such evidence should be excluded by the tribunal as an exercise of their discretion and the need to protect due process.[10] Same logic would apply when tribunals are faced with other types of evidence that should not be included in the record.

Therefore, this paper employs the terminology of 'exclusionary rules of evidence' not to connote that arbitration practice aligns with common law but rather to recognise that, in some circumstances, tribunals should exercise their discretionary powers to exclude evidence. For this reason, arbitration could be argued to have evolved its own endemic *lex evidentiae* independent of legal traditions.[11] That being said, arbitration does not, of course, reside in a vacuum and is influenced by the legal cultures of the

5. For example, *see* German law: section 203(1), Criminal Code and sections 383 and 142(2), Civil Procedure Code; Italian law: Arts 200 and 256, Code of Criminal Procedure; French law: Arts 226-313, New Criminal Code; Swedish law: Chapter 36, section 5, Swedish Procedural Code.
6. Jenia Iontcheva Turner & Thomas Weigend, *The Purpose and Functions of Exclusionary Rules: A Comparative Overview*, 255-257 (Sabine Gleiss & Thomas Richter (eds), Springer Open 2019): noting that the scope of exclusionary rules varies greatly between jurisdictions.
7. *See Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, p. 3 (2005): 'The Tribunal observes that the law of the United States, both as to production of documents or to the privilege enjoyed by some set of documents, is not directly applicable to this arbitration. Rather document production in this arbitration is governed by Article 24 of the UNCITRAL Arbitration Rules and guided by the Parties' own agreements to production as evidenced in their February 24, 2005 letters.'
8. Queen Mary University of London and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration*, 7, https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (accessed 29 Jan. 2024).
9. Discussed *infra*; *see also* Franco Ferrari, Friedrich Rosenfeld & Dietmar Czernich, *Due Process as a Limit to Discretion in International Commercial Arbitration*, 1-2 (Franco Ferrari, Friedrich Rosenfeld & Dietmar Czernich (eds), Wolters Kluwer 2020).
10. Of course, the circumstances where such steps should be taken are subject to debate: Patricia Shaughnessy, Dealing with Privileges in International Commercial Arbitration, 451, 469 (Scandinavian Studies in Law 2007).
11. Julian Bickman, Fact-Finding in International Arbitration: The Emergence of a Transnational Lex Evidentiae, paras 1.9-1.47 (Wolters Kluwer 2022).

lawyers practising it.[12] For example, common law style document disclosure is widely accepted in arbitration while tribunals nonetheless tend to attribute more weight to documentary evidence over witness testimonies resembling a civilian tradition.[13]

The subject of this chapter, therefore, contributes to a broader debate as to whether international arbitration has any endemic rules of evidence at all and, if it does, what these rules are. The subject is an important one given that, among many other reasons, the majority of international arbitrations anecdotally turn on facts rather than legal issues.[14] This observation is particularly stark in arbitrating disputes in specific sectors such as construction, which tend to concern a considerable volume of evidence.[15]

The purpose of this chapter is to argue that 'exclusionary rules of evidence' must exist in international arbitration as a standalone concept. This is a necessary consequence of the broad discretion of tribunals and the duties that they are subject to, which are discussed in sections §5.02 and §5.03, respectively. Such a conceptual shift would be helpful to both arbitrators who must determine the exclusion of evidence, sometimes even *sua sponte*,[16] and the parties who bear the burden of proof to raise evidentiary objections.[17]

It should also be added that exclusion of evidence in international arbitration does not pertain solely to admissibility of evidence but also to document disclosure and inspections.[18] Indeed, issues that arise at the disclosure and admissibility stage are closely related.[19] In the context of exclusion, the relevant tribunal duties, categorisation of principles, and the applicable test would be similar. The evidentiary objections that the parties would raise would be equally alike, although some differences exist that are

12. Jean-François Poudret & Sébastien Besson, Comparative Law of International Arbitration, 554 (2nd ed., Sweet & Maxwell 2007); Paul Oberhammer, Evidence: Learning from Arbitration, 243 (C. H. van Rhee and Alan Uzelac, Intersentia 2017).
13. Bin Cheng, General Principles of Law as Applies by International Courts and Tribunals, 318-319 (CUP 1953); Durward V Sandifer, Evidence Before International Tribunals, 197 (University Press of Virginia 1975).
14. Constantine Partasides KC & Alan Redfern, Redfern and Hunter on International Arbitration, p. 347 (7th ed., OUP 2023); Jan Paulsson & Georgios Petrochilos, UNCITRAL Arbitration, 236 (Wolters Kluwer 2018).
15. Queen Mary University of London and Pinsent Masons, *International Arbitration Survey – Driving Efficiency in International Construction Disputes*, 25, https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey (accessed 5 May 2024); *see also* Renato Nazzini & Aleksander Kalisz, *Construction Law, the Arbitration Act 1996 and Beyond: The Contribution of the Technology and Construction Court to Arbitration*, 197-199 (Peter Coulson & David Sawtell (eds), Hart 2023).
16. IBA Rules on the Taking of Evidence in International Arbitration 2020 (IBA Rules), Art. 9(2) and (3) state that evidence may be excluded at the tribunals' 'own motion'; Rules on the Efficient Conduct of Proceedings in International Arbitration 2018 (Prague Rules), Art. 3.1 and 3.2.
17. Nathan O'Malley, Rules of Evidence in International Arbitration, 336 (2nd ed., Routledge 2019).
18. IBA, p. 28: 'Articles 9.2 and 9.3 provide the limitations on admissible evidence, whether oral or written. These limitations also apply to the production of documents pursuant to Article 3 and inspections pursuant to Article 7.' On the proximity of admissibility and disclosure in international arbitration, *see* IBA Rules, Art. 9(2) on the exclusion of evidence that relates to both; *see also* Roman Khodykin, Carol Mulcahy & Nichols Fletcher, A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, 425 (OUP 2019).
19. Nathan O'Malley, Rules of Evidence in International Arbitration, 280 (2nd ed., Routledge 2019).

acknowledged below, and tribunals are, of course, at liberty to give consideration to the stage at which evidence is introduced or requested.

Further, the chapter argues in section §5.04 that, in the light of tribunal discretion and duties, the appropriate evidentiary test should be a form of a flexible balancing exercise factoring the circumstances of the case. The section also outlines the possible outcomes of such a balancing exercise and presents them as a menu of options available to tribunals. This would not only include exclusion or inclusion of evidence to the record but involve other measures such as cost sanctions, redaction orders or 'attorneys' eyes only' regimes, to name a few.

Finally, in section §5.05, the chapter discusses what are the different types of exclusionary rules of evidence relevant to international arbitration. It argues in favour of a threefold division based on the circumstances that 'taint' the evidence and put into question its inclusion in the record. Therefore, evidence may be excluded on the basis of its substance (Principle 1), on the basis of how it was obtained (Principle 2) and on the basis of non-compliance with procedural directions of the tribunal (Principle 3).

