PRACTICAL GUIDELINES ON THE RECESSION OF EVIDENCE IN ARBITRATION

1. Evidence - What it is

Evidence is the means by which facts are proved in any proceedings. Each party will tender evidence which supports his version of the facts which are in issue in those proceedings, and the tribunal will make a finding of fact after weighing the evidence of each party. The finding of fact is usually the preference of one party’s version over the other’s, but it need not necessarily be the case.

2. Evidence in Arbitrations

The Evidence Act does not apply to Arbitrations (S1 Evidence Act(1950)). However, the Arbitrator is required to follow the rules of natural justice, in particular to give a fair opportunity to a party to contradict any statement contrary to their view Sarkar On Evidence 15th Ed Sec 1 p30. There appears to be a divergence of views as to whether the strict rules of evidence apply to arbitrations. Sarkar is of the view that they do not, the only requirement being that the rules of natural justice as above said. Commercial Arbitration by Musthill & Boyd 2nd Ed at p352 on the other hand seems to be of the view that contrary to popular belief, there is no relaxation in arbitrations of the strict rules of evidence, as arbitrators [in England] are bound by the laws of England, and the rules regarding admissibility are part of that law(p352)are adhered to. I am of the view that Sarkar’s view is likely to prevail, given that the Evidence Act(1950) expressly does not apply to Arbitrations. This appears to also be the result reached in the case of Jeuro Development S.B. v Teo Teck Huat[1998] 6MLJ 545, where Augustine Paul J held that a departure from the rules of the Evidence Act(1950) does not per se amount to misconduct, unless the rule of evidence violated was one based on natural justice, and an infringement of it is therefore repugnant to one’s sense of justice and fairness. Arbitrators in practice should however not diverge too far from the strict rules of evidence, in particular in the reception of hearsay evidence without the opportunity of cross-examination, to avoid their Awards being set aside for misconduct.
3. **Types Of Evidence**

Evidence can be oral, documentary (including photographs, tape recordings etc) or real. Real evidence are real objects like motorcars, mattresses etc.

4. **Discovery In Arbitrations**

Discovery is the process where parties are obliged to disclose the existence of documents material to the matters in dispute. There are two types of discovery, general discovery and specific discovery.

**General Discovery**

General Discovery is where each party is obliged to disclose all documents material to the matters in dispute, subject to some exceptions. General Discovery is the rule in Court. Every document that is the possession of the party, as well as those once in the possession of the party are required to be disclosed.

**Specific Discovery**

Specific Discovery is where parties are required to disclose only identified documents, or documents in identified categories. Specific Discovery is ordered where one of the parties is able to establish that there is reason to believe that the other party has not fully complied with its discovery obligations.

**The Practice In Arbitrations-Restricted Discovery**

The Arbitrator should use discrimination in his powers to order discovery, depending on the particular circumstances in the Arbitration. The circumstances may include those where there may be a large volume of documents, only a few of which may be helpful to either party, in which case general discovery may be inappropriate due to cost and time considerations. Musthill suggests the following possibilities of restricted discovery:

(i) Where the dispute turns on a few clearly defined issues specific discovery relating only to those issues

(ii) Where the documents are numerous, they need not be listed individually—it may be sufficient to identify bundles of documents.
(iii) Where the case falls into distinct parts, and hearing split into stages, discovery may only be ordered for the documents material to that stage.

(iv) Where there are numerous documents, and the arbitrator is confident that parties will make full disclosure, disclosure may be omitted altogether and the parties may proceed directly to inspection.

*Musthill* is of the view that there are no fixed rules, and the rules for discovery must be fashioned to fit the particular circumstances.

*Musthill* p323-326

5. **The Confusion In Agreed Bundles: Authenticity & Evidence Of Contents.**

There is often a confusion as to the term “Agreed Document” or “Agreed Bundle”. A document may be agreed that it exists as a document, but not necessarily that the parties agree as to the truth of its contents. The majority of documents in a typical arbitration would fall into the former category, i.e. agreed as to the authenticity of the document. It is therefore convenient that documents (and consequently bundles) in arbitration be divided into three categories:

(i) Agreed as to authenticity

(ii) Agreed as to authenticity and as to the truth of contents

(iii) Non-Agreed

It would appear that in Court proceedings, the maker would require to be called for both categories (i) and (iii) to prove the truth of the contents of the documents concerned, on a reading of S73A Evidence Act(1950), unless they fall within the excepted categories(overseas, impracticable etc). In Arbitrations however, it is suggested that the Arbitrator obtain the agreement of both parties to dispense with the maker of the document being called except in the non-agreed category where authenticity is challenged, subject to the right of cross-examination of the witness through which the document is tendered. Usually, these documents will be fairly limited. No witnesses need be called for category (ii)[ Agreed as to authenticity and contents]

(See generally discussion in Musthill 326)
As a point of interest, the Evidence Act (1950) at S94 seems to suggest that where the language of a document is plain in itself and where it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts—does this prevent contradiction of contents of documents by external evidence? In my view it does not—it requires accurate application to existing facts, so surely evidence must be allowable to challenge the accuracy of application to existing facts.

