Evidence for Arbitrators

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Preliminary Observations

Evidence is essentially the means of proving a fact before a tribunal. Seen as such, it represents the bricks from which a case is constructed. The mortar in this image represents the argument. Thus, where it is sought to prove that a binding contract between two parties contains a certain term:

- the evidence is the document, or oral testimony from a witness as to signature; while
- the argument is that where parties execute a written form of agreement, the terms of that agreement are all to be found in the document.

The word 'evidence' is often used as a shorthand expression for 'admissable evidence'. Thus you may hear a judge say to counsel, in rejecting hearsay testimony, 'That's not evidence'. In this lecture I propose not to use the word in this sense. In as much as we shall be concerned with notions of admissibility, I shall attempt to use the full expression 'admissible evidence'.

One final word of warning. The law of evidence has its origins in the 18th and 19th centuries, when issues of fact were determined by juries. This should be borne in mind. Many of the rules of evidence were designed to simplify the decision-making task of the jury and to exclude material which the simple juror might find distracting. Nowadays, except for criminal trials, the tendency is for trial by judge alone. This has led to a considerable watering down of the more technical rules by judges as a matter of practice, and to legislative change. It is common for a judge to avoid deciding a difficult evidentiary point by saying that he or she receives the evidence 'subject to objection'. The objection is then

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forgotten as the case proceeds unless the particular piece of evidence becomes of critical importance. Notwithstanding this tendency, the rules of evidence may be complex and bewildering. The standard text on the subject, written by Professor Wigmore, runs to 11 volumes in its 1940 third edition.

It is not the purpose of this article to provide comprehensive instruction upon this subject. The idea is to lead to an understanding of the basic principles and purposes of the law of evidence so that an arbitrator may be able to deal with problems which arise in arbitrations, for these problems must be decided instantly. Often it is difficult when two lawyers solemnly assert differing positions as to the admissibility of a document — or, when one party is unrepresented, to ensure that the represented party obtains no unfair advantage by putting inadmissible material to the arbitrator.

Strictly speaking, proceedings before an arbitrator are subject to the rules of evidence. This must be recognised. However, this rule is mitigated by a number of practical considerations.

1. The parties very often will not be concerned to raise technical objections.
2. Parties often consent to the reception of non-contentious material.
3. It is not easy to upset an award for a failure to adhere to the rules of evidence. This is particularly the case where the arbitrator receives evidence which is inadmissible, in contrast to the position where he or she refuses to receive material which a party wishes to place before them. Therefore it is better to err on the side of generosity.
4. Often the parties are not represented by lawyers, so technical questions do not arise.

The role of evidence therefore should be understood: it is to provide the arbitrator with the material which they may use to reach their decision. This material may be:

- a formal admission (although strictly speaking this is not really evidence);
- oral testimony on oath of witnesses;
- documents;
- real evidence (for example, a core sample of concrete) which includes observations upon view; or
- the experience and expertise of the arbitrator, (in contrast to a judicial tribunal which approaches the problem with the innocence of a newborn babe).

The following is not evidence:
- the submissions or arguments of lawyers, building consultants or parties;
- unsworn statements; and
- questions — it is the answer, not the question, which may be acted upon.

The law of evidence affects these materials in three different ways:

(1) rules affecting admissibility;
(2) rules affecting the manner of receiving evidence; and
(3) rules affecting the use which may be made of evidence.

We shall consider each of these rules in turn.

Rules affecting admissibility

Principle of relevance

The basic principle is that relevant material is admissible, but it is often difficult to determine relevance. This involves an examination of issues.

1. What are the issues?
2. Does the material make the suggested conclusion more or less probable?
3. The issue of credit — generally it is proper to attack the credit of a witness, but not to reinforce the credit of a witness.

To provide an example: did a builder agree to perform the work by a fixed date or did he merely give an estimate of time? The proprietor is contending for the firm date. Relevant evidence would include:

- conversations between the parties on this point;
- the fact that at the time of the agreement the plans had not been finalised;
- a letter from the proprietor to his bank manager after the date of the agreement stating that the completion date was uncertain;
- evidence that the builder applied for an extension of time; and
- the fact that the proprietor is a convicted perjurer.