§5.02 ARBITRAL AUTONOMY AND PARTY AUTONOMY

In the context of arbitral procedure and the treatment of evidence in particular, applicable laws and rules set out two key principles. On the one hand, they afford the tribunals with broad and discretionary procedural authority. On the other hand, that discretion tends to be limited by the principle of party autonomy. After all, arbitration is an inherently private dispute resolution process, and the parties should hence have a say in how their disputes are resolved.[20]

Turning to arbitration rules, the ICC Rules offer hardly any specific guidance to tribunals in relation to evidence, let alone its possible exclusion, noting broadly that '[i]n order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.'[21] The VIAC Rules follow a similar approach.[22] Other arbitration rules take a step further and contain some minimal guidance in addition to broad procedural discretion and party autonomy. The SCC Rules state, for example, that '[t]he admissibility, relevance, materiality, and weight of evidence shall be for the Arbitral Tribunal to determine.'[23] Many other leading arbitration rules contain provisions to a similar effect,[24] but none

20. Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, 24(3) JIA 327, 327-328 (2007) https://doi.org/10.54648/joia2007023.
21. International Chamber of Commerce Arbitration Rules 2020 (ICC Rules), Art. 22(2).
22. Vienna International Arbitral Centre Rules of Arbitration 2021 (VIAC Rules), Art. 28(1).
23. Stockholm Chamber of Commerce Arbitration Rules 2023 (SCC Rules), Art. 31(1).
24. For example, *see* London Court of International Arbitration Rules 2020 (LCIA Rules), Art. 22.1(vi); Singapore International Arbitration Centre Arbitration Rules 2016 (SIAC Rules), Rule 19.2; Hong Kong International Arbitration Centre Administered Arbitration Rules 2018 (HKIAC Rules), Art. 22.2; Dubai International Arbitration Centre Arbitration Rules 2022 (DIAC Rules), Art. 25.2; American Arbitration Association Commercial Arbitration Rules 2022 (AAA Rules), Rule 35(b).

prescribe a formal procedure or criteria for the inclusion or exclusion of evidence. This makes the conclusions of the International Law Commission accurate:

> The rules of international courts and tribunals and their constitutive instruments do not address evidence in detail. They make only a general reference to evidence in the form of timelines and presentation. They do not contain any reference to the kinds of evidence, presentation, handling, assessment and conclusions to be drawn from the evidence. Judicial practices of different courts and tribunals have developed rules of evidence that go beyond existing rules of international courts and tribunals.[25]

Therefore, arbitration rules leave such specific matters of evidence to the parties and tribunals. Procedural discretion and party autonomy are also enshrined in the various arbitration laws. For example, the English Arbitration Act states that tribunals have procedural and evidentiary discretion that, subject to party agreement to the contrary, expressly encompasses questions of 'the admissibility, relevance or weight of any material'.[26] The Act is also non-exhaustive in listing such procedural and evidentiary issues, and hence, the arbitral discretion extends to other aspects of evidence, such as document disclosure and inspections.[27]

Other arbitration laws give the tribunals similar broad evidentiary powers. To provide a civil law example, the German Code of Civil Procedure states that 'The arbitral tribunal is empowered to determine the admissibility of taking evidence, take evidence and assess freely such evidence.'[28] Belgium and the Netherlands contain equivalent provisions, while the US courts have also consistently upheld the principle.[29] Most other arbitration laws, including those based on the UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law'), follow a similar approach, with little divergence between civil and common law jurisdictions.[30]

For the above reasons, tribunals have a general procedural discretion or arbitral autonomy, which also extends to their treatment of evidence but is subject to party autonomy to decide upon a different procedure. Nonetheless, if the parties do exercise their rights to agree upon a procedure, it rarely concerns the admissibility and

25. International Law Commission, *Evidence Before International Courts and Tribunals, Report on the work of the sixty-ninth session*, https://www.un-ilibrary.org/content/books/9789213628720s023-c003 (accessed 2 May 2024).
26. English Arbitration Act 1996, section 34(1) and (2)(f).
27. Robert Merkin & Louis Flannery KC, Merkin and Flannery on the Arbitration Act 1996, 378 (6th ed., Routledge 2020).
28. German Code of Civil Procedure (*Zivilprozessordnung*), section 1042.
29. Roman Khodykin, Carol Mulcahy & Nichols Fletcher, A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, 410-411 (OUP 2019).
30. For example, *see* UNCITRAL (United Nations Commission on International Trade Law) Model Law on International Commercial Arbitration 1985 (as amended in 2006) (Model Law), Arts 19(1)-(2) and 34(1); French Code of Civil Procedure, Art. 1467; George M Von Mehren & Claudia Salomon, *Submitting Evidence in an International Arbitration*, 20(3) JIA 285, 285-286 (2003) https://doi.org/10.54648/joia2003023; however, *see* the Swedish Arbitration Act, section 25 that suggests evidence can only be excluded on the grounds of manifest irrelevance to the dispute or the timing at which the evidence is invoked although, of course, parties can incorporate other grounds through, for example, the selected arbitration rules.

disclosure of evidence.[31] This does not, however, mean that tribunal discretion is unrestricted.

§5.03 DUTIES OF THE TRIBUNAL AND EXCLUSION OF EVIDENCE

Arbitral tribunals are subject to different duties, the source of which is party agreement, application of law as well as ethical obligations.[32] Although their application concerns the entire scope of arbitral procedure and even substantive matters, three duties play a particular role in the context of exclusion of evidence. Their purpose is twofold. They (1) set the outer limits of tribunal discretion and (2) guide the exercise of the said discretion. They will be analysed in turn, starting with the most important: due process.

[A] Duty to Afford Due Process and Render an Enforceable Award

One of the key principles that impacts international arbitration is due process, which supersedes tribunal discretion and party autonomy.[33] It hence sets the outer limit to how tribunals can approach evidence. Due process stems from public policy as a safeguard imposed by states to justify arbitration having a derogatory effect on the jurisdiction of national courts.[34] Although public policy or *ordre public* is a far broader concept, encompassing issues that exceed international arbitration,[35] in the specific context of arbitral procedure, both due process and public policy are closely related.[36]

The multiplicity of terminology does not end there. Rather confusingly, from a comparative standpoint, due process bears several different designations across various jurisdictions. Sources refer to natural justice principles,[37] procedural fairness

31. Patricia Shaughnessy, Dealing with Privileges in International Commercial Arbitration, 451, 459 (Scandinavian Studies in Law 2007).
32. Constantine Partasides KC & Alan Redfern, Redfern and Hunter on International Arbitration, pp. 550-552 (7th ed., OUP 2023).
33. Julian Lew, Loukas Mistelis & Stefan Kroll, Comparative International Commercial Arbitration, 95 (Wolters Kluwer 2003): calling due process one of the 'magna carta' principles of international arbitration.
34. Fabricio Fortese & Lotta Hemmi, *Procedural Fairness and Efficiency in International Arbitration*, 3(1) GJIL 110, 112-113 (2015) https://doi.org/10.21827/5a86a89d8e651.
35. Constantine Partasides KC & Alan Redfern, Redfern and Hunter on International Arbitration, pp. 550-552 (7th ed., OUP 2023).
36. Matti Kurkela & Santtu Turunen, Due Process in International Commercial Arbitration, 17-22 (OUP 2010): this overlap stems particularly from the New York Convention and its references to public policy as a ground to refuse recognition and enforcement of an award in Art. V(2)(b). *See also* Audley Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19(2) AI 217, 239 (2003) https://doi.org/10.1093/arbitration/19.2.217.
37. Frederick F Schauer, *English Natural Justice and American Due Process: An Analytical Comparison*, 18(1) WMLR 47, 47-48 (1976): while 'due process' origins from the fifth and fourteenth amendments to the US Constitution, 'natural justice' is the English law equivalent developed by the courts.

principles[38] or the rules of fair trial[39] when referring to concepts synonymous with due process. Others mention the right to be heard, the so-called *principe de la contradiction* or equal treatment.[40] None of these approaches are incorrect, but they rather reflect the various municipal terminologies. At the heart of the concept is the notion that parties should be treated fairly and equally.[41] This section of the paper discusses how procedural due process interacts with issues of exclusion of evidence. Indeed, both the inclusion and exclusion of evidence can trespass on this cardinal principle in the right circumstances.

