SOME PROCEDURAL PROCESSES IN ARBITRATION PRIOR TO HEARING

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1.0 INTRODUCTION – SETTING THE STAGE

1.1 The arbitrator has been validly appointed and after having his[1] appointment confirmed and having convened a preliminary meeting, the first order for directions has been issued. The order for directions will typically contain the following directions:

(a) timetable for the submission of pleadings which typically comprise points of claim, points of defence (and counterclaim if any), reply to points of defence and defence to counterclaim, and reply to the defence to counterclaim;

(b) timetable for discovery and inspection of documents and the subsequent bundling of documents;

(c) timetable for the preparation and submission of witness statements;

(d) timetable and manner for the submission of expert reports (if any); and others.

All the above, and some others besides, will need to be done and accomplished by the parties (or their representatives/solicitors) before the commencement of hearing.

1.2 This paper will briefly discuss and outline the procedural steps and what I would regard as "preferred practices" required to accomplish items (b), (c) and (d) above, and will forward some recommendations which I feel from my experience would assist in the conduct of the whole arbitral reference. This paper will also

[1] The "he", "his" and "him" in this paper should be taken to also refer to "she" and "her" respectively.

make references to the UNCITRAL Arbitration Rules on which Arbitration Rules of Regional Centre for Arbitration Kuala Lumpur (Revised August 2001) are based.[2] References will also be made to the relevant provisions of Arbitration Act 1952.

1.3 It is stressed that the arbitrator will need to constantly remind himself as to his jurisdiction or the lack of it: whether he has the jurisdiction to take a certain course of action. Even though it was held in *Bremer Vulkan Schiffbau und Maschinenfabrik* v. *South India Shipping Corp*[3] that an arbitrator is effectively the sole judge of the arbitral procedures in the arbitration which he is presiding, it must be said that this does not give him a licence to act beyond his jurisdiction as laid down in the arbitration agreement and for that matter the relevant provisions of Arbitration Act 1952. In stating this, it is stressed that it cannot be over-emphasised on the importance of the arbitrator having read and thoroughly understood the provisions of the arbitration agreement and the rules of arbitration which are incorporated by reference. It seems the case that in most arbitration agreements/clauses in Malaysia, there is more often than not a reference to the arbitration being subject to Arbitration Act 1952.[4]

PART A: DISCOVERY AND BUNDLING OF DOCUMENTS

2.0 DISCOVERY

2.1 The following provision of section 13(1) of Arbitration Act 1952 is relevant in this regard:

> "Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the parties to the reference, and all persons claiming through them respectively, shall, *subject to any legal objection*, … produce before the arbitrator or umpire all documents within their *possession or power* respectively which may be required or called for, *and do all other things which, during the proceedings on the reference, the arbitrator or umpire may require*." (italics supplied)

2.2 From the provision it is plain that an arbitrator does have the power to order discovery.[5] Discovery is the process by which parties to the arbitration are obliged to disclose the documents in their "possession or power" which are material to the dispute. This process seems to be a unique device or process to the common law systems.

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2 See Rule 1(1) of Arbitration Rules of Regional Centre for Arbitration Kuala Lumpur.

3 [1981] AC 909.

4 For arbitrations held pursuant to UNCITRAL Rules or Arbitration Rules of Regional Centre for Arbitration Kuala Lumpur, note however the difficult provisions of section 34 of the Arbitration Act 1952.

5 See *Kursell* v. *Timber Operators and Contractors Ltd* [1923] 2 KB 202.

Discovery can be of two types:

(a) general discovery whereby the parties are required, "subject to any legal objection", to disclose *all* documents that are material to the subject matter of the dispute; and

(b) specific discovery whereby the parties are only required to disclose identified documents, or documents which fall within identified categories, again "subject to any legal objection".

