Evidence and Arbitration

This note is intended to provide a brief summary on the subject of evidence. More particularly I will deal with where source material might be found and some of the issues that arise. I would caveat at the beginning of this talk that university courses on the Law of Evidence are lengthy, as are the textbooks, and it is one of the more difficult University examinations. You will realise from this that it is not going to be possible to compress all of the Law of Evidence into a brief talk. Hopefully we will provide you with some useful advice and guidance.

I provide a full text so if there are citations etc that I refer to these will all be listed in a reference section at the end.

Introduction

There are two starting points for this discussion.

(i) Firstly the Civil Evidence (Scotland) Act 1988 (“the 1988 Act”) and in particular section 9 which states as follows:

“9. In this act unless the context otherwise requires civil proceedings include…

(b) Any arbitration, whether or not under an enactment, except insofar as in relation to the conduct of the arbitration specific provision has been made as regards to the rule of evidence which are to apply.”

(ii) Secondly, the Arbitration (Scotland) Act 2010 (“the 2010 Act”), and the Scottish Arbitration Rules (“the 2010 Rules”). There are a number of mandatory and discretionary rules which apply. In particular, rule 28 deals expressly with the procedure and evidence for arbitral proceedings. This is a discretionary rule rather than a mandatory rule. To quote:

“28(1) it is for the tribunal to determine –
(a) The procedure to be followed in the arbitration, and
(b) The admissibility, relevance, materiality and weight of any evidence.”

Those are no more than one would normally expect any tribunal of fact to have to ascertain.
Before leaving this particular topic I would mention the decision in the case of Arbitration Application number 3 which was issued by Lord Glennie on 5 October 2011. No.s 1 has not yet been reported for confidentiality reasons. You may already have heard about this case in relation to the question of appeals but there is a reference to evidential matters that is worth repeating. At paragraph [28] Lord Glennie says “As I read the relevant paragraphs of the award, the point is really the evidential one. This I think is rather what the arbitrator thought. Giving a sense of interpretation to what is written there, I think the arbitrator was saying no more than that. This evidence was not going to help him and was not sufficiently probative to justify its admissions. [29] I do not consider that this issue raises a point of law. Pleadings in arbitration need not, indeed normally should not, follow the form of pleadings and common use in the Court of Session. It is for the Arbitrator to decide questions as to the admissibility, relevance, materiality and weight of any evidence: rule 28(1)(b). It is not to be assumed that the absence of averments directly on a point will mean that evidence relating to it is inadmissible. Even if the averments are excluded, the evidence may still be admitted. That is for the arbitrator. The Petitioners complained that the arbitrator misunderstood the potential relevance of the evidence. If so, so be it. That is not a complaint to which the Court can entertain. They can try again, at an appropriate stage, to persuade him of its relevance. The exclusion of the averments from the pleadings seems to me to be irrelevant to the question though ultimately that is for the arbitrator to decide not the Court.”

As well as rule 28(1) which deals with the generality, the other parts of that rule deal with the powers of the tribunal and give it a very broad discretion in relation to the nature of the arbitral proceedings.

While it is clear that the tribunal is intended to have a wide discretion the arbitrator must still have a starting point and must deal with evidential matters in a way that is fair to both parties.

I would suggest that while there are situations in which a different approach might be taken, the starting point for the arbitrator should be the normal civil rules of evidence. The following comments which I will make in relation to this are broadly based on those normal civil evidence rules. The caveat once again is the considerable flexibility given to the Arbitrator.

It is worth noting at this point that the 2010 act does not specifically displace the 1988 Act, nor does the 2010 Act amend the 1988 Act.
Standard of Proof

Before coming to the general issues which arise under the 1988 Act it is worth mentioning the standard of proof which will generally be applied in civil proceedings. There are two issues which arise.

(a) Burden of proof – generally this will rest upon the party making the claim rather than the party resisting the claim. This will be equally applicable to arbitration as in other civil proceedings.

(b) The general rule is that the burden of proof must be discharged on a “balance of probabilities”. The easiest way to try and explain this is that the tribunal or the arbitrator must find that it is more likely than not that a particular fact exists or has occurred. There is no fixed standard for the balance of probability and this might be variable even within the context of a civil court. However, what Lord Denning says in Miller v Minister of Pensions [1947] 2 All ER 372 at 374 is “If the evidence is such that the Tribunal can say “we think it more probable than not” the burden is discharged, but if the probabilities are equal it is not.” Or Lord Simon in Davies v Taylor [1974] AC 207 at page 219F-220A

“Beneath the legal concepts of probability lies the mathematical theory of probability. Only occasionally does this break surface – apart from the concept of the burden of proof on a balance of probabilities which can be restated as the burden of showing odds for at least 51-49 and that such and such has taken place or will do so… but proof depends on credibility, as to which probability is…only a factor to be weighed and when it comes to prediction there are so many factors to be considered (not least the extraordinary vagaries of human nature) that mathematical theory can have in general only marginal significance.”

To summarise, every case will be determined on the basis of a number of variable factors all of which will be in the mind of the arbitrator when making a decision.

Civil Evidence (Scotland) Act 1988

In order to provide some form of suggested framework for the weighing of the admissibility, relevance etc of evidence which are matters which are entirely within the discretion of the arbitrator there are provisions in the 1988 Act. I will also pick up on some general topics at the end. It is of course entirely possible that the arbitrator might consider it appropriate to deal with matters solely on the basis of written submissions without hearing any evidence at all, or that in circumstances where there are clearly disputed facts he may consider that is appropriate to hear evidence from witnesses.