Given the divergence in defining due process and its scope, domestic arbitration laws provide a necessary reference point for understanding the limits to tribunal discretion. For example, the UNCITRAL Model Law does not make an express reference to due process, albeit the mandatory Article 18 states that tribunals should treat the parties with equality and afford them the full opportunity to present their case.[42]

Similar due process obligations are found in non-Model Law jurisdictions. For example, the English Arbitration Act sets out general duties of the tribunal in section 33, including the duty to 'act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'. The provision also adds that the adopted procedures should be suitable to the circumstances and 'avoid unnecessary delay or expense'.[43] This has been said to represent the English law notion of due process.[44]

The differences between jurisdictions are not insignificant, but, in essence, violation of procedural due process represents a ground on which an award may be set aside, albeit subject to a high threshold.[45] The Model Law, for example, specifies that an award may be set aside if the party making the application furnishes proof that it was unable to present its case, the procedure was not in accordance with party agreement or contrary to a mandatory provision of the *lex arbitri*.[46] Many other

38. Gary Born, International Commercial Arbitration, 42 (Wolters Kluwer 2020) argues in favour of employing the language of 'procedural fairness' in international arbitration since the other concepts have specific connotations in domestic settings. However, this term also has its origin in domestic law, *see* Sophie Boyron & Wendy Lacey, *Procedural Fairness Generally*, 259-261 (Mark Tushnet, Thomas Fleiner & Cheryl Saunders (eds), Routledge 2013); this chapter hence adopts the terminology of 'due process' as it is prevalent in international arbitration literature.
39. Susanne Knickmeier, *Securing a Fair Trial Through Exclusionary Rules: Do Theory and Practice Form a Well-Balanced Whole?*, 329-347 (Sabine Gleiss & Thomas Richter (eds), Springer Open 2019).
40. Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36(4) VJTL 1313, 1321 (2003).
41. Audley Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19(2) AI 217, 239 (2003) https://doi.org/10.1093/arbitration/19.2.217.
42. UNCITRAL Model Law, Arts 18 and 34.
43. Arbitration Act 1996, section 33.
44. Robert Merkin & Louis Flannery KC, Merkin and Flannery on the Arbitration Act 1996, 697 (6th ed., Routledge 2020).
45. Constantine Partasides KC & Alan Redfern, Redfern and Hunter on International Arbitration, pp. 541-545 (7th ed., OUP 2023); However, courts are concerned with trespasses on due process and not the correctness of tribunals' decision. For example, *see* English High Court in *Sonatrach v. Statoil Natural Gas*, 2 Lloyd's Rep 252 para. 11 (2014).
46. UNCITRAL Model Law, Arts 34(2)(a)(ii) and (iv).

arbitration laws follow a similar approach to the Model Law. The English Arbitration Act allows an award to be set aside on the grounds of a serious irregularity, which includes violations of the aforementioned section 33.[47] However, unlike the Model Law, the threshold for such a challenge to succeed is higher as the court must consider that the irregularity was 'serious' and affected the tribunal, the proceedings or the award.[48] The Swedish Arbitration Act also allows awards to be challenged on grounds of an irregularity in the course of proceedings if it 'probably influenced the outcome of the case'.[49]

Similarly, principles of due process can be distilled from the New York Convention and the grounds on which courts can refuse to enforce a foreign arbitral award. These grounds include a party not being afforded the right to be heard or being properly put on notice, the arbitral procedure being contrary to party agreement, and the award being contrary to public policy of the state of enforcement.[50]

Although the domestic sources of due process contain key differences regarding the necessary threshold or extent to which due process considerations can lead to the award being set aside, the general principle remains.[51] An award, therefore, may be challenged on the grounds of lack of due process which essentially functions as a limit to the exercise of tribunal discretion and party autonomy in the area of evidence.[52] By extension, tribunals arguably have a duty to render an award that is not subject to being set aside and/or can be enforced abroad, although the precise scope of this duty is disputed since arbitrators, of course, cannot foresee where the parties will enforce the award.[53]

Having established that due process and its various iterations appear in most, if not all, domestic arbitration laws and the New York Convention, it is worth discussing how the inclusion or exclusion of evidence can trespass on this cardinal principle and potentially challenge the award.

The right to be heard is the first and perhaps most significant manifestation of due process from the standpoint of evidence exclusion. It will come into focus, particularly

47. English Arbitration Act 1996, section 68; UK House of Lords in *Lesotho Highlands Development Authority v. Impregilo SpA*, UKHL 43 para. 27 (2005): stated that section 68 reflects 'the internationally accepted view that the Court should be able to correct serious failures to comply with the "due process" of arbitral proceedings: cf art 34 of the Model Law'.
48. *Ibid*., section 68(3).
49. Swedish Arbitration Act 1999, section 34.
50. Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), Arts V(1)(b), (d) and V(2), respectively.
51. Constantine Partasides KC & Alan Redfern, Redfern and Hunter on International Arbitration, p. 542 (7th ed., OUP 2023).
52. Franco Ferrari, Friedrich Rosenfeld & Dietmar Czernich, *Due Process as a Limit to Discretion in International Commercial Arbitration*, 1-2 (Franco Ferrari, Friedrich Rosenfeld & Dietmar Czernich (eds), Wolters Kluwer 2020); Patricia Shaughnessy, Dealing with Privileges in International Commercial Arbitration, 451, 460 (Scandinavian Studies in Law 2007); L Yves Fortier, *The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration – A Few Plain Rules and a Few Strong Instincts*, 399 (Albert van den Berg (ed.), Wolters Kluwer 1999).
53. Gunther Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, 18(2) JIA 135, 135 (2001) https://doi.org/10.54648/317806; Julian Lew, *The Law Applicable to the Form and Substance of the Arbitration Clause,* 114-115 (Albert van den Berg (ed.), Wolters Kluwer 1999).

if the opponent makes objections to the inclusion of evidence. If tribunals do not discuss the objections but admit the said evidence outright, it could be perceived as a failure to afford the party its right to be heard.[54] Conversely, a decision to exclude evidence could amount to denying the party its 'due opportunity to present proofs and argument'.[55] The right to be heard also underpins tribunal control over the procedural timetable. Evidence that is introduced late and subsequently excluded by the tribunals would typically not amount to a breach of due process,[56] nor must the tribunal afford a party indefinite opportunity to respond.[57] Nonetheless, if the evidence was only uncovered after the expiration of the deadline, due process may require the opposite.[58]

Outright rejection of evidence that is relevant and material might also, without a good reason, amount to tribunal's failure to consider party submissions and hence trespass on the right to be heard.[59] Equally, admitting evidence without giving the opponent the opportunity to produce counter-evidence could also fall short of due process.[60] This being said, tribunals retain a considerable degree of discretion. Determinations of what is relevant and material, as well as decisions on admissibility and disclosure, are a prerogative of the tribunal and, without more, such as perhaps

54. For example, *see* Netherlands Supreme Court in *De Jong/Quaade*, HR 08.11.1963, NJ 1964/139 (1964); *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine*, ICSID Case No. ARB/01/3, Decision on Annulment, para. 192 (2010).
55. United States Court of Appeals in *Tempo Shain Corp. v. Bertek, Inc*, 120 F.3d 16 pp. 17-21 (1997); *see also* investor-State arbitration proceedings in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, para. 185 (2010); Tracey Frisch, *Death by Discovery, Delay, and Disempowerment: Legal Authority for Arbitrators to Provide a Cost-Effective and Expeditious Process*, 17 CJCR 155, pp. 162-165 (2015).
56. For example, *see* in relation to late-filed requests to hear new witnesses in a Court of Arbitration for Sport proceedings: *X v. Jamaican Football Federation and FIFA*, 4A_162/2011 (2011).
57. *Pacific China Holdings Ltd (In Liquidation) v. Grand Pacific Holdings Ltd*, 4 HKLRD para. 77 (2012); *Allianz General Insurance Company Malaysia Berhad v. Virginia Surety Company Labuan Branch,* Originating Summons No. WA-24NCC(ARB)-13-03/2018 paras 31-36 (2020): 'A tribunal is not obliged to slavishly adopt the position of parties but instead it is allowed to pick and choose the arguments it deems necessary for its consideration.'
58. For example, *see* Paris Court of Appeal where such allegations was raised albeit they failed in defeating the award: Paris Court of Appeal in *Revue de l'arbitrage,* 1991, p. 345 (1988).
59. BGH, BGHZ 96, p. 40 (1985); United States District Court for the District of Puerto Rico in *Hoteles Condado Beach, La Concha & Convention Center v. Union De Tronquistas Local 901*, 588 F. Supp. 679 (D.P.R. 1984) 686 (1984): 'The exclusion by an arbitrator of evidence central and decisive to a party's position, so affects the fairness of the proceeding as a whole, that such action must be considered arbitrary, unreasonable, incomplete, improper and capricious. Accordingly, we conclude that the conduct described above is so destructive of plaintiff's right to present his case, that it warrants the setting aside of the arbitration award.' Reasoning was upheld on appeal in *Hoteles Condado Beach, La Concha & Convention Center v. Union De Tronquistas Local 901*, 763 F.2d 34 (1985).
60. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, para. 200 (2010): 'The right to present one's case, or "*principe de la contradiction*", in arbitral proceedings includes the right of each party to make submissions on evidence presented by its opponent'; Hague Court of Appeal in *Rice Trading (Guyana) Ltd v. Nidera Handelscompagnie BV,* XXIII Ybk Comm Arb, p. 731 (1998).