2.3 There is much debate as to the ambit and extent of discovery which *should* be ordered by the arbitrator. It is not denied that an extensive discovery can be a lengthy and expensive exercise in the run-up to the hearing[6]; the end result may not sometime justify an over indulgence in it. The traditional practice of seeking disclosure of each and every document, which may or may not be relevant to the issues in dispute, inevitably will cost time and money. In fact it is my experience that only a small fraction of the documents disclosed and subsequently bundled, are referred to and used in hearings.[7] This approach is exemplified by the test laid down in *Compagnie Financiere du Pacifique* v. *Peruvian Guano Co.*[8] It is submitted that an extensive discovery can also at times be used as a device to unnecessarily prolong the commencement of arbitral hearing. Recent judicial approach in legal proceedings seems to suggest a limited discovery in legal proceedings is preferred.[9]

2.4 It can be said that if the disputes between the parties are relatively straightforward and well defined with only a few issues in contention, an arbitrator may well be advised to exercise his discretion to order for specific discovery. It is thus suggested that a study of the pleadings already submitted at that stage may be an indication.[10] ***It however must be said that there are no fixed and unchanging rules as to whether an arbitrator should order specific or general or full disclosure.*** In some instances, for example, in a construction arbitration when the impartiality of the Engineer or interference of the Employer is an issue, then a general and full discovery may be appropriate. Liberty to apply must generally be made available to the parties or their counsels or representatives.

2.5 It can also be mentioned in passing here that discovery in judicial proceedings, which are governed by Order 24 Rules of High Court may be different in scope compared to that in arbitral proceedings. The High Court proceedings require the discovery of documents which are in the "possession, custody or power relating to

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6 This will negative two of the advantages, or perceived advantages, of arbitration as a means of dispute resolution.

7 That is the reason why some arbitrators resort to ordering the compilation of "core bundle of documents" at the conclusion of hearings.

8 (1882) 11 QBD 55.

9 See for example, *O Co* v. *M Co* [1996] 2 Lloyds Rep 347.

10 This will include of course the particulars. See for example *Wright* v. *Times Business Publications Ltd & Anor* [1991] 3 MLJ 12.

the matters in question in the action"[11] whereas in section 13(1) of Arbitration Act 1952 quoted above, it calls for the discovery of documents in the "possession or power" of the parties and all persons claiming through them.

2.6 What then constitute "possession or power"? Professor Jeffrey Pinsler in his works expresses the opinion that "possession" must mean both physical holding of a document and a legal right to possession.[12] "Power" has been given the following meaning in *Lonrho Ltd & Anor* v. *Shell Petroleum Co Ltd and Anor*[13]:

> "… in the context of the phrase "possession, custody or power" the expression "power" must, in my view, mean a *presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else*."[14] (emphasis supplied)

2.7 It is to be noted that the provision of section 13(1) Arbitration Act 1952 specifically mentions and provides for discovery of *documents* and not information or real evidence. Discovery cannot generally be ordered against non-parties[15] with the exception of "parties claiming through them". Same documents which have different handwritten notes or remarks on them may all need to be disclosed.

2.8 It was mentioned above that it was advisable for an arbitrator to include a liberty to apply after ordering a specific discovery. Discovery process cannot however go on and on: there must be a stop to it sometime, either before the commencement of hearing or during the currency of hearing. In this regard, it is suggested that both parties can be ordered to swear an affidavit to the effect that there are no more documents in their "possession or power" which are material or relating to the dispute. It is further submitted that an arbitrator has the power to so order in view of the provisions of section 13(1) Arbitration Act 1952 which provides that an arbitrator can "*do all other things which, during the proceedings on the reference, the arbitrator or umpire may require*".

2.9 It is sometime said that discovery is a two-stage process: the first stage involves an order for disclosure of documents followed by the second stage that is the inspection of the documents so disclosed. Inspection involves allowing the opposite parties to view the documents disclosed and to make copies of them. Bundling of the documents which is the end result of this process will then follow.

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11 Order 24 Rule 1(1) Rules of High Court 1980.
12 Jeffrey Pinsler, *Civil Practice in Singapore and Malaysia* (2001) at p. XXIIA 10 – 50.
13 [1980] 1 WLR 627.
14 *Ibid*., *per* Lord Diplock at p. 635.
15 See *Christopher Martin Boyd* v. *Deb Brata Das Gupta* [1998] 6 MLJ 281. It is submitted that documents in the possession or power of an agent of the party, for example an engineer/architect of the employer who is in law an agent of the employer, may need to be disclosed.

