ARBITRATION IN CONSTRUCTION DISPUTES
A Procedural and Legal Overview

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1.0 INTRODUCTION

Contrary to popular belief and knowledge, arbitration is not the only means of resolving disputes arising from construction contracts.[1] Compared to other means of dispute resolution, arbitration as a means of resolving disputes does however have well-defined and generally well-understood mechanisms: this enables it to gain recognition as occupying its very definite place in the arena of dispute resolution "industry". Further, even though there is some erosion to arbitration's monopoly in standard forms of construction contracts as the sole and compulsory means of dispute resolution, it will not be wrong to state that arbitration as a means of resolving construction industry disputes is at the moment relatively well-entrenched. Besides, or because of this, there is also the legislative protection and control for arbitration principally in the form of Arbitration Act 1952 (hereinafter referred to as "the 1952 Act"). That is the reason why apart from arbitration and litigation, the rest of the dispute resolution mechanisms are collectively referred to as *Alternative* Dispute Resolution (or ADR for short).

This paper is a brief overview of the legal and procedural landscape of arbitration from its commencement to its conclusion and thereafter. Being an overview, this paper cannot be treated as an exhaustive treatment of the subject, nor is it an attempt so to do: detailed and authoritative expositions can be found elsewhere.[2]

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[1] See, for an overview of other dispute resolution mechanisms, Oon Chee Kheng, *Resolution of Construction Industry Disputes – An Overview* being a paper based on a lecture presented to The Institution of Engineers, Malaysia (Negri Sembilan Branch) on 24 May 2003.

[2] For example, Sir Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England*, Second Edition (1989) (hereinafter referred to as "*Mustill and Boyd*"). Sir Michael J Mustill is later to be Lord Mustill, Lord of Appeal in Ordinary, House of Lords.

2.0 THE NATURE OF ARBITRATION

The 1952 Act does not define arbitration. Arbitration as a means of resolving (construction industry) disputes must however be distinguished from other means of dispute resolution. For example, in *Sports Maska Inc* v. *Zittrer*,[3] the Canadian Supreme Court observed that the courts are not bound by the language used and what is described as an expert determination is in reality an arbitration. Further, arbitration as a means of resolving disputes must also be distinguished from other processes such as valuation or certification. In the case of *Ajzner* v. *Cartonlux Pty Ltd*,[4] it has been held that a process involving a reference to a person described as an "arbitrator" was not an arbitration but a reference to a valuer to make a determination in accordance with that person's skill and knowledge.

The distinction is important for the following reasons:

(a) Arbitration is governed by the 1952 Act, ADRs are not.

(b) An arbitrator is immune from legal suits;[5] whereas there is potential liability for valuer, certifier and expert.

(c) Decisions of an arbitrator, valuer, certifier and expert have different legal effects and consequences.

(d) An arbitrator will need to observe strictly the rules of natural justice whereas a valuer, certifier or an expert may not need to.

In *Collins* v. *Collins*,[6] Romilly MR said, "An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of a particular matter in difference or dispute between the parties …"[7] This is a broad definition which is not very useful. It is better to list the attributes which collectively identify arbitration, like what Lord Wheatley did in *Arenson* v. *Arenson*.[8] He listed the following attributes which point towards arbitration:

> "(a) there is a dispute or a difference between the parties which has been formulated in some way or another; (b) the dispute or difference has been remitted by the parties to the person [i.e. the arbitrator] to resolve in such manner that he is called upon to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision."[9]

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[3] [1988] 1 SCR 564.
[4] [1972] VR 919.
[5] *Sutcliffe* v. *Thackrah* [1974] AC 727.
[6] 28 LJ Ch 184.
[7] *Ibid*. at pp.186-187.
[8] [1977] AC 405.
[9] *Ibid*. at p. 428.

3.0 ADVANTAGES AND LIMITATIONS OF ARBITRATION

The advantages of arbitration *vis-à-vis* litigation are often said to be the following:

(a) Speed

Arbitration is not burdened by the backlog of cases in the courts which results in the long gap of time between the filing of writs and actual hearings. Further, parties can agree on procedure and avoid the cumbersome rules and documentation in litigation. Hearings in arbitration are less formal. All these will translate into faster resolution of the disputes referred to arbitration.