outright arbitrariness, would not trespass on the right to be heard.[61] It is also arguable that excluding evidence at the document production stage would be far less likely to offend the right to be heard.[62] After all, the tribunal is not yet in possession of the documents and would not be directly denying the party its right to give evidence.

Second, due process encompasses the principle of equality of arms, also called the principle of equal treatment. It is closely linked to the right to be heard but nonetheless distinct. While the right to be heard is concerned with the mere opportunity to make submissions, the principle of equal treatment connotes a certain standard of adequacy of that opportunity.[63] The investor-State tribunal in *Tulip Real Estate v. Turkey*[64] stated that a party must not be under conditions that place it at a substantial disadvantage vis-à-vis the opponent.[65] For example, allowing one party to produce evidence but not the other could trespass on the equality of arms (as well as the right to be heard).[66] It has also been suggested that tribunals should not uncritically accept the evidence of a party in the face of objections as to its credibility,[67] and parties have a duty not to obtain evidence through improper means.[68]

Although due process provides for equal treatment, it does not require that the parties should be treated identically. The circumstances of the parties not being 'comparable' typically suffice to avoid a successful equality of arms challenge.[69]

Third, another corollary of due process, and often alleged in combination with violation of the right to be heard and equality of arms, is impartiality and independence

61. Franco Ferrari, Friedrich Rosenfeld & Dietmar Czernich, *Due Process as a Limit to Discretion in International Commercial Arbitration*, 7 (Franco Ferrari, Friedrich Rosenfeld & Dietmar Czernich (eds.), Wolters Kluwer 2020).
62. Nathan O'Malley, Rules of Evidence in International Arbitration, 58-59 (2nd ed., Routledge 2019).
63. For example, *see* UNCITRAL Model Law, Art. 18: 'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case' where the right to be heard and equality of arms are mentioned in parallel; *Dudko v. Australia,* Comm. No. 1347/2005 para. 7.4 (2007): 'The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.'
64. *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment (2015).
65. *Ibid*. [33].
66. *CBS v. CBP*, SGCA 4, Civil Appeal No. 30 of 2020 para. 61 (2021); Swiss Federal Supreme Court, BGE 142 III 360 para. 4.1.1 (2016); *Central European Aluminium Company (CEAC) v. Montenegro,* ICSID Case No. ARB/14/8, Decision on Annulment, para. 110 (2018).
67. *See Ltd v. De La Rue International Ltd*, EWHC 68 (Comm) para. 41 (2014), albeit this allegation did not succeed since the tribunal did engage with the issue.
68. *OOO Manolium-Processing v. Belarus*, Case No. 2018-0, Decision on Claimant's Interim Measures Request, paras 159-160 (2018).
69. Franco Ferrari, Friedrich Rosenfeld & Dietmar Czernich, *Due Process as a Limit to Discretion in International Commercial Arbitration*, 11 (Franco Ferrari, Friedrich Rosenfeld and Dietmar Czernich (eds), Wolters Kluwer 2020); *Ryan v. République de Pologne* Rev. Arb. 304 (2019): 'Equality of arms implies the obligation to provide each party with a reasonable opportunity to present its case – including evidence – in conditions that do not place a party in a substantially disadvantageous position compared to its opponent.'

of arbitrators,[70] although some sources treat it as a standalone concept.[71] Decisions to include or exclude evidence are typically prejudicial to one party. Therefore, it is not uncommon for that party to challenge the award on grounds of actual or apparent bias. In analysing such a challenge, domestic courts would look for the rationale behind the tribunal decision. Following a principled approach to the exclusion of evidence allows us to mitigate the risk of such allegations succeeding.[72] If the tribunal is found to be biased, the sanction is not just the award being unenforceable but also a possible sanction against them personally, such as a reduction in fees or even personal liability.[73] They may also be removed in such circumstances.[74]

The fourth due process principle relevant to the subject is the duty of tribunals to afford the parties sufficient notice.[75] This element is concerned with the parties being kept informed of procedural developments in the arbitration, such as the submission of new documents by their opponent.[76] Albeit it does not clearly relate to exclusion of evidence, it often relates to the surrounding circumstances in which parties introduce the said evidence.

Despite differences in the scope of due process across jurisdictions, there is a significant degree of convergence. It may be possible, therefore, to discern international due process that is accepted across legal systems.[77] Therefore, the exclusion and inclusion of evidence may trespass on the various manifestations of procedural due process, including:

- the right to be heard
- the right to equal treatment/equality of arms
- independence and impartiality
- the obligation to ensure proper notice.

Due to the severe consequences of the lack of due process, it is easy to see why some tribunals might experience 'due process paranoia'. Its consequence is to reduce

70. Matti Kurkela & Santtu Turunen, Due process in International Commercial Arbitration, 111 (OUP 2010); Ronan Feehily, *Neutrality, Independence and Impartiality in International Commercial Arbitration, A Fine Balance in the Quest for Arbitral Justice*, 7(1) PSJLIA 88, pp. 105-106 (2019).
71. For example, *see* Dominique Hascher, *Independence and Impartiality of Arbitrators: 3 Issues*, 27(4) AUILR 789, 789 (2012) noting that independence and impartiality is derived from the arbitrators' 'essential obligations towards the parties'.
72. For example, *see ABB AG v. Hochtief Airport GmbH,* EWHC 388 (Comm) (2006); *Euroflon Tekniska Produkter AB v. Flexiboys I Motala AB,* Case No. Ö 1590-11 (2012).
73. Gary Born, International Commercial Arbitration, para. 13.05 (Wolters Kluwer 2020).
74. For example, *see* section 24(1)(a) of the English Arbitration Act 1996. If the arbitrator's conduct suggest she has 'a mind that is closed to the consideration and weighing of relevant factors', she could be removed: *Jackson v. Thompson*, EWHC 218 para. 15 (2015); *See* most recently the English High Court in *H1 & Anor v. W & Ors*, EWHC 382 (Comm) paras 70-85 (2024).
75. *CDX and another v. CDZ and another*, SGHC 257, para. 34 (2020).
76. *Lenmorniiproekt OAO v. Arne Larsson & Partner Leasing Aktiebolag,* Case No. Ö 13-09 (2010); Case No. 132, Lebanon Court of Cassation, 5th Chamber 29.10.2002 (2002).
77. Charles Kotuby, *General Principles of Law, International Due Process, and the Modern Role of Private International Law*, 23 DJCIL 411, 424-433 (2013).

the exercise of tribunal procedural discretion to a minimum.[78] This, in turn, leaves scope for parties to raise unmeritorious due process objections in an effort to influence the tribunal to their advantage.[79] The problem is aggravated given that oftentimes, the line between complying and falling short of due process is thin.

However, there is a silver lining. The above examples of due process violations suggest that demonstrating an overall absence of arbitrariness could suffice to satisfy due process. Due process appears to be an obligation of conduct and not of result. What domestic courts are typically looking for is the engagement of tribunals with the arguments put to them by the parties.[80] This suggests that if the tribunals show engagement with the evidentiary objections or requests for inclusion of evidence, they will stay well within the boundaries of due process.