6. **How To Deal With Objections**

Objections are devices which, when properly used, assist the Arbitrator to keep the hearing within its jurisdictional boundaries, prevent a party from straying from its case as pleaded, and prevent inadmissible evidence from being let in. Unfortunately, they are sometimes used as tactical devices to break the rhythm of the examining advocate’s questioning or the flow of the evidence of a witness. The Arbitrator has therefore to keep an open mind on objections, as they may well be justified if the other party, through ignorance or design, persists in putting in material which is objectionable. On the other hand, he also has to be vigilant to control “tactical” objections, and use all his experience, skill and control of proceedings to minimise such objections, without misconducting himself by depriving the a party of his legitimate rights to object.

7. **Usual Grounds For Objections**

**Excess of Jurisdiction**

Objections may be taken that a party is seeking to have a dispute resolved that is outside the scope of the arbitration agreement, reference to arbitration or pleadings.

As the arbitrator’s jurisdiction arises from the arbitration agreement, as subsequently delineated by the reference in the notice to arbitrate and the parties’ pleadings, he must be vigilant to ensure that he does not stray outside these boundaries.

However, s18 of the new Arbitration Act 2005 empowers the arbitrator to rule on his own jurisdiction, which was not the case in the previous legislation, and will remove to a large extent the delays that were previously suffered by the need to go to court to determine jurisdiction.
Relevance

Only evidence which is relevant to a fact in issue in arbitral or court proceedings is admissible. This general principle is reflected in S5 of the Evidence Act 1950. Having said that, facts peripheral to facts in issue, such as facts which are closely connected to a fact in issue, or facts necessary to explain the cause and effect of relevant facts in issue, or facts necessary to introduce a fact in issue, or to explain motive or state of mind, or which tend to establish the probability or otherwise of a fact in issue are also relevant facts and evidence of these peripheral facts may also be admissible.

Privilege

Evidence need not be tendered if it is “privileged”. This protection is inserted for public policy reasons, to enable parties to freely confide in their legal advisors if proceedings are contemplated or to facilitate settlement of disputes by allowing parties to make concessions in such settlement negotiations they might not otherwise make if not so protected.

(a) Legal Professional Privilege

This extends to all communications between a party and his legal advisors which came into existence at the time when litigation or arbitration is contemplated or pending is privileged. (Bernstein p140)

It also extends to reports prepared by professional advisors for the whose dominant purpose is for litigation or Arbitration in England, but it is unclear if the position is the same in Malaysia, as the Evidence Act(1950) s126 & 129 seem to confine the privilege to communications between a party and his advocate.

(b) Negotiations For The Compromise of A Dispute-Without Prejudice Communications

Communications between parties or their agents which are bona fide attempts to compromise disputes between themselves are privileged. This is so whether or not they are labelled “without prejudice”. Once agreement is reached however the privilege is lost. The Arbitrator or Court is entitled to examine without prejudice communications to determine if in fact a settlement agreement was reached.
How To Ensure Efficient Reception Of Evidence:
Documents, Chronologies, Scott Schedules & Witness Statements

Most Arbitrations in this country involve construction disputes, which by their very nature involve voluminous documents. Further, busy practitioners usually do not invest the time early enough to get to grips with the issues in a case, and tend to err on the side of caution and put in all documents remotely connected with the case. Almost invariably, only 10-20% of these documents are actually referred to in the case. This is an extremely unsatisfactory state of affairs, as at the very least it will involve moving large quantities of paper about, and worse, it may unnecessarily prolong the proceedings or obscure the real issues in the case. It is suggested that this can be mitigated to a large extent by Arbitrators giving sensible directions to

(i) produce “core bundles” early, confined strictly to issues raised in the pleadings, and limited in numbers depending on the Arbitrator’s assessment as to the complexity of the case—it is suggested that it should not exceed 3-5 bundles in most typical disputes.

(ii) Arrange the documents in these bundles in chronological order (as opposed to documents related to individual issues, which in my view does not show the linkages between issues, in particular cause and effect)

(iii) Produce chronologies consisting separate columns of date, brief summaries of each document, the issue they relate to, and their reference in the core bundles.

This will usually force parties to do more work up front, which apart from giving them a greater understanding of the issues in the Arbitration, saving time in cross-examination etc, will usually result in the core bundles being the primary source of documents referred to in the hearing, saving the need to transport large quantities of documents about, and enabling the Arbitrator to always have the essential documents on hand.

Scott Schedules

Although these schedules are strictly speaking part of pleadings and in the nature of further and better particulars, they have been included in this paper as they present a useful tool for organising and systematically dealing with evidence of multiple sub-issues such as liability for individual
defects in a construction claim. An example of such a Schedule might be as follows: However, they must be viewed as no more than a tool, as injustice can be done by forcing a party to put his case in this way if it is not practicable or possible. In the case of *GMTC v Yuasa Warwick* (1994) 73BLR 102 the U.K. Court of Appeal, in allowing an appeal where a Judge struck out parts of a Plaintiff’s claim for his inability to so provide details in the form of a Scott Schedule, held that no Judge was entitled to require a party to establish causation and loss by a particular method, and advised parties to object at the outset if they are required to plead a case in a way which does not represent the way they wish to put the case. Where Experts give evidence, it may be prudent for the expert for each side to give evidence on each item in the Schedule, rather than for the Claimant’s expert to give evidence on all items and the Respondent’s expert to give evidence on all items after close of the Claimant’s case-this will enable the Arbitrator to decide each issue when both conflicting views are fresh in his mind.