(b) Cost

Faster hearing and less paperwork mean lower costs to be borne by the parties.

(c) Privacy and Confidentiality

All arbitral hearings are held behind closed doors and members of the public are not allowed to be present unless consents of the parties and the arbitrator are obtained. Further, the requirement of confidentiality is always attached, expressly or impliedly, to arbitration.[10]

(d) Enforceability

If not challenged, the arbitral award is as good as a court judgment.

(e) Party Autonomy

Unlike litigation, parties in arbitration have a freedom of choice as to the arbitrators, language used, procedure to be adopted, method of arbitrators coming to their decision, time and venue of hearing and others which are not expressly excluded by the 1952 Act as falling within the province of the court.

(f) Subject Matter in Dispute

It is often said that an arbitrator, chosen partly because of his technical training, can grasp the facts and understands them much better and faster compared to lay judges can.

(g) Flexibility

This feature is in fact tied to party autonomy as the parties can agree how best to conduct the proceedings from its commencement to its conclusion.

[10] See *Dolling Baker* v. *Merrett* [1990] 1 WLR 1205. See also Article 30, LCIA Rules.

How valid are, however, all the listed advantages?

(a) Speed

It is true that arbitration as a means of resolving dispute can be faster compared to litigation but this is not always the case. Increasingly, lawyers are engaged to represent parties in arbitration who may turn the arbitral hearing to one which is not unlike a court hearing. Further, and especially in the case of inexperienced arbitrators, delaying tactics by lawyers are not dealt firmly by the arbitrator for which a judge, because of his training and professional background, can deal easily. It will not be wrong to say that even experienced arbitrators may feel inhibited by the provisions of the 1952 Act to be too "active".

(b) Cost

Arbitration is not necessary cheaper compared to litigation. In litigation, you do not have to pay the judge and the use of the courtroom etc. In arbitration, arbitrator(s) and the venue of the hearing will have to be paid.

(c) Privacy and Confidentiality

Though privacy is definitely being upheld, but there have been some recent inroads into relaxing the strictness of confidentiality.[11] Further, it may also be asked, with respect to the requirement of confidentiality, what are confidential? For how long? Who are bound by this requirement of confidentiality? Further, it has to be said that if an arbitral award is challenged in court, the award together with all documents filed in court are public documents and hence the notion of confidentiality is thereafter irrelevant. However, the requirement of confidentiality is not without its strong advocates and this requirement is still strongly guarded against.[12]

(d) Enforceability

Though an award is to a large degree as enforceable as a court order, it is however still subject to challenge in that it can be set aside or be remitted to the arbitrator for reconsideration.

(e) Party Autonomy

This to a large extent is still true but some cynics are suggesting if a large dose of "arbitrator supremacy" may also be present.

[11] See *Esso Australia Resources Ltd* v. *Plowman* 128 ALR 391 especially the judgment of Mason CJ.
[12] See the spirited and the somewhat rhetorical defence of confidentiality in arbitration by Sir Patrick Neill QC in *Confidentiality in Arbitration* (1996) 62 JCIArb 1.

(f) Subject Matter in Dispute

Not all construction industry disputes involve complex technical issues; some may just turn on the interpretation of a clause in the construction contract. Further, it may be said that a technically qualified arbitrator may not have a real advantage: there is a distinction between an arbitrator using his technical knowledge and expertise to understand and evaluate the evidence before him and to provide or fill the gap of the evidence himself.

(g) Flexibility

This is true for arbitration but it has to be remembered that the price of flexibility may be certainty and consistency.

The parties to a construction contract can of course choose if they want arbitration to be the means of resolving disputes between them. However, it is advised that the choice should be an *informed* choice. Having said thus, it has to be appreciated that there is the intervention of reality: all standard forms of contracts in Malaysia provide for arbitration as the means of resolving disputes between the parties. It must however be said that there are indications of increasing trends that international commercial disputes are often referred to arbitration for their resolution. Further, it is also said that most construction industry disputes are suitable to be referred to arbitration because of their complex technical nature and that construction law is a rather complex branch of law.