Although the fear of due process is very much a storm in a teacup, it is plain to see why many tribunals view admitting virtually all evidence to the record as the less risky approach. However, this is nothing more than an extension of the due process paranoia problem and can cause injustice to parties where exclusion is warranted. Instead, this paper proposes that the due process paranoia can be addressed if tribunals follow a principled approach to the exclusion of evidence by reference to its other duties as well, which are discussed further below.

[B] Duty to Conduct the Procedure Efficiently

Although due process represents a central element of international arbitration and the duties of the tribunals, it is not the only consideration that arises in relation to exclusionary rules of evidence. More evidence inevitably means more work to the tribunal, the parties and the arbitral institutions, who are often committed to strict deadlines and a tight procedural calendar. This translates to increased costs and delays.

Provided that due process requirements are met (this is typically the easy part), the duty that guides tribunals in excluding evidence the most is ensuring procedural efficiency or economy.[81] It consists of two limbs: the avoidance of unnecessary delay and expense.[82] The principle is significant and has been treated by some sources as an

78. Klaus Peter Berger & Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32(3) AI 415, 415-416 (2016) https://doi.org/10.1093/arbint/aiw020.
79. Franco Ferrari, Friedrich Rosenfeld & Dietmar Czernich, *Due Process as a Limit to Discretion in International Commercial Arbitration*, 1-2 (Franco Ferrari, Friedrich Rosenfeld & Dietmar Czernich (eds), Wolters Kluwer 2020); Lucy Reed, *Ab(use) of due process: sword vs shield*, 33(3) AI 361, 364-365 (2017) https://doi.org/10.1093/arbint/aix022.
80. For example, *see Shin-Etsu Chem. v. Xinmao Science*, Min Si Ta Zi No. 18 (2008); *LKSur S.A v. Fichtner GmbH & Co. KG*, Case No. 08/16276 (2009).
81. For example, *see* English Arbitration Act 1996, section 33(1)(b): 'The tribunal shall – … adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.'
82. Nadia Darwazeh, *Chapter 7: Is Efficiency an Arbitrator's Duty or Simply a Character Trait?*, 58-60 (Patricia Shaughnessy & Sherlin Tung (eds), Wolters Kluwer 2017).

iteration of due process.[83] After all, a procedure that is grossly inefficient can be viewed as depriving the parties of due process. The overlap between the two principles might, hence, be a question of scope and practical effect. Nonetheless, procedural efficiency certainly affects the exclusion of evidence in its own right. Many arbitration laws attribute special importance to procedural economy. The Swedish Arbitration Act[84] and the English Arbitration Act[85] are possible examples, expressly establishing the connection between procedural economy and the exercise of tribunal discretion. Indeed, without a duty to conduct the procedure efficiently, one of the key advantages of arbitration and dispute resolution would be lost.[86]

However, while a breach of due process may lead to the award being set aside or unenforceable, what are the sanctions to tribunals that prompt them to observe procedural economy? The answer lies in targeting the tribunal personally, subject to the laws on immunity. For instance, a forfeiture of remuneration is one possible avenue permissible under some arbitration rules. The ICC, for example, envisages a forfeiture of arbitrators' fees if the award is rendered after the deadline prescribed by the arbitration rules.[87] Several arbitration laws also envisage the removal of the arbitrator in cases of undue delay.[88] Principles on expediency would be inevitably violated if the tribunal indefinitely allowed parties to introduce new evidence and hence delay the proceedings. After all, most domestic legal systems regulate how evidence is gathered given that 'too zealous pursuit of evidence can easily transform institutions designed to resolve conflict into a rationalization and a setting for possibly even more rancorous conflict'.[89]

In this context, the line between violating the duty to conduct the procedure efficiently and the duty to afford due process is blurred. An arbitrator's pursuit of efficiency can be easily argued by a party to trespass on due process and, in particular, the right to be heard. For instance, that party may seek to introduce last-minute

83. For example, *see* various approaches considered in Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36(4) VJTL 1313, 1321 (2003).
84. Swedish Arbitration Act 1999, Art. 21: 'The arbitrators shall handle the dispute in an impartial, practical, and speedy manner.'
85. English Arbitration Act 1996, section 1(a): '[T]he object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense (…).'
86. Queen Mary University of London and White & Case, *2018 International Arbitration Survey: The Evolution of International Arbitration*, 8, https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (accessed 29 Jan. 2024).
87. Jose Ricardo Feris, *New Policies and Practices at ICC: Towards Greater Efficiency and Transparency in International Arbitration* (Emmanuel Jolivet & Philip Kucharski (eds), ICC 2016).
88. Norwegian Arbitration Act 2004, section 16: 'If an arbitrator becomes de jure or de facto unable to perform his functions or if an arbitrator for other reasons fails to act without undue delay, his mandate shall terminate if he withdraws from his office or if the parties agree on the termination. Otherwise, any party may ask the courts to decide by way of interlocutory order whether the mandate shall terminate for one of the said reasons.' *See also* similar provisions in the Swedish Arbitration Act, section 17; Polish Code of Civil Procedure, Art. 1177(2); German ZPO, section 1038(1); UNCITRAL Model Law, Art. 14(1).
89. W Michael Reisman & Eric E Freedman, *The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication*, 76(4) AJIL 737, 737 (1982) https://doi.org/10.2307/2201551.

evidence. Although the tribunal could, for example, include such evidence and revisit the procedural timetable in an effort to ensure the opponent's opportunity to respond, it is clear that due process does not require the tribunal to afford the parties unrestricted opportunities to respond.[90] The solution must, hence, be a balancing exercise, weighing the circumstances of the case.

The rationale of procedural economy dictates perhaps the most common exclusionary rule of evidence – the evidence having poor relevance to the case or materiality to the outcome. This is perhaps the most common reason for documents to be excluded. It is a general requirement present in the IBA Rules[91] as well as many of the domestic laws and arbitration rules mentioned above.[92]

'Relevance' requires a party seeking to obtain documents to prove to the tribunal that they are likely to be relevant to the case or they have a prima facie relevance in relation to the contention in the case.[93] Put differently, relevance is proven by showing that the evidence may be important for the requesting party to meet its burden of proof.[94] For example, a tribunal may exclude a part of a witness testimony if it is not relevant to the issues raised.[95] In this context, the authenticity and accuracy of evidence play a role, as they impact the extent to which evidence has any value or relevance at all.[96]

'Materiality', on the other hand, requires the evidence to bear upon the final decision in the case.[97] A document could be relevant to the case, meaning that it pertains to one of the key contentions in the dispute, but be non-material since, for example, the tribunal already has dozens of similar documents proving the identical point.