2.10 Section 13(1) Arbitration Act 1952 provides that if so ordered by the arbitrator, a document which is within the "possession or power" of the parties must be produced; the only exception is when there is a "*legal objection*" to its disclosure. A "legal objection" within the meaning of section 13(1) Arbitration Act 1952 can be the following:

(a) legal professional priviledge[16];
(b) public interest immunity;
(c) self-incrimination of the party disclosing the document;
(d) if the document is marked "without prejudice";
(e) if disclosure may cause a breach of contractual covenant such as a duty to maintain confidentiality; and
(f) diplomatic priviledge.

2.11 A question may be asked, despite the availability of the liberty to apply: What if there is a failure or a delay in one party complying with the Arbitrator's order for discovery? In this instance, what are the options available to the Arbitrator to ensure compliance?

2.12 It is suggested that in this instance the Arbitrator can do one of the following:

(a) issue of a peremptory order; or
(b) defaulting party may be penalised with cost.

A party may also wish to apply to the High Court in respect of discovery pursuant to the provision of section 13(6)(b) of the Arbitration Act 1952 in the case of persistent default of one party.

2.13 Before leaving the issue of discovery, it may be pertinent to study the provisions of the UNCITRAL Arbitration Rules and see what they entail. It seems that discovery does not quite have a place in arbitrations conducted according to UNCITRAL Rules: there is no specific provision for discovery in UNCITRAL Rules as is understood above which is essentially a feature of the (English) common law system.[17]

2.14 A "compromise" of sort with respect to common law style discovery is however available in the UNCITRAL Rules by way of Article 24(2) and Article 24(3) of the Rules:

> "Article 24(2) The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the tribunal shall decide, a summary of the documents

[16] See *Dato' Au Ba Chi & Ors* v. *Koh Keng Kheng & Ors* [1989] 3 MLJ 445.

[17] Note that for arbitrations conducted according to UNCITRAL Rules, section 34 of Arbitration Act will operate and the provisions of the Act do not apply; the parties hence cannot avail themselves to section 13(6)(b) of the Act to seek the assistance of the High Court in this regard.

> and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence."
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> "Article 24(3) At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine."

It is apparent from these provisions of UNCITRAL Rules that, with respect to document production, this is conceptually different from the "discovery" as is commonly understood in the common law jurisdictions.

2.15 In principle, therefore, it can be reiterated that discovery as is understood in the common law adversarial system does not have a place in UNCITRAL arbitrations. There is no obligation, subject to the provisions of Articles 24(2) and (3) of UNCITRAL Rules, to produce copies of documents which a party may possess: the concept of "possession or power" is not one inherent in UNCITRAL Rules. This is generally in accord with the inquisitorial practice in civil law jurisdictions.

3.0 BUNDLING OF DOCUMENTS

3.1 After the discovery (disclosure and inspection) process, the documents disclosed will be required to be categorised and bundled for use during the arbitral hearing. Like the discovery process, the arbitrator is well advised to lay down a timetable to accomplish this.

3.2 There are generally two methods of bundling the documents. One is by bundling together all documents which relate to an identified item of claim as indicated in the pleading/points of claim. For example, if the points of claim is formatted in the form of several claims, each claim may have its own set of relevant documents which may be unnecessary for the other claims. In this case, it may be useful to bundle the documents with reference to each of the claims. There would be, of course, bundles of documents which would be common to all the claims: for example contract documents and minutes of meetings.

3.3 The other method is the more traditional method of bundling the documents disclosed. It may however be mentioned that not all documents disclosed and inspected must be bundled. A party, or both the parties may decide that the some selected documents (after having been disclosed and inspected and copies of them made) will not be necessary to be bundled for various reasons. The bundles are generally

(a) the agreed bundles;
(b) the Claimant's bundles; and
(c) the Respondent's bundles.