4.0 THE ARBITRATION AGREEMENTS

It has been said that arbitration is a consensual form of dispute resolution and it is therefore a pre-requisite for arbitration to proceed that the parties must consent to refer their dispute to arbitration. Such a consent is called the arbitration agreement. Arbitration agreements, like most agreements, can be either oral or written. However, if an arbitration were to come under the purview of the 1952 Act, the arbitration agreement must be in writing.[13]

An arbitration agreement does not need to be a separate and distinct agreement from the main agreement between the parties: it can be in the form of a single clause within the main contract itself; in fact in most standard forms of construction contracts this is the case.[14]

The importance of an arbitration agreement however extends to more that an expression of consent to refer to arbitration, it also limits the extent of an arbitrator's jurisdiction with respect to a particular 'dispute' or 'difference' which

[13] See section 2 of the 1952 Act.
[14] See therefore Clause 67.1 of FIDIC 4; Clause 34 of PAM '98; Clause 54 of JKR 203/203A; Clause 55 of IEM Standard Form for Civil Works and Clause 47.3 of CIDB Form for Building Works.

is referred to him for determination. The question of whether a 'dispute' or 'difference' falls within the subject matter of an arbitration agreement, and hence is one which the arbitrator has jurisdiction, is a matter of construction of the words used by the parties in their arbitration agreement.[15] As an illustration, an arbitrator therefore has no jurisdiction to consolidate different causes of actions arising from different contracts even if the parties are the same.

What, then, is a 'dispute' or 'difference' which can be referred to arbitration? It is to be noted that these two words are not defined in the 1952 Act itself.[16] The dispute or difference must be one which is "real" and *bona fide* and a mere refusal to pay upon a claim for which the liability is admitted is not a difference within the meaning of the 1952 Act.[17]

5.0 STAYING OF COURT PROCEEDINGS

It must be stressed that the presence of an arbitration agreement does not bar or prohibit either or both parties from referring their disputes to the courts. However, if a party to an arbitration agreement commences a court action against another party, the other party sued can apply to the court[18] to have the action stayed pending arbitration. The power of the court to stay such a court action commenced by a party to an arbitration agreement is contained in section 6 of the 1952 Act.[19]

It can be distilled from a detailed reading of section 6 of the 1952 Act that the court *may* stay a court proceeding commenced by a party to an arbitration agreement upon the other party's application for a stay if the following elements are present:

(a) there must exist a valid and binding arbitration agreement;

(b) there is a commencement of legal proceedings;

(c) the legal proceedings are "in respect of any matter agreed to be referred to arbitration"; and

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[15] See the judgment of Edgar Joseph Jr FCJ in *State Government of Sarawak* v. *Chin Hwa Engineering Development Co* [1995] 3 MLJ 237 where he said, at p. 245, "It is obvious that the perimeters of the arbitrator's jurisdiction must be determined having regard to the interpretation of the particular agreement in each case."

[16] The word "difference" is used in the 1952 Act itself whereas the word "dispute" is never used therein. Though there are judicial pronouncements to the contrary, it is suggested that these two words are interchangeable and for most practical purposes carry the same meaning.

[17] See *Elf Petroleum* v. *Winelf Petroleum* [1986] 1 MLJ 177.

[18] The court of competent jurisdiction shall be the High Court.

[19] See also *Perbadanan Kemajuan Negeri Perak* v. *Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309.

(d) the party which applies to stay the court proceedings must make the application "before taking any other steps in the proceedings".

It must be pointed out that the order to grant a stay is the court's discretion and even if all the above listed elements are present, the court may still not grant the order for a stay if, for example, there is an inordinate delay in applying for a stay; there is a *bona fide* allegation of fraud; the dispute is one of a purely legal nature or arbitration alone will not dispose off all the issues in the dispute. However, it is worth pointing out that there is a judicial authority to the effect that if a party to an arbitration agreement applies for a stay of court proceeding, the *prima facie* duty of the court is to grant the stay.[20] To the extent that it means the court has no discretion under the 1952 Act to refuse to grant stay if all the requirements are satisfied, this writer respectfully begs to differ. Other than the provisions of section 6, it has also been said that the court shall have the inherent jurisdiction to grant stay.[21]

6.0 THE ARBITRATOR - APPOINTMENT AND REMOVAL

An arbitrator may be appointed by the parties themselves,[22] by an independent third party,[23] or by the Court.[24] An arbitrator needs not be legally qualified and must not have any interests in the dispute referred to him and must be free from bias and be seen to be so. Sometime an arbitration agreement specifies the qualification of an arbitrator and unless such a qualification is waived by the parties, the appointment of an arbitrator who does not meet the qualification will not be valid appointment.[25]

Section 3 of the 1952 Act provides that

> "The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court."