Although determinations of relevance and materiality are firmly within the discretion of the tribunal, persistent refusals by tribunals to order document disclosure or admit documents can lead to perceptions of bias, leading to subsequent challenges to the award on the grounds of due process. Courts, however, will typically be able to

90. *Mme Sergent c/ SCA Coopérative Agricole Agraly*, n° 14/14277, Rev. Arb. (2015) 961 (2015): stating that documents submitted after the deadline under the procedural timetable could be excluded; *BSG Resources Limited v. Vale S.A., Filip De Ly, David A.R. Williams, Michael Hwang*, EWHC 3347 (Comm) paras 12-20 (2019): documents submitted three weeks after the hearing were excluded, which did not amount to a violation of due process under the English Arbitration Act 1996.
91. IBA Rules, Arts 9.1 and 9.2(a).
92. For example, *see* Swedish Arbitration Act 1999, section 25: 'The arbitrators may refuse to admit evidence presented if it is manifestly irrelevant to the dispute ….'
93. Bernard Hanotiau, *Document Production in International Arbitration: A Tentative Definition of 'Best Practices'*, 117 (Bernard Hanotiau (ed.), ICC 2006).
94. Nathan O'Malley, Rules of Evidence in International Arbitration, 62 (2nd ed., Routledge 2019).
95. *Ibid*., 282-283.
96. For example, *see EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, para. 225 (2009); *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, Interim Decision, paras 115-120 (2017).
97. Peter Ashford, The IBA Rules on the Taking of Evidence in International Arbitration: A Guide, 71 (CUP 2013).

distinguish between the two.[98] What follows is that evidence which is irrelevant and non-material can be outright excluded. Such measures are well within the boundaries of due process and procedural efficiency.[99]

It is worth noting that, in relation to the disclosure of evidence, another exclusionary principle stemming out of procedural economy is that the search and handover of documents would be unreasonably burdensome.[100] This is essentially a fact-based proportionality analysis linked to the grounds of procedural efficiency.[101]

[C] International Public Policy

Another duty that becomes relevant in the context of exclusion of evidence stems from international public policy. In this area of evidence, the line between substantive and procedural rules becomes blurred. After all, international public policy is typically considered a substantive principle that affects jurisdiction of arbitral tribunals and admissibility of claims. Nonetheless, in the area of exclusion of evidence in particular, it would also apply to procedure.[102]

Much like due process, this duty stems from not only domestic practice but also the need to preserve the integrity of international arbitration and the public function of tribunals.[103] There are various circumstances in which it could be invoked in the context of evidence. For example, evidence could be obtained through corruption in breach of the said international public policy. Investment tribunals have persistently held that corruption is contrary to most if not all, domestic laws as well as international law.[104]

Furthermore, several authorities have emphasised that investment tribunals have the duty to actively combat corruption,[105] and hence, it would be inconceivable to retain evidence obtained by bribery in the record on the grounds of international public policy. The approach towards other evidence obtained in breach of *jus cogens* principles should be similar, torture being another example, as evidence obtained by it

98. For example, *see ABB AG v. Hochtief Airport GmbH*, EWHC 388 (Comm) (2006); *Euroflon Tekniska Produkter AB v. Flexiboys I Motala AB*, Case No. Ö 1590-11 (2012).
99. *Rosenweig v. Morgan Stanley*, 494 F.3d 1328 (2007).
100. IBA Rules, Art. 3(3)(c)(i).
101. Jeffrey Waincymer, Procedure and Evidence in International Arbitration, 866-867 (Wolters Kluwer 2012).
102. *Ibid.*, 749.
103. Walter Mattli, Thomas Dietz & Ralf Michaels, Roles and Role Perceptions of International Arbitrators, 68-72 (OUP 2014).
104. *Mr X, Buenos Aires v. Company A*, YCA 1996, ICC Case No. 1110 (1963); *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara*, UNCITRAL, Volume XXV, Yearbook Commercial Arbitration, Volume 25 (1999); *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd and Others*, Q.B. 288 p. 315 (2000); *World Duty Free Co Ltd v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, paras 142-143 and 145 (2006).
105. Bernarde Cremades & David Cairns, *Transnational Public Policy in International Arbitral Decision Making: The Cases of Bribery, Money Laundering and Fraud*, 65 and 79 (Kristine Karsten & Andrew Berkeley (eds), ICC 2006); Michael Hwang & Kevin Lim, *Corruption in Arbitration – Law and Reality,* 8(1) AI 1, 14 (2012) https://doi.org/10.54648/aiaj2012001.

is excluded in most if not all, jurisdictions.[106] As Article 15 of the Convention against Torture provides:

> Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.[107]

Therefore, international public policy considerations can give rise to some of the most difficult issues of evidence. An award that is tainted by violations of international public policy would inevitably be challenged in follow-on proceedings.[108]

§5.04 BALANCING EXERCISE FOR DETERMINING EXCLUSION

Against the background of the broad evidentiary discretion and its duties, the tribunal should engage in a balancing exercise weighing the evidence in the light of the circumstances of the case before them. The exclusion of evidence is inherently a case-by-case exercise involving primarily questions of fact. Given the nature of discretion, the types of circumstances that tribunals can find persuasive in the exclusion of evidence are potentially endless.[109] Whatever considerations tribunals deem relevant, however, they must remain within the boundaries of the duties outlined above.

Nonetheless, certain trends and patterns can emerge from international and domestic practice. For instance, tribunals can consider the public availability of documents when considering the exclusion of illegally obtained evidence.[110] Tribunals also appear to fiercely protect privilege and give weight to the scope of privilege that parties and their representatives are subject to under relevant domestic laws.[111] There

106. Wojciech Jasiński, *Admissibility of Evidence Obtained by Torture and Inhuman or Degrading Treatment. Does the European Court of Human Rights Offer a Coherent and Convincing Approach?* 29(2) EJCCLCJ 127, 127-152 (2021) https://doi.org/10.1163/15718174-bja10022; Anne Veronique Schlaepfer & Philipe Bartsch, *A Few Reflections on the Assessment of Evidence by International Arbitrators*, 3 IBLJ 211, 214 (2010).
107. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 15, General Assembly resolution 39/46.
108. For example, *see* most recently the UK Supreme Court setting aside an award on the grounds of fraud and corruption: *The Federal Republic of Nigeria v. Process and Industrial Developments Ltd*, EWHC 2638 (Comm) (2023).
109. Jeffrey Waincymer, Procedure and Evidence in International Arbitration, 411-413 (Wolters Kluwer 2012).
110. For example, *see* Aleksander Kalisz, *Illegal and Inappropriate Evidence in International Investment Law: Balancing Admissibility*, 6(1) CLR 60, 72-76 (2021); Peter Ashford, *The Admissibility of Illegally Obtained Evidence*, 85(4) Arbitration 377, 387 (2019); *R (on the application of Bancoult No 3) v. Secretary of State for Foreign and Commonwealth Affairs*, [2018] UKSC 3 para. 20 (2018): 'First, the document must constitute or remain part of the mission archive, and, second, its contents must not have become so widely disseminated in the public domain as to destroy any confidentiality or inviolability that could sensibly attach to it.'; *Matter of Dampman v. Morgenthau*, 158 Misc. 2d 102 (1993).
111. Klaus Peter Berger, *Evidentiary Privileges: Best Practice Standards Versus/and Arbitral Discretion*, 22(4) AI 501, 506-512 (2006) https://doi.org/10.1093/arbitration/22.4.501.

are many such trends and patterns that can be discerned from available tribunal practice that may point tribunals towards relevant considerations. This being said, proposing an exhaustive evidentiary test is outside the scope of this chapter which focuses on drawing conceptual boundaries of 'exclusionary rules of evidence' as a whole.

Once the tribunal engages in such fact-sensitive balancing exercise, what should it do with the findings? In *Libananco*, the tribunal said that it 'may consider other remedies available apart from the exclusion of improperly obtained evidence or information'.[112] Indeed, empowering tribunals to stay in control of the process by using procedural management tools at their disposal represents an important element in solving the issue of due process paranoia.[113] The various sources hence provide a range of options that are not mutually exclusive:

- include evidence
- exclude evidence
- exclude a part of the evidence[114]
- include evidence but order redactions[115]
- include evidence but lower its probative value[116]
- order a costs sanction on grounds of party bad faith conduct[117]
- order interim measures to preserve evidence[118]
- take adverse inferences[119]

112. *Libananco Holdings Co Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, para. 80 (2008).
113. Klaus Peter Berger & Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32(3) AI 415, 431-432 (2016) https://doi.org/10.1093/arbint/aiw020.
114. For example, *see* IBA Rules, Art. 9(2): '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, *in whole or in part* (…)' (emphasis added).
115. For example, privileged documents, *see Bank for International Settlements, Reineccius v. BIS*, PCA Case No. 2000-04, Partial Award, p. 11 (2002); *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II)*, ICSID Case No. ARB/13/13, Award, paras 166, 171 and 220-230 (2017).
116. For example, *see* in relation to including hearsay evidence *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, paras 223-237 (2009).
117. IBA Rules, Art. 9(8); *Reliastar Life Ins. Co., N.Y. v. Emc Nat. Life Co*, 564 F.3d 81 (2009); William W Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TLR 647, 674-679 (1989).
118. Power to order interim measures to preserve evidence is enshrined in many arbitration rules but recognised expressly in the UNCITRAL Arbitration Rules, Art. 26(2)(d); *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Procedural Order No. 14, para. 72 (2014); *Mr Hassan Awdi, Enterprise Business Consultants, Inc and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Decision on the Admissibility of the Respondent's Third Objection to Jurisdiction and Admissibility of Claimant's Claims, paras 1-11 (2013).
119. For example, tribunals can draw inferences from the misconduct of parties in adducing evidence: IBA Rules, Art. 9(6); Nathan O'Malley, Rules of Evidence in International Arbitration, 224-225 (2nd ed., Routledge 2019).