3.4 Before moving on, it will be necessary to understand a few terms with respect to documents. Agreed bundles generally refer to those bundles the documents comprised therein are agreed as to their authenticity but their contents or their interpretations may not be agreed. Within this category will be contract documents, minutes of meetings, certificates of payment and others. The parties should be encouraged to avoid duplication of documents in various bundles.

3.5 It is my experience that notwithstanding this practice of having "Claimant's Bundles" and "Respondent Bundles", the authenticity of documents is rarely an issue in arbitrations and it is hardly that counsels will challenge the authenticity of the documents comprised in the other party's bundles. It is suggested that if fraud or forgery of documents is raised, the alleging party *may* well be entitled to refer the referred matter or dispute to the High Court and the arbitration agreement *may* be regarded as having ceased to have effect.[18] In this sense, I find it difficult to see the relevance and necessity of any "kiasu" attitude in the process of bundling the documents.

3.6 It is however possible that parties may agree as to both the authenticity of certain documents contained within the agreed bundles and truth of the contents of these documents. These documents would then collectively form a separate bundle or bundles as the case may be as distinct from the "agreed bundles" wherein documents are agreed as to their authenticity but not their contents.

3.7 There will of course be non-agreed bundles and these can be either the Claimant's bundles or the Respondent's bundles. Expanding on this, the various bundles can thus be

(a) agreed bundles: agreed on authenticity;
(b) agreed bundles: agreed as to both authenticity and to the truth of their contents ("agreed and admitted");
(c) non-agreed Claimant's bundles; and
(d) non-agreed Respondent's bundles.

3.8 The effects of agreed bundles of documents can be seen in the (then) Supreme Court's case of *Jaafar Shaari & Anor* v. *Tal Lip Eng & Anor*[19]:

> "First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity.
>
> Secondly, the truth of contents of any of the documents in the agreed bundles of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.

[18] See section 25(2) Arbitration Act 1952.
[19] [1997] 3 MLJ 693.

> Thirdly, such documents therein do not form automatically a part of the evidence of the case in question ipso facto, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly … either in examination of any witness, in submission …
>
> Fourthly, at the end of the whole case, the truth of the contents of any documents is up to the court to determine, …"[20]

In arbitrations, it is strongly suggested that the arbitrator obtains the specific consent (and has this recorded) as to the method of production of the various documents e.g. whether the one who signs a letter will need to be present for evidence to be adduced with respect to that particular letter.

3.9 It is my experience that solicitors or parties' representatives tend to be "*kiasu*" and adopt the "cautious" approach of not agreeing to any documents, or agreeing only contract documents, drawings, minutes of meetings and others and leaving the rest of the documents in the "non-agreed" category. This is a sheer waste of expenditure if the same documents are repeated in both the Claimant's bundles as well as the Respondent's bundles.

3.10 The bundles are to be sturdily bound (or filed in arch files) and bundle references should be prominently marked on their covers and at the spines of each of the bundles. The documents in each bundle should be arranged chronologically. Every page in all the bundles should be paginated: care must be paid to ensure that the page numbers of all the pages in all the bundles must be the same for bundles bearing the same reference. It is suggested that a master copy of each bundle be made (with pagination) and then photocopies be made from each of these master copies. Four copies of each bundle will need to be made: one for the arbitrator, one for the Claimant's solicitors, one for the Respondent's solicitors and one for the use of the witness during cross-examination.