In that latter context, the 1988 Act sets out the general framework for civil evidence. I will just give a few brief headings following the initial sessions of the Civil Evidence (Scotland)
Act 1988 which will hopefully provide some guidance. The use of the word “court” is to be read as “arbitrator” or “tribunal” as necessary

s.1 Corroboration

s.1 states that the arbitrator may be satisfied that a fact has been established even though that evidence is only spoken by one person and there is no corroboration. In the event where two parties take opposing views then the arbitrator will require to weigh the evidence and to take his own view on the credibility of the witnesses themselves.

s.2 Hearsay

While hearsay evidence might fall outwith what one would normally call the “best evidence rule”, that is, direct evidence from a witness, it is evidence which can be considered in civil proceedings. There is also provision made at section 2(4) which provides that written statements including affidavits and reports can be taken as evidence without been spoken to by a witness. However, it will be a matter for the arbitrator to determine the weight to be given to such evidence if the facts and the documents are disputed, or in a case of an affidavit or statement if the person themselves is not available to be cross examined.

s.3 Credibility

The assessment of credibility one of the skills of an arbitrator or any judge when weighing up evidence. For example it is possible to put a prior statement to a witness to test the credibility of their evidence. While objection may be taken to such a line of questioning, it is legitimate to allow this.

s.4 Additional evidence

In civil proceedings, with the leave of the court it is possible for a person to be recalled as a witness, or to call an additional witness. The general rule will be that witnesses to fact should not be in Court to hear evidence from other witnesses to fact except insofar as they are parties to the proceedings.

s.5 Documents

Sections 5 and 6 of the 1988 Act deal with this. A document can include any map, plan, graph, drawing, photograph, disc, tape, film or recorded visual images.

s. 5 this deals with documents which are part of a business record. Such documents may be admitted into evidence without being spoken to by witness provided they are docqueted by an officer of the business or undertaking to which they belong.
This would be applicable where one is dealing with for example balance sheets or documents of that type. However, where such evidence is in dispute and is not spoken to by a witness then the arbitrator will have to determine the weight to be given to such evidence.

s.6. Generally speaking copy documents in civil proceedings purporting to be authenticated by a person responsible for the making of the copy shall, unless the Court directs otherwise be deemed a true copy and traces for evidential purposes as if it where the document itself. This might be relevant for documents such as title deeds whether principal is unavailable.

Generally speaking the parties will agree with the court or tribunal that copies of documents are satisfactory for the purposes of any hearings.

General issues

I would mention at this point a few particular issues which might arise for an arbitrator in relation to evidence.

A. Objections

There may be an objection raised by a legal representative either in relation to a line of questioning taken or in relation to particular documentary evidence provided in the arbitration. An objection might be taken that the document produced or the evidence given has not been fairly obtained or the provenance of documents might be called in to question an objection taken to that. In the face of an objection a number of options are available to the arbitrator. It is preferable in the interests of all concerned for decisions to be taken there and then. The arbitrator can decide to allow the evidence, the arbitrator can uphold the objection and disregard the evidence, or the arbitrator can admit the evidence but not make a final decision on admissibility at that stage.

In relation to evidence generally there may be some guidance given by the legal representatives but ultimately it will be the arbitrator’s decision as to whether or not to allow particular evidence to be admitted. I would refer you again to the passage which I quoted earlier from Lord Glennie’s case from October in which he to some extent makes it clear that the normal rules in relation to proper pleadings etc will not necessarily apply rigidly to arbitrations. There is of course the overarching duty of fairness to both parties to be considered.
B. Confidentiality v Privilege

This might be a particularly thorny issue for an arbitrator to make a ruling on if there is an objection made. This would unfortunately be the subject of a whole seminar. No communication is privileged merely because it is made in confidence. Communications with accountants and bankers have been found not to be privileged whereas communications between solicitor and client are in general terms given absolute protection. To quote Lord Denning in AG v Mulholland [1963] 2 QB 477 at 489:-

“Take the clergyman, the banker or the medical man. None of these are entitled to refuse to answer when directed to by a judge…the judge will respect the confidence which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only is it relevant but also it is a proper and indeed necessary question.”

C. Court power to compel witnesses

Rule 45 of the 2010 rules is a mandatory rule which indicates that on an application to the Court by the tribunal or any party a person may be required to attend the tribunal, or to disclose documents or other material evidence.

Rule 45(2) goes on to state:

“The Court may not order a person to give any evidence, or to disclose anything, which the person would be entitled to refuse to give or disclose in civil proceedings.”

Arguably one therefore has an assumption been made that the normal civil rules of evidence will apply.

D. Matters which do not require proof

These can generally be termed as matters which are within judicial knowledge, matters which are the subject of agreement or admissions. In LJC Hope’s decision in Lord Advocate’s Reference (No1 of 1992):

“There is a significant difference between common knowledge and judicial knowledge and judicial knowledge within the strict meaning of that expression which makes proof of a fact at a trial unnecessary. In Walker on Evidence it is stated, in regard to the question which matters fall within judicial knowledge. In general they are matters which can be immediately ascertained from sources of indisputable accuracy, or which are so notorious as to be indisputable.”
Ultimately, we return to the rules governing arbitral proceedings which make it clear that the admissibility relevance, materiality and weight of any evidence are for the arbitrator to determine.

References

1. Civil Evidence (Scotland) Act 1988
2. Arbitration (Scotland) Act 2010
3. Scottish Arbitration Rules 2010
4. Miller v Minister of Pensions [1947] 2 All ER 372
6. Arbitration Application Number 3, Lord Glennie, CSOH 5 October 2011
7. AG v Mulholland [1963] 2 QB 477
8. Evidence – Fraser Davidson W Green 2007
10. Stair Memorial Encyclopaedia
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