Irrelevant evidence would include the following facts:
- the proprietor had written a letter to his bank manager saying that he had

agreed to a firm completion date (as opposed to evidence that the proprietor had written to the *builder* confirming the fixed completion date);
- the builder had refused to give firm completion dates on other jobs; and
- the builder has a reputation for integrity and fair dealing.

Rule excluding without prejudice statements

The policy of the law is to promote compromise. Thus, when parties are negotiating, concessions made by a party will not be used against that party provided:

(a) the concession was made as part of the settlement negotiations; and
(b) the statement was made without prejudice.

Thus, when, following the appearance of large cracks in a building, the proprietor writes in outraged terms to the builder demanding that he return to make good, the following evidence might be useful:

- the builder apologised and said he provided inadequate footings;
- the builder agreed to come back to carry out rectification works without charge; or
- without such an agreement, the builder returns and sends no bill.

These are all consistent with an admission of fault by the builder. Contrast this with the situation where the builder denies liability but says without prejudice he will return and make good without charge. This statement may not be led in evidence or put in cross-examination to the builder.

Consider the question of an offer of cash settlement. The House of Lords has drawn a distinction between three situations where the builder offers a cash settlement:

- an open offer;
- a without prejudice offer; or
- a sealed offer.

No use whatever — including on the matter of costs — may be made of a without prejudice offer. The open offer is available to the arbitrator as part of the evidence. Thus when the proprietor knows he will be found liable to pay

something, he may wish to put before the arbitrator that he is being reasonable. The sealed offer is a procedure which falls between the two. The arbitrator knows that the proprietor was made an offer, but not the amount of it. It is opened after the award is made and may affect the question of costs.

Rule excluding communications between clients and legal advisors

Again this is an exceptional privilege accorded to parties as a matter of public policy. As such it is limited in scope to:

- communications between lawyer and client;
- documents brought into existence by the lawyer, client or a third party; and
- documents written for the sole purpose of instructing the lawyers, obtaining legal advice or conducting the case (*Grant v Downs* (1976) 135 CLR 674).*

In our example, privileged information would be:

- conversations and correspondence between either party and their lawyers; and
- the engineering report for purposes of arbitration.

The following information would not be privileged:

- a letter from a client to a solicitor which deals with fund raising for the building;
- a report from a consulting engineer procured for the purpose of rectifying defects; and
- a document acquired from a third party for use in arbitration which was not brought into existence for that purpose — for example, if the proprietor were to ask for and obtain the architect's file.

Nat Employers Insurance v Waind (1979) 24 ALR 86.

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* Editor's note: this article was written prior to the decision of *Esso Australia Resources Ltd v commissioner of Taxation* (Cth) (1999) 74 ALTR 339 in which a dominant purpose test was preferred to the narrow sole purpose test.

Rule against hearsay

Hearsay is an out of court statement of a person not called to give evidence. This is not admissible because the maker of the statement is not available to be tested by cross-examination or assessed by the arbitrator.

For example, if the question was whether the proprietor had authorised a variation by instruction to the foreman, the builder cannot give evidence that the foreman told him he received such an instruction.

It is common for non-contentious hearsay, such as a soil test report, to be received by consent, as this saves expense. This is a matter for the good sense of the parties.

Statutory provisions admitting documentary evidence

All States have an Evidence Act which, among other things, governs the admissibility of documentary evidence — see, for example, s 48 of the *Evidence Act 1995* (NSW).

Evidence as to credit

A witness may be cross-examined as to credit, but the attacking party must accept the answers given — they cannot, as a general rule, lead evidence against the credit of a witness. You cannot lead evidence in support of credit of your own witness.

Thus, the proprietor may be cross-examined with a suggestion that he habitually seeks to avoid paying his debts by dreaming up complaints. If he admits this fact, no problem. But if he denies this fact, the arbitrator is not entitled to assume that because the question has been asked it is true. The builder is not entitle to lead evidence to disprove the denial, as this would open up irrelevant issues. The proprietor is not entitled to reinforce his denial by leading evidence of his good commercial reputation.

However, it may be difficult to draw a distinction in some cases as to credit or issue — for example, an allegation that the builder is a drunkard.

Note that there is an exception which would permit the builder to prove a conviction notwithstanding a denial.

Rules affecting the manner of receiving evidence

Documents

An arbitrator should constantly bear in mind that a relevant document must

be proved. A contract is proved by a witness verifying the signatures. A letter is proved by a witness saying he or she posted it and producing a carbon copy. In most cases, therefore, proof is dispensed with by agreement. When in doubt the arbitrator should ask all parties whether there is any objection to the document being received.