With respect to the revocation of an arbitrator's authority, the implication of section 3 of the 1952 Act is two-fold:

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[20] In *Perbadanan Kemajuan Negeri Perak* v. *Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309, Hashim Yeop Sani CJ said, at p. 312, "It is also a well settled principle that where parties have agreed to refer disputes for arbitration and the court is satisfied that a dispute exists, but one of the parties to the contract commences an action to have the matter determined by the court, the *prima facie* stand of the court is to stay the action and allow the parties to go to the tribunal to which they have agreed. In other words once the party applies for a stay and there is a dispute within the meaning of a valid and subsisting arbitration clause the inclination of the court is that effect should be given to the arbitration clause."

[21] See *Mustill and Boyd* at pp. 461- 462.

[22] The appointment of a person can be inserted into the arbitration agreement before the existence of a dispute or by consent of the parties after a dispute between the parties has arisen.

[23] Such as the President of The Institution of Engineers, Malaysia.

[24] The court of competent jurisdiction shall be the High Court.

[25] See *Rahcassi Shipping Co* v. *Blue Star Line Ltd* [1967] 3 All ER 301.

(a) the arbitrator's authority may be revoked by the High Court; and

(b) the parties can *inter-parte* provide in the arbitration agreement a provision to allow for such a revocation.[26]

Sections 9(a), 12(a) and 12(b) of the 1952 Act deals with the situations where the appointed arbitrator "refuses to act, or is incapable of acting, or dies". In the three situations, the High Court shall have the power to make appointment or substitute or replacement arbitrator. It seems from the provisions of the 1952 Act that an appointed arbitrator cannot resign, at worst he can "refuse to act". An arbitrator can also be removed if the arbitrator is not impartial, or may not be impartial.[27] Other than these, an arbitrator can also be removed, or has his authority revoked, if he has misconducted himself, or has misconducted the proceedings. What constitutes "misconduct" is an issue we now turn.

7.0 THE ARBITRATOR - MISCONDUCT

The word "misconduct" is not defined in the 1952 Act. The use of the word is unfortunate for misconduct does not necessarily imply a lack of moral value.[28] The High Court has the power to remove an arbitrator, or has his authority revoked, if the arbitrator has misconducted himself or has misconducted the proceedings.[29] Further, with respect to an award which has been published by the arbitrator, the award may be set aside if the arbitrator has been found to have committed misconduct or has misconducted the proceedings.[30]

It is submitted that it would be difficult to categorise all instances that amount to misconduct within the meaning of arbitration law. Certain obvious instances of misconduct include bias or partiality[31]; failure to decide all issues contained in the reference[32]; acceptance of bribes or other forms of inducement; improper delegation of duties; failure to observe rule(s) of natural justice and others.[33]

It can be seen from the brief instances given above that except for acceptance of bribes and acting with partiality, the rest of the instances can hardly be considered to be "immoral". In the newly enacted English Arbitration Act 1996, the word "misconduct" is not used; instead the phrase "serious irregularity" is used.

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[26] For an example of this, see Clause 47.3(g)(iii) of CIDB Standard Form of Building Contract (2000 Edition).
[27] Section 25(1) Arbitration Act 1952.
[28] As pointed out by Raja Azlan Shah J (as His Royal Highness then was) in *Sharikat Pemborong Pertanian dan Perumahan* v. *FELDA* [1971] 2 MLJ 210 at p. 211, "In the law of arbitration, misconduct is used in its technical sense as denoting irregularity and not moral turpitude."
[29] Section 24(1) Arbitration Act 1952.
[30] Section 24(2) Arbitration Act 1952.
[31] *Veritas Shipping Corporation* v. *Anglo-Canadian Cement Ltd* [1966] 1 Lloyds' Rep 76.
[32] *Official Assignee* v. *Chartered Industries of Singapore* [1978] 2 MLJ 99.
[33] The list is of course not closed.