- permit the opponent to submit counter-evidence[120]
- adopt an 'attorneys' eyes only' regime[121]
- resignation of the arbitrators.[122]

Tribunals should consider combining several of the above measures in appropriate circumstances. For example, if the balancing exercise strongly suggests that evidence should be included in the record, the party that applied for its inclusion might also be subject to a costs sanction to account for the bad faith conduct in procuring the evidence.[123] Conversely, if the balancing exercise favours exclusion of illegally obtained evidence, the tribunal may consider ordering interim measures to prevent a party from further procurement of similar evidence. Such measures can assist the tribunal in preserving due process, as well as exercising their duties.

§5.05 THREE CATEGORIES OF EXCLUSIONARY RULES OF EVIDENCE

Despite the exclusion of evidence in international arbitration being a case-by-case exercise guided and limited by tribunal duties, it is possible to predict the typical circumstances in which such questions arise. Therefore, the following question is: in what circumstances are such steps warranted? What are the exclusionary rules of evidence?

Perhaps the most widely used set of guidance in this area is the IBA Rules, which can be adopted by the parties or tribunals but which predominantly tend to be treated as non-binding guidance.[124] The IBA Rules can be considered 'soft law' as they are not per se binding and must be adopted by the parties or tribunals. They are, nonetheless, a reflection of an internationally acceptable compromise between various jurisdictions in relation to evidentiary rules in arbitration and are widely used as non-binding but

120. For example, *see Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, para. 200 (2010): 'The right to present one's case, or "*principe de la contradiction*", in arbitral proceedings includes the right of each party to make submissions on evidence presented by its opponent.'
121. For example, *see* in relation to commercial arbitration *China Machine New Energy Corp. v. (1) Jaguar Energy Guatemala LLC, (2) AEI Guatemala Jaguar Ltd*, SGCA 12 Civil Appeal No. 94 of 2018 paras 19, 109-115 (2020).
122. Although this is arguable, some authorities state that if the arbitrators cannot uphold the key principles of due process or international public policy, they should be able to resign: Emmanuel Gaillard & John Savage, *Applicable Law Chosen by the Parties*, p. 824 (Emmanuel Gaillard & John Savage Gaillard (eds), Kluwer Law International 1999).
123. Bernard Honatiau, *Complex – Multicontract-Multiparty – Arbitrations*, 14(4) AI 369, 373 (1998) https://doi.org/10.1093/arbitration/14.4.369; Nigel Blackaby KC, Constantine Partasides KC & Alan Redfern, Redfern and Hunter on International Arbitration, p. 311 (7th ed., OUP 2023).
124. The IBA Arbitration Guidelines and Rules Subcommittee, *Report on the reception of the IBA arbitration soft law products*, https://www.ibanet.org/document?id=Subcommittee-on-Arbitration-Guidelines-and-Rules-IBA-soft-law-products-Sept-2016 (accessed 1 May 2024): The IBA Arbitration Guidelines and Rules Subcommittee, pp. 8-9: estimating in the 2016 Report that although the IBA Rules were considered in 48% of arbitrations, in 80% of these cases the IBA Rules were referenced by tribunals as guidance only rather than binding.

authoritative guidance.[125] In fact, they attempt to 'preserve the lines of distinction between the rights of the parties and the authority of the arbitral tribunal'.[126] The IBA Rules hence contain a list of factors that tribunals 'shall' consider in relation to admissibility and disclosure of evidence:

(1) Relevance and materiality
(2) Legal impediment or privilege
(3) Unreasonable burden to produce the evidence
(4) Loss or destruction of the document
(5) Confidentiality
(6) Political or institutional sensitivity
(7) Procedural economy, proportionality, fairness or equality of the parties.[127]

The inclusion of the word 'shall' suggests a mandatory exclusion of evidence, although tribunals nonetheless retain discretion to determine whether one of the above exclusionary rules applies in the circumstances. By contrast, in another provision, the IBA Rules state that tribunals 'may' exclude evidence if it was illegally obtained.[128] Nonetheless, the IBA Rules rather list the circumstances in which exclusion is warranted than set out specific criteria for exclusion and the exercise of tribunal discretion. They are also non-exhaustive.[129]

Many other sources link rules of exclusion to some of the duties of tribunals, mainly stemming out of due process.[130] The difficulty around such division is that the evidence rarely trespasses on a single principle, such as equality between the parties or international public policy. These principles can also often favour both the inclusion and exclusion of evidence depending on the specific circumstances. This chapter, hence, proposes a change in taxonomy to divide exclusionary rules of evidence against the circumstances that 'taint' the evidence and put exclusion into question. In doing so, three principles are proposed:

(1) Exclusion of evidence on the grounds of its substance
(2) Exclusion of evidence on the grounds of how it was obtained

125. Nathan O'Malley, Rules of Evidence in International Arbitration, 8-9 (2nd ed., Routledge 2019).
126. 2020 IBA Rules of Evidence Review Task Force, *Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration*, p. 28, https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D (accessed 30 Jan. 2024).
127. IBA Rules, Art. 9(2).
128. *Ibid.*, Art. 9(3).
129. The list appears exhaustive although several grounds of exclusion have been omitted: Roman Khodykin, Carol Mulcahy & Nichols Fletcher, A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, 425-426 (OUP 2019).
130. Bruce A McAllister & Amy Bloom, *Evidence in Arbitration*, 34(1) JMLC 35, 35-36 (2003); Jeffrey Waincymer, Procedure and Evidence in International Arbitration, 792-797 (Wolters Kluwer 2012); Frederic G Sourgens, Kabir A N Duggal & Ian A Laird, Evidence in International Investment Arbitration, 237-239 (OUP 2018); *see also* domestic practice in Theodore Perlman, *Due Process and the Admissibility of Evidence*, 64(8) HLR 1304 (1951) https://doi.org/10.2307/1337083.

(3) Exclusion of evidence on the grounds of non-compliance with procedural directions of the tribunal.