<table>
<thead>
<tr>
<th>No of Item</th>
<th>Full Particulars of Defect Alleged</th>
<th>Claimant’s Cost Or Estimate of Remedying Defect</th>
<th>Respondent’s Estimate of Remedying Defect</th>
<th>Defendant’s Observations</th>
<th>Arbitrator</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Tiles In Dining Room of different shades-To Hack And Remove All Tiles, And Relay New Tiles</td>
<td>RM7,500</td>
<td>RM1,500</td>
<td>Only 20% of Dining Room tiles affected.</td>
<td>RM7,500 allowed as not possible to colour match 80% balance of Tiles</td>
</tr>
<tr>
<td>2.</td>
<td>Plaster Uneven In Master Bedroom</td>
<td>RM5,000</td>
<td>Nil</td>
<td>Within Specification and Workmanship standards For Medium Cost Apartments</td>
<td>Nil-Plastering Not Defective</td>
</tr>
</tbody>
</table>
**Witness Statements**

Evidence in chief in anything other than short Arbitrations should always be reduced to witness statements, with clear directions that

(i) they should be comprehensive as possible, and fully referenced to the bundles of documents

(ii) that only oral clarification of these statements at hearing will be allowed.

Again, drafting of comprehensive witness statements will increase the parties's understanding of the case early, leading to more efficient use of time at hearing. The direction to confine oral evidence in chief to clarification should be made known to parties that it will be enforced at hearing, to prevent brief witness statements being produced which extend to long periods of hearing time in “oral clarification”. Having said that, the Arbitrator needs to be flexible according to the particular circumstances applicable, to avoid allegations of misconduct in preventing a party from adducing evidence.

9. **Weighing Evidence-Burden & Standard of Proof**

**Burden**

This is an area that usually causes problems for non-legal Arbitrators. A few simple rules would probably address most situations encountered.

(i) He who asserts must prove Generally, it is the Claimant who bears the overall burden of proving his case.

(ii) if a defence is raised by the Respondent, the Respondent will bear the burden of proving his defence.

(iii) A Claimant requires to prove all elements of his case

A common example of confusion arises where a Claimant Contractor claims to be entitled to prolongation claims for being delayed by the acts of prevention of the Respondent Employer. The Claimant will bear the burden of proving that

(a) there was a delay to his work
(b) there was an act of prevention by the Employer
(c) the act of prevention caused the delay
It is not uncommon for Arbitrators to expect the Respondent Employer to prove that the act of prevention did not cause delay, merely because it is asserted by them. This is incorrect because causation is a vital part of the Claimant Contractor’s case, and is therefore required to be proved by him. [In fact, in the well known case of *Wharf Properties v Eric Cumine Associates*, the Privy Council was prepared to hold that a pleading was defective and liable to be struck out if the causal nexus between the breach and the damage (i.e. delay) was not set out in the pleading].

**Standard**

In civil cases, the standard of proof is the balance of probabilities. This merely means that one party’s version of the facts must be more probable than the other’s on the evidence tendered. If either party’s version of the facts is equally probable on the evidence, the Claimant’s case fails.

10. **Emerging Techniques**

*“Hot Tubbing” Experts*

Hot tubbing enables opposing expert witnesses to question each other directly before they give the expert opinions.

The practice first evolved in international arbitration.

The technique is especially attractive as it reduces the tendency of experts to be partisan and support their client’s position, as it is one thing to give skewed answers to questions from a usually inexpert lawyer, and quite another to do so to an expert’s peer.

It also is more effective as both points of view are immediately presented, unlike the conventional scheme where they may be separated by considerable time, making it more difficult to appreciate the differences and make a sound decision.

*Chess Clock Arbitrations*

In the chess clock procedure for arbitration the parties are allocated a limited time to present their cases at the hearing (which includes evidence in chief, cross-examination, re-examination and submissions) The parties
are timed for each phase to ensure that they do not exceed their allocated time limit, similar to a chess match.

Chess clock arbitrations is an excellent way to control the time and cost of an arbitration, gives certainty to the diaries of parties, their advisers and arbitrators. In the case of arbitrators, it is attractive as their commitment in time is limited, and there is a higher likelihood of securing high quality but popular arbitrators.

The technique rewards parties who are well prepared and punishes those who are not.

**Conclusion**

In conclusion, the one principle that must always be in the forefront of every Arbitrator’s mind in the reception of evidence must be the principle of natural justice. There are also several practical measures and emerging techniques that the Arbitrator can and should take which will result in more efficient taking of evidence, and conduct of the hearing in general. Finally, the Arbitrator must always remember that there is a fine line between robust control of proceedings (for efficiency) and compromising natural justice, and he must ensure he is on the right side of this line!

*By Rajendra Navaratnam*