8.0 COMMENCEMENT OF THE REFERENCE

Before any arbitration can proceed and for an arbitrator to exercise any powers under the arbitration agreement, the arbitrator has to be notified of his appointment first, and the appointed arbitrator has to consent to act as arbitrator. It must be stated that the very fact of nomination as an arbitrator does not mean that the arbitrator is duty bound to accept the appointment: he has the option to decline or "refuse to act"[34]. It will be advisable for an arbitrator to study the arbitration agreement between the two parties to see if he fits the "qualification" stipulated in the agreement.

Usually, the party that initiates the arbitral reference (hereinafter referred to as "the claimant") or his solicitors will write to the other party (hereinafter referred to as "the respondent") stating that a dispute or difference has arisen between them and that he would like to evoke the contractual remedy of referring the dispute to arbitration. Often the claimant will provide, for example, a list of three proposed arbitrators for the concurrence of the respondent. If the parties fail to agree, the appointment of the arbitrator will be left to, for example, an independent third party such as the President of The Institution of Engineers, Malaysia if that is what the arbitration clause provides.

The appointed arbitrator will first convene a preliminary meeting[35] as soon as possible after his appointment is confirmed. This is the first face-to-face meeting between the parties and the arbitrator. The issues which are usually discussed and confirmed during the preliminary meeting may include the following:

(a) preliminary issues: points of law, possible disclosure by the arbitrator or declaration of independence, confirmation of arbitrator's fees, etc;

(b) service of pleadings (points of claim; points of defence and counterclaim; reply to defence and defence to counterclaim; reply to defence to counterclaim);

(c) discovery and inspection of documents and their bundling;

(d) number of witnesses including expert witness;[36]

(e) preparation of witness statements and their exchange;

(f) language used for the hearings if none is provided in the arbitration agreement;

(g) hearing dates.

[34] To use the phrase used in Arbitration Act 1952.
[35] There can be more than one of such meeting.
[36] Witnesses are usually witnesses of fact; expert witnesses are witnesses of opinion.

An Order for Directions is usually issued at the conclusion of the preliminary meeting which contains the directions issued by the arbitrator and is usually expressed to be issued with the consent of both parties. The Order for Directions usually contains the phrase "Liberty to Apply" which means that the directions issued can be changed upon application by any party who makes an application to the arbitrator.

The issues discussed during the preliminary meeting are of some importance and these are elaborated below.

9.0 PLEADINGS AND EVIDENCE

Pleadings contain the facts, or what are averred to be facts, which a party (either the claimant or the respondent) uses to define the issues in dispute with the other party. Pleadings therefore define the issues between the claimant and the respondent and either of the parties will not be allowed to venture beyond the perimeters of the pleadings. It is therefore important for a party to draft its pleadings containing *facts* which together constitute the very ingredients of its cause of action.

In the course of hearing, a party may deem it necessary to amend its pleadings and this amendment will require the leave (i.e. permission) of the arbitrator and the other party will be given the liberty to agree or object. As a matter of basic principle, leave is usually given to the party who applies for amendment if the other party can be compensated with cost and that the other party will not be irrevocably prejudiced.[37] In dealing with an application to amend after the close of pleadings, it is submitted that the principles to be applied in determining whether or not to allow the application, the arbitrator ought to follow that which are applied in a court of law.[38]

As stated just now, what are pleaded are only the *facts* or *averment of facts* on which a party will rely to mature into a cause of action which in turn can entitle the party to the reliefs prayed for. These facts will need to be proved. It is in the process of proof that evidence is adduced to prove those pleaded facts.

The strict rules of evidence as embodied in Evidence Act 1950 do not apply to arbitrations.[39] However, it is the opinion of this writer that the rules of evidence as comprised in Evidence Act 1950 are amplifications of the rule(s) of natural justice and an arbitrator is well advised to recognise those rules.

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[37] *Yamaha Motor Co Ltd* v. *Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213.

[38] See the judgement of Lord Denning MR in *Congimex SARL* v. *Continental Grain Export Corporation (New York)* [1979] 2 Lloyds LR 346 at p.359.

[39] Section 2 Evidence Act 1950. See also *Jeuro Development Sdn Bhd* v. *Teo Teck Huat* [1998] 6 MLJ 545. *cf*. the common law position where arbitrators are bound by the same rules of evidence as are the courts of law: *Re Enoch and Zaretzky, Bock & Co* [1910] 1 KB 327 and *Mustill & Boyd*, p.352.