The first exclusionary principle concerns the substance of the evidence. In fact, most of the exclusionary grounds listed in the IBA Rules relate to it.[131] As was discussed above, evidence having little relevance to the case or poor materiality to its outcome is a key example.[132] Privileged and confidential documents are also a frequent issue, and there are many cases in which such evidence was excluded.[133]

The second and third principles of exclusion are concerned not with the substance of the evidence but with the procedure. Therefore, second, some evidence is excluded solely on the basis of how it was obtained – for example, through illegality.[134] Such circumstances often involve an analysis of party conduct in question with the analysis of the substantive value of the evidence. The component, hence, fits with Article 9(3) of the IBA Rules that allows tribunals to exclude such evidence. The ground of 'unreasonable burden to produce the requested evidence'[135] would also fall under this category in the context of document disclosure and involve considerations of proportionality of the request.[136]

The third exclusionary principle of evidence concerns non-compliance of the evidence with procedural directions of the tribunal. Tribunals may, for example, set hard deadlines for submitting documents. In *Zeevi Holdings v. Bulgaria*, the claimant attempted to introduce new evidence despite an earlier procedural order stating that no further documents shall be admitted. The tribunal subsequently excluded the said documents.[137] Against this background, procedural economy appears to be the primary

131. IBA Rules, Art. 9(2)(a)-(b) and (e)-(g). Interestingly, the IBA Rules in Art. 9(2)(d) list 'loss or destruction of the Document that has been shown with reasonable likelihood to have occurred'. However, this cannot be an exclusionary rule of evidence as there is nothing to exclude – the evidence does not exist.
132. For example, *see Generica Ltd. v. Pharm. Basics, Inc*, 125 F.3d 1123, p. 1131 (1997); *Economy Forms Corporation v. The Government of the Islamic Republic of Iran; the Ministry of Energy; Dam & Water Works Construction Co. ('Sabir'); Sherkat Sakatemani Mani Sahami Kass ('Mana'); and Bank Mellat (formerly Bank of Tehran)*, IUSCT Case No. 165 (1983).
133. For example, *see* in relation to privilege *Bank for International Settlements, Reineccius v. BIS*, PCA Case No. 2000-04, Partial Award, p. 11 (2002); *Vito G. Gallo v. The Government of Canada*, PCA Case No. 55798, Procedural Order No. 3, para. 49 (2009); *see* in relation to confidentiality *Euroflon Tekniska Produkter AB v. Flexiboys I Motala AB*, Case No. Ö 1590-11 (2012).
134. For example, *see* Aleksander Kalisz, *Illegal and Inappropriate Evidence in International Investment Law: Balancing Admissibility*, 6(1) CLR 60, 61-63 (2021); Peter Ashford, *The Admissibility of Illegally Obtained Evidence*, 85(4) Arbitration 377, 377-378 (2019).
135. IBA Rules, Art. 9(2)(c).
136. Nathan O'Malley, Rules of Evidence in International Arbitration, 47 (2nd ed., Routledge 2019); *INA Corporation v. The Government of the Islamic Republic of Iran*, IUSCT Case No. 161, Award, para. 37 (1985): 'The Respondent's attempt to excuse its non-compliance with the Tribunal's Order [to disclose documents] by merely stating that the documents were "voluminous" is not convincing. The Respondent did not raise this asserted excuse until the hearing, long after the date for submission of these materials had passed; even then, the Respondent gave no indication of the actual amounts of material involved or any description of the alleged problems involved which prevented submission of the materials by the Respondent or their inspection by INA.'
137. *Zeevi Holdings v. The Republic of Bulgaria and the Privatization Agency of Bulgaria*, Case No. UNC 39/DK, Award, para. 61 (2006).

consideration in the area. In fact, in another case before the English courts, the exclusion of a 2,000-page document three months after the hearing did not amount to a violation of due process.[138] The tribunals acting contrary to their own procedural directions in order to include new evidence might, however, trespass on due process. In the *Fraport v. Philippines* investment arbitration, a party applied to introduce new evidence after the close of the hearing, which the tribunal admitted. The Decision on Annulment found that this decision breached due process as it restricted the opponent's right to be heard and respond to the new evidence.[139]

To summarise the point, and in an effort to remedy the lack of systematisation in the area, there is a need to reopen how exclusionary principles are categorised in international arbitration. Having considered practice and doctrinal sources, this paper argues that exclusionary rules of evidence should be divided into three categories depending on the circumstances that taint the evidence:

(1) **Principle 1: The substance of the evidence excludes it from the record**: covering circumstances where nothing was procedurally questionable in relation to the evidence, but rather the evidence itself was privileged, confidential, politically sensitive or otherwise should be excluded due to its substance. Most importantly, this principle addresses evidence that simply does not meet the threshold of relevance and materiality.
(2) **Principle 2: How the evidence was obtained excludes it from the record**: addressing whether the evidence was obtained inappropriately or whether its production was overly burdensome. It stretches from evidence obtained in breach of *ius cogens* principles such as torture, through evidence obtained through corruption, to evidence obtained through domestic civil wrongs.
(3) **Principle 3: The evidence does not comply with a procedural direction of the tribunal**: concerning issues such as the phase in which evidence was introduced, for instance, during the hearing or even moments before the final award. Other considerations include non-compliance with the language requirements, submission of overly voluminous evidence contrary to tribunal directions and other similar factors.

These categories of exclusionary rules are not mutually exclusive and can be argued and analysed in parallel. For instance, in *Rompetrol v. Romania*, the tribunal dealt with evidence procured through wiretapping that was allegedly contrary to confidentiality and national security.[140] The same piece of evidence, therefore, triggered two possible exclusionary rules – one concerning Principle 1, relating to the

138. *BSG Resources Limited v. Vale S.A., Filip De Ly, David A.R. Williams, Michael Hwang,* EWHC 3347 (Comm), paras 12-20 (2019).
139. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, paras 218-247 (2010).
140. *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, paras 255-261 and 270-280 (2013).

substance of the documents (confidentiality and national security) and Principle 2, namely how the evidence was procured (wiretapping).

Moreover, it is conceivable that a single piece of evidence triggers all three principles. Say, for example, that one party employs hackers to break into the investor's servers for the purpose of finding documents it can use in the arbitration (possibly making it inappropriately obtained under Principle 2) and the documents that were subsequently obtained are covered by client-attorney privilege (possibly excluding the evidence in relation to its substance under Principle 1). The party then only attempts to admit the evidence days before the deadline for the final award, restricting the opponent's ability to respond (possibly excluding the evidence on the grounds of failure to comply with tribunal procedural directions under Principle 3). Naturally, the more principles of exclusion are infringed by the introduced evidence, the stronger the argument that it should be excluded, although the test is inevitably a case-by-case one, subject to the relevant burden and standard of proof of the evidentiary objection.

Finally, it is worth emphasising that the three principles mentioned above are also relevant to document disclosure/production, not just admissibility. However, the exclusionary principle relating to non-compliance with the tribunal's procedural direction (Principle 3) would be less relevant to document disclosure since it involves a party applying for tribunal permission to request evidence from the opponent that may be simply refused, although the tribunal can prescribe a specific procedure for requesting documents, such as a Redfern Schedule.[141] Other principles would apply to disclosure unchanged. Indeed, by way of example, parties may and do raise arguments of privilege at the document production stage.[142]

§5.06 CONCLUSIONS AND OUTLOOK

This chapter sets out exclusionary rules of evidence as a standalone concept in the procedural practice of international arbitration which stems out of tribunal discretion and the various duties of the tribunals. Due process serves as the minimum standard that must be observed, but other principles, such as procedural economy and the observance of international public policy, should be factored in by tribunals to guide the exercise of their discretion.

That being said, resolving the issue of exclusion of evidence is an inherently case-by-case exercise. As a consequence of evidentiary discretion tribunals can, subject to their duties, give weight to any considerations they deem relevant in resolving the issue. Once the tribunal reaches a decision through a balancing exercise of these various relevant considerations, it has a range of options available to it apart from the

141. *Dunkeld International Investment Ltd. v. The Government of Belize (Number 1)*, PCA Case No. 2010-13, Procedural Order No. 1, para. 9 (2014): 'Document production requests submitted to the Tribunal for decision *must* be in tabular form pursuant to the model included with this Order as Annexure B. The Parties are encouraged to use the model format throughout their exchange of requests, objections, and responses' (emphasis added).

142. *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on Document Production Regarding the Parties' Respective Claims to Privilege and Privilege Logs (2013).

inclusion or exclusion of evidence such as ordering redactions, imposing a costs sanction on the recalcitrant party or permitting counter-evidence.

Finally, the chapter proposes to divide the exclusionary rules of evidence against the circumstances that 'taint' the evidence in question. Therefore, evidence may be excluded on the basis of its substance (Principle 1), on the basis of how it was obtained (Principle 2) and on the basis of non-compliance with procedural directions of the tribunal (Principle 3). Principle 1 relates to the substance while the other two are concerned with questions of procedure.