PART B : WITNESS STATEMENTS AND EXPERT REPORTS

4.0 WITNESS STATEMENTS

4.1 It is disappointing to note that there are still arbitrators who insist that examination in chief be conducted orally. The legitimate request of counsels or representatives that evidence in chief be reduced to writing (witness statements) and these be taken as read during examination in chief and the cross examination

[20] *Ibid., per* Peh Swee Chin FCJ at p. 706. See also the judgment of Mahadev Shankar J (as His Lordship then was) in *Chong Khee Sang* v. *Pang Ah Chee* [1984] MLJ 337 especially with respect to the third point made by Peh Swee Chin FCJ above. It is also to be noted that a priviledged document which is inadvertently included in an agreed bundle may nevertheless remains inadmissible: see *Dato' Au Ba Chi & Ors* v. *Koh Keng Kheng & Ors* [1989] 3 MLJ 445.

of that particular witness can commence almost immediately is not accepted. I have heard cynical remarks by counsels and their clients on so-and-so arbitrators who reject the joint request of both parties and their counsels to table witness statements that since the arbitrators are paid by the day, it serves their "interests" to have oral examination in chief. For whatever reason, and with the modern trend worldwide to reduce orality in hearings (both arbitral or judicial), this insistence on oral examination in chief does not seem justifiable. With the filing of witness statements, the time taken for examination in chief will be considerably reduced. If witness statements are taken as read, then examination in chief will be confined to short oral clarification. With the filing of witness statements, this also allows the arbitrator to read them in advance of the hearing.

4.2 It is not denied that witness statements are more often than not written and compiled by the parties' lawyers. The "bonus" and advantage of this is that the lawyers will gain a deeper understanding of the case and hence they can readily grasp the intricacies of the myriad of facts a lot better.

4.3 It seems odd that there are also arbitrators who insist on formal affidavits to be filed rather than the "normal" witness statements. It is suggested that this is unnecessary as the witnesses and their statements will be examined under oath or affirmation anyway and the arbitrator has the power to so order.[21]

4.4 It may be appropriate at this stage to address the issues of pleadings and witness statements as there are some lay (i.e. non-legally trained) arbitrators that I have come across who seem to confuse the two. It is trite law that "he who asserts must prove". Proving is the process of adducing *evidence* to ascertain the truth or otherwise of "*facts*" or "*facts in issue*". Pleadings, it must be said, list the parties' facts, or what they claim are the facts, which, if proved, will establish a proper cause of action which, if permissible in law, gives rise to a right or entitlement to a claim. "Facts" must therefore be distinguished from "evidence": evidence tends to prove the facts.[22] The evidence of the parties which they use to "prove" the facts contained in pleadings are laid down in the witness statements.

4.5 It will be remembered that the third point made above by Peh Swee Chin FCJ in *Jaafar Shaari* "that documents therein do not form automatically a part of the *evidence of the case* in question ipso facto, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly … either in examination of any witness, in submission …" (italics supplied). *It is therefore suggested that the arbitrator should direct the parties to have the witness statements prepared with reference to the bundles of documents*. It is not denied that this direction of requiring reference to bundles in witness statements means that the bundling process must be completed before

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21 Section 13(2) Arbitration Act 1952.

22 It may be stated here that Evidence Act 1950 does not apply to arbitrations: see section 2 Evidence Act 1950 and *Jeuro Development Sdn Bhd* v. *Teoh Teck Huat (M) Sdn Bhd* [1998] 6 MLJ 545.

preparation of witness statements can be accomplished, it is submitted however that this is nevertheless a good practice.

4.6 There is also a practice, albeit not a frequent practice from my experience, that witness statements are prepared in the same format as for affidavits, i.e. with "exhibits" attached to the witness statements. This may have the advantage of being able to prepare witness statements while the bundling of documents (with all agreed paginations in place) are still in process but this, in my view, unnecessarily causes the witness statements to contain documents which are also to be found in various bundles beside making the witness statements rather bulky.

4.7 Witness statements must be prepared in the first personal pronoun, i.e. use "I" rather than "we", "the Claimant" and others.[23] It must be remembered that it is the witness who is giving evidence, not the party (either the Claimant or the Respondent) who calls for his attendance. Further, it must also be appreciated that it is the witness who is giving evidence, not the company from where he comes from or which he owns.

4.8 The witness statements should be prepared in numbered paragraphs and preferably in narrating style giving the events happening or the issues arising in chronological order. The numbered paragraphs facilitate references to them during cross-examination and also during closing submissions.