It is a simple rule of evidence that he who asserts must prove; a contractor if he were to succeed in his claim must prove that he is entitled to the claim and he must also prove the quantum of his entitlement. The burden of proof is "balance of probability".[40]

Broadly and if classified by the source of evidence, the evidence adduced can be either oral or documentary. Witnesses are produced by each of the party to give oral evidence; and very often the evidence is supplemented by making references to documents. It is to these two topics which we now turn.

10.0 DOCUMENTARY EVIDENCE

There are usually three types of bundles of documents in arbitration: agreed bundles, claimant's bundles and the respondent's bundles. Usually, agreed bundles comprise those documents which authenticity is not disputed by both the claimant and the respondent. These usually include for example the contract documents. The claimant's bundles and the respondent's bundles contain documents the contents and the authenticity of which are disputed by the respondent and the claimant respectively.

Before the bundling of documents can take place, there is a process called discovery – inspection of documents by which each party must disclose all documents which are within their "possession or power"[41]. "Without prejudice" documents need not be produced for inspection, so are those documents to which privilege is claimed. In determining relevancy with regard to disclosure of documents, the test laid down in *Compagnie Financiere du Pacifique* v. *Peruvian Guano Co*[42] is often used. The test to determine if a document ought to be disclosed is whether it is reasonable to suppose that the document, to quote Brett LJ, "contains information which may enable the party applying for discovery either to advance his own case or to damage that of his adversary or which may fairly lead him to a train of inquiry which may have either of these two consequences."[43] It may be worth pointing out that this rather wide test has recently been criticised.[44]

It may also be worth pointing out that a document does not become admissible in evidence merely because it has been included in the bundle: the documents and their contents will still need to be proved.[45]

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[40] Not "beyond all reasonable doubt" which burden applies to criminal cases.
[41] See section 13(1) of the 1952 Act. Note however that O 24 r 1 (1) RHC 1980 uses the phrase "possession, custody or power".
[42] (1882) 11 QBD 55.
[43] *Ibid*., at p. 63.
[44] *O Co* v. *M Co* [1996] 2 Lloyds Rep 347 which suggests a limited discovery. But, depending on circumstances, a comprehensive discovery is frequently necessary.
[45] *Chong Khee Sang* v. *Pang Ah Chee* [1984] 1 MLJ 377.

11.0 ORAL EVIDENCE - WITNESSES

The 1952 Act provides *inter-alia* that "… the parties to the reference, and all persons claiming through them respectively, shall … submit to be examined by the arbitrator or umpire on oath, or affirmation."[46] Oral examination of witnesses consists of examination in chief of the witness by the party calling him; this is followed by cross-examination by the opposing party followed by re-examination by the party calling the witness.

The recent trend is for the examination in chief to be replaced by a written witness statement and apply for the statement to be taken as read before the arbitrator. It is a good practice if the witness statements can relate to the documents in the various bundles of documents.

Witnesses are only required to give what he perceives by his senses: sight, hear, smell, touch and feel. He is not required to give opinion unless he is an expert witness. Expert witnesses are witnesses of opinion and not witnesses of facts.

At the end of the whole hearing process, the arbitrator will need to evaluate and weigh the evidence adduced, he must not fill the gap with his knowledge and add in evidence which has not been adduced by any party. In evaluating the evidence, the arbitrator will determine whether the facts as pleaded in the pleadings have been proved. After having determined the facts, the arbitrator will then apply the applicable laws to the ascertained facts. In this process, the arbitrator will usually be assisted by counsels who will present either oral or written submissions touching on both facts and laws. The end result of this exercise is the publication of an award by the arbitrator which is the subject we now turn.

11.0 THE AWARD

Like the word "arbitration", the word "award" also lacks a legislative definition in the 1952 Act. As pointed out by Rose CJ in *Re Arbitration Between Mohamed & Koshi Mohamed*,[47] " 'Award' is not a term of art; and it seems to me that the test as to whether an award, be it final or interim, has been made must depend on whether the order in question amounts to a decision." The award will spell out the rights and the liabilities of the one party *vis-à-vis* the other as a consequence of the dispute. With the publication[48] of the award except an interim award, the arbitrator becomes *functus officio*, i.e. he no longer has any power vested in him. However, the following four qualifications will need to be borne in mind which does not render the arbitrator becoming *functus officio*:

[46] Section 13(1) of the 1952 Act.
[47] (1963) 29 MLJ 32 at p. 32.
[48] The usual word used is "publication" of an award which word does not accord with the notion of arbitral confidentiality.