Where there is a contest the parties and the arbitrator are entitled to require strict proof. For example, it is not inconceivable that a letter might go astray.

Photographs

Like documents, photographs should be proved by the photographer or a person present at the time they were taken. Another method is for a witness to verify that the photograph actually shows a picture of its subject matter, as photographs can be touched up. When in doubt, seek consent.

View

It should be remembered that the view and what is said on the view may be evidence.

Witnesses

In most cases witnesses are the principal source of evidence. They should be sworn.

The choice of witnesses is a matter for the parties; the arbitrator may not call witnesses. The arbitrator may take into account the failure of a party to call an apparently available witness, but the failure of a party to call a witness does not of itself entitle the arbitrator to assume that the witness would have given any particular evidence. For example, assume our builder alleged an extra was authorised by the proprietor in the presence of the foreman, but the proprietor denies this. An unexplained failure by the builder to call the foreman may embolden the arbitrator to accept the proprietor's evidence, but the failure to call the foreman would not of itself entitle the arbitrator to reject the builder's evidence.

The manner of presenting the evidence, in the sense of the order of witnesses, is a matter for the parties. The arbitrator should be careful not to take over the proceedings, especially when the parties are represented, although he or she may make suggestions.

It may suit the arbitrator to hear all the evidence on one issue from both sides before moving to the next issue — for example, to go through a list of defects, hearing from both sides on each item. He or she may invite parties to do this, but it would be unwise to oblige them to follow this procedure. It should be remembered that the parties know more about the case than the arbitrator, at least at the beginning.

Normal procedure is for the applicant to go first, by calling his or her witnesses and examining them. They are then cross-examined by the opponent. They may be re-examined by the applicant. There is no right of further cross-examination except by leave.

Examination in chief

This is done by question and answer. Questions should be relevant to the issues. Leading questions — that is, questions which suggest an answer — are not permitted. This prohibition is not enforced for merely formal matters.

Cross-examination

This is done by question and answer. Questions should be relevant to the issues. Questions may be directed to credit, but the cross-examiner is bound by an answer to a question as to credit. The duty of counsel is to put his or her case to opposing witnesses. This is a useful indication to all parties and to the arbitrator as to the likely areas of real contest.

Re-examination

No leading questions are permitted. Questions may be directed only to matters upon which the witness was cross-examined, not to new matters overlooked in examination in chief (except by leave).

Role of arbitrator with respect to witnesses

An arbitrator may ask questions, but he or she should not enter into the arena by attacking a witness. This may require self restraint, but the best judges are quiet judges.

An arbitrator should be slow to interfere, especially when the parties are represented. He or she should be very slow to stop cross-examination as this may amount to misconduct or be construed as bias. However, he or she may require parties to refrain from unfair questioning such as double questions (Have you stopped beating your wife yet?) or questions which are based on incorrect statements of evidence.

It is very doubtful that an arbitrator has the power to refuse to hear evidence, even where a party calls an expert in a field within the expertise of the arbitrator which the arbitrator may think a waste of time or even a vexatious prolongation of the hearing.

In all these situations, remember that the legal representative (assuming competence) knows where he or she is going. Remember also that a hint will usually be sufficient and effective, especially if it produces the consent of the parties.

Above all, remember that it is difficult to upset an award where the parties have been given free rein. It is easier to establish misconduct or departure from the rules of natural justice from a positive act of an arbitrator than from their inactivity.

Order of proceedings

The normal procedure is for the applicant to call all of his or her evidence and then close their case. In the absence of agreement to the contrary, this procedure should be observed. The applicant also calls evidence in reply to the cross-claims of his opponent and evidence to meet any allegations put to his or her witnesses in cross-examination.

It is only in exceptional cases that the applicant is entitled to re-open their case and submit more evidence (except for putting documents to an opponent witness in cross-examination). Such an exceptional circumstance would arise, for example, if the respondent failed to put a matter of complaint in cross-examination but then led evidence on it in their own case. The test is whether the applicant could have reasonably foreseen the need to call the evidence.

Conclusion

The basic principle that should guide the arbitrator is one of fairness to the parties. When in doubt, an arbitrator should admit the evidence — no one will know whether they acted upon it. Parties should be left to run their own case. ⌘