4.9 There is some opinion that witness statements should be prepared in question and answer format not unlike what may be perceived as the actual oral examination in chief. In other words, what can be ironically called "written format of oral examination in chief". It is suggested that it is a matter of style as to which format is preferred. I personally prefer the "numbered paragraphs" approach as I generally find this to be neater and easier to follow with the flow of events or issues narrated by the witness not interrupted by the counsel's planned questions.

4.10 The arbitrator should direct that the witness statements should be simultaneously exchanged by both parties at a day and venue to be agreed. It is suggested that the arbitrator should make it clear to both parties during preliminary meeting that he would not allow any witness who has not prepared a witness statement to testify: this also prevents the other party from being ambushed with a surprise. Similarly, the arbitrator should also exercise his discretion if a witness should be allowed to introduce new evidence not contained in the submitted witness statement: rules of natural justice must however always be borne in mind. Leave must be sought by the counsels to produce a new witness (who has previously not submitted a witness statement) and to introduce new evidence not previously contained in a witness statement. The arbitrator's earlier direction should not be a fixed and unchanging rule.

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[23] Cf. Order 41 r 1(4) Rules of the High Court 1980.

4.11 UNCITRAL Arbitration Rules do not have any restriction if the evidence in chief is in the form of oral testimony or by way of witness statements. But it is still suggested that it is a good practice for witness statements be submitted for arbitrations conducted under UNCITRAL Arbitration Rules.[24]

5.0 EXPERT REPORTS

5.1 Witnesses are normally witnesses of facts: i.e. they give evidence based on what they perceive *via* the senses. Experts, sometime called expert witnesses, are witnesses who give their opinions. The first issue an arbitrator must decide is that experts can only be allowed to give evidence with the leave of the arbitrator. This also applies to the number of experts each side is permitted to call. The rules of natural justice must also prevail in this case: it a party is given leave to call for expert witness to testify, the other party may also be given the right to similarly act. Before granting leave to allow for expert testimony, an arbitrator should consider if the appointed expert has the requisite experience and academic qualifications to so act as an expert. It must be stresses that mere academic qualifications may not be sufficient; there must be practical familiarity and knowledge on the subject. My conversations with most arbitrators in Malaysia are that generally, leave is usually granted. To err on the cautious side, most Malaysian arbitrators with whom I have compared notes with will not be likely to refuse leave for expert(s) to be called if an application is made.

5.2 It is rare indeed from my experience as arbitrator and as counsel that, in Malaysia construction arbitrations, an arbitrator on his own initiative calls for expert witness(es) to assist him: whether an arbitrator has the power so to do under Arbitration Act 1952 is a debatable point. The UNCITRAL Arbitration Rules however expressly grant an arbitrator with such a power.[25]

5.3 The style and format of the expert reports vary and it is rare indeed if an arbitrator gives directions on this aspect. However, it is suggested that an arbitrator should give directions on the simultaneous exchange of expert reports by the experts of both parties and to direct the experts to have meetings (which can be on a without prejudice basis) to narrow and bridge the gap in any differences which they may have prior to the hearing.

5.4 Guidance as to the duties and responsibilities of expert witnesses are helpfully, and indeed authoritatively, laid down in the oft-cited case of *National Justice Compania Naviera S. A.* v. *Prudential Assurance Co Ltd ("The Ikarian Reefer")*:[26]

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[24] See Article 25(5) UNCITRAL Arbitration Rules.

[25] Article 27(1) UNCITRAL Arbitration Rules. Indeed, UNCITRAL Arbitration Rules seem only to allow for arbitrator-appointed experts rather than party-appointed experts. Article 27 lays down the rules with respect to the procedures to be followed for these arbitrator-appointed experts.

[26] [1993] 2 Lloyd's LR 68.

> "1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation …
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> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise … An expert witness in the High Court should never assume the role of an advocate.
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> 3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
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> 4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
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> 5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one …
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> 6. …
>
> 7. …"[27] (references to cases omitted)

The above guidelines, it is submitted, must be borne in mind by arbitrators, counsels and also the expert witnesses themselves.