(a) if the award is an interim award;

(b) case remitted by the High Court;[49]

(c) the power to correct "any clerical mistake or error arising from any accidental slip or omission";[50] and

(d) the question of cost.[51]

An award must meet certain requirements before it will be enforced by the court.

Firstly, the award must be cogent and must contain an adjudication of the issues and not a mere expression of opinion. Secondly, he award must also be certain and consistent: there should not be any ambiguity or doubt in the award. Thirdly, it must be final and complete: the award must settle all issues referred to him for a decision. Fourthly, the award must not contain any illegality or anything which is contrary to public policy. Fifthly, the award must be capable of being performed. Sixthly, the remedies awarded by the arbitrator must be one which is within his jurisdiction to award; for example, an arbitrator has no jurisdiction to publish an award which directs the transfer of real property.[52]

The award can be enforced by a party to the arbitral reference by either putting into operation section 27 of the 1952 Act or by enforcement by the court.[53]

The court has power to remit an award back to the arbitrator for his reconsideration and an award so remitted must be reconsidered and made by the arbitrator within three months.[54] The court also has power under the 1952 Act to set aside an award.[55] Though section 24(2) of the 1952 Act when read literally suggests that the court can only set aside an award when the arbitrator has committed misconduct or has misconducted the proceedings, it has been generally accepted that the court has inherent jurisdiction to set aside awards on grounds of[56]

(a) error of law on the face of the record;

(b) the award is partly or wholly in excess of jurisdiction;

(c) defective award.

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[49] Under section 23 of the 1952 Act
[50] Under section 18 of the 1952 Act.
[51] Under section 19(4) of the 1952 Act.
[52] See section 16 of the 1952 Act.
[53] *Middlemiss & Gould* v. *Hartlepool Corporation* [1973] 1 All ER 172; *cf. Dr Ng Ah Kow* v. *Dr Low Shik Aun* [1970] 2 MLJ 257.
[54] See section 23(2) of the 1952 Act.
[55] See section 24(2) of the 1952 Act.
[56] See *Mustill & Boyd*, p. 548. See also the judgment of Richard Malanjum J (later JCA) in *Chaim Tau Tze & Anor* v. *The Sarawak Land Consolidation and Rehabilitation Authority* [1994] 3 CLJ 605 at p. 610.

An arbitrator has the jurisdiction to award interests. Interests are in two parts; interests before the making of the award[57] and interests after the making of the award[58]. Arbitrator also has discretion to deal with the question of costs in his award[59]; both the costs of the reference and the costs of the award. Costs of the reference include all expenditures in the entire case whereas the costs of the award consist of the arbitrator's remuneration and expenses.

12.0 CASE STATED PROCEDURE

The procedure is provided for in section 22(1) of the 1952 Act and the arbitrator may activate the procedure himself or he can be directed by the High Court to do so. The procedure has been much criticised by practising arbitrators and academics as being easily used as a tool for a party with a weak case to unnecessary prolong it.[60]

Principles governing the exercise of discretion by the High Court in directing the case to be stated with respect to a question of law have been laid down in *Halfdan Greig & Co* v. *Sterling Coal & Navigation Corp*[61] which was approved by Peh Swee Chin J (as he then was) in *Yee Hoong Loong Corporation Sdn Bhd* v. *Kwong Fook Seng*.[62] The principles are

(a) point of law must be real and substantial;

(b) it should be capable of being accurately stated as a point of law; and

(c) the point of law must be of such importance that resolution of it is necessary for the proper determination of the case or dispute.

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[57] *Lian Hup Manufacturing Co Sdn Bhd* v. *Unitata Bhd* [1994] 2 MLJ 51.
[58] See section 21of the 1952 Act.
[59] See section 19(1) of the 1952 Act.
[60] Similar provision in English Arbitration Act 1950 has been repealed by Arbitration Act 1979. The newly enacted Arbitration Act 1996 also has no such provision.
[61] [1973] 1 All ER 1073
[62] [1993] 1 MLJ 163.