5.5 It is possible that in certain circumstances, an arbitrator may grant an adjournment of hearing to allow a party who has not earlier called an expert to do so with a view of assisting the counsel in cross-examination or even to prepare a rebuttal report.

5.6 It may not be out of place to say a few words on the assessment by the arbitrator of the evidence given by experts.[28] It must be said that an arbitrator, not unlike a judge in High Court trials, is the sole arbiter of facts and it is the arbitrator who must make his findings on the facts adduced by both parties. With respect to expert evidence, this is no different. An arbitrator can however form his opinion, and prefer one opinion to the other[29] and to reject the expert's opinion even if the opinion is unchallenged by a rebuttal or contradictory opinion.[30] It must however be pointed out that for the expert testimony and his conclusion to be admissible,

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27 *Ibid., per* Cresswell J at pp. 81 – 82. Though based on judicial proceedings, it is submitted that arbitral proceedings are no different.

28 Even though the focus of this paper is on some pre-hearing procedures.

29 See, for example, *Singapore Finance Ltd* v. *Lim Kah Ngam (S'pore) Lte Ltd* [1984] 2 MLJ 202.

30 See, for example, *Sek Kim Wah* v. *PP* (even though this is a criminal case).

the facts or assumptions upon which he based his findings must first be admissible *and proved*.

5.7 Experts should be treated with respect, indeed all witnesses should be so treated by arbitrators. However, an arbitrator should not treat expert testimony to be the absolute truth, and be awed by the experts (irrespective of their standing) even if the testimony is not opposed by a rebuttal testimony. The words of B. T. H. Lee J in *Shen Yuan Pai* v. *Dato' Wee Hood Teck & Ors*[31] can perhaps be quoted which generally illustrate a skepticism of expert evidence:

> "The law on the value of an expert evidence is found in *Phipson on Evidence*, 10th Edition, paragraph 1286, page 481. It reads:
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> > 'The testimony of experts is often considered to be of slight value, since they are proverbially, though perhaps unwittingly biased in favour of the side which calls them, as well as over-ready to regard harmless facts as confirmation of preconceived theories, moreover, support or opposition to given hypothesis can generally be multiplied at will.'"[32]

6.0 CONCLUSIONS

6.1 There are other procedures that an arbitrator may need to deal with such as the timetable for the submission of pleadings, dealing with applications for further and better particulars, amendments to pleadings and others. This paper focuses on only three of these pre-hearing procedures and processes:

(a) discovery and inspection of documents and the subsequent bundling of documents;

(e) preparation and submission of witness statements; and

(f) expert witnesses and the submission of expert reports.

I have also given some views, with respect to these three subject matters, as to how possibly arbitrations, in particular construction arbitrations for which I have relatively more exposure, should be conducted and handled by arbitrators.

6.2 It is reiterated that an arbitrator should always bear in mind the rules of natural justice when dealing with pre-hearing matters, and indeed such must be borne in mind throughout the arbitral reference. He must be aware of the scope and limit

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31 [1976] 1 MLJ 16.

32 *Ibid*., at p. 22. It may be stated that my copy of *Phipson on Evidence* (14th Edition, 1990) has somewhat qualified, but not expressly denied, this view and stated that the accelerating process of scientific and technological advances enhances the tendency that courts have become much more dependent on expert testimony: see para 32-40 at p. 831.

of his own jurisdictions and his powers: what he can do and what he can't. Reference must always be made and care must always be paid to the provisions of the arbitration agreements, and also the provisions of any arbitration rules which have been incorporated (possibly by reference) by the arbitration agreement.

6.3 An arbitral process is very much a legal process and a formal arbitral hearing is sometime not very much different from a judicial hearing. It can broadly be said that pleadings identify the issues in dispute, discovery, bundling of documents, witness statements all point towards substantiation of the issues identified and hearing is meant to test the accuracy or truth of the evidence adduced (in witness statements). The pre-hearing procedures described in this paper are thus an integral part of the whole arbitral process and are thus should not be lightly treated and dealt with by either arbitrators or parties' counsels or representatives.