# Report of the Law Review Committee on the review of the Parol Evidence Rule - November 2006

Source

http://www.sal.org.sg/digitallibrary/Lists/Law%20Reform%20Reports/Attachments/21/Parol%20Evidence%20Final%20Report%20-%20for%20printing.pdf

Summary

No major change to the parol evidence rule. Abolishing the parol evidence rule is not desirable. Does not discuss about how arbitration comes into play with the parol evidence rule.

The parol evidence rule should only apply to a contract where all the terms of the contract have been reduced to the form of a document (or more than one document). It will not apply where the contract is partly written and partly oral.

Evidence will not be excluded, if it is relevant under substantive law. Courts can apply common law exceptions.

The admission of evidence relating to collateral contracts, even where they are inconsistent with the principal agreement, should be allowed.

Extrinsic evidence may be admissible to ascertain that existing facts are consistent with the meaning of the document, where the document is ambiguous or obscure in relation to the existing facts.

# Admissibility of the Parol Evidence Rule to Arbitration

Summary of all resources:

Arbitrators in Singapore are not bound by judicial rules of evidence, such as those against extrinsic evidence. This is because these judicial rules of evidence are based on the premises that jurors are not to be trusted to have the ability to judge evidence by its relevance or weight. On the other hand, the arbitrator helps parties interpret the contract as they intended it. Hence, the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence.

Accepting parol evidence can be admissible because 1) rules of evidence in court proceedings should not naturally apply to arbitration; 2) flexibility promotes equality and satisfies the parties' needs; and 3) helps to bridge cultural gaps.

Generally, parol evidence is only admissible if the contract is ambiguous and used to explain the parties' intentions of the contract. It is not admissible, however, when there is an explicit requirement in the contract that the contract can only be modified in writing. Parol evidence is also not admissible if the evidence is used to explicitly change the meaning of the contract.

**Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor**
**[1999] 2 MLJ 481**

**Malaysia**

Source

http://www.lawnet.com.sg/lrweb/search.do?subaction=lrLp2ViewCaseDetail&catCd=33&ncit=[1999]%20MLJ%20103&formattedQuery=%28arbitration%3CAND%3Eparol%3CAND%3Eevidence%3CAND%3Erule%29+%3CAND%3E+%28Priority+%3D+%22Y%22%29+&lrPortletId=lp2cm&catDesc=Malayan%20Law%20Journal

Summary

Dispute over arbitration award. Rules of evidence do not apply to arbitrations, as stated in Evidence Act.

Extrinsic evidence is generally not admissible to vary or add to the terms of a written contract. However, courts have treated such extrinsic evidence as a separate contract, collateral to the main transaction. (Chitty on Contracts)

Relevant Material from Source

And so far as questions of evidential admissibility are concerned, it has been always recognized that the technical rules of evidence that govern a trial in the ordinary courts do not apply to arbitrations. In this regard, I would refer to and readily accept as correct the following statement of the law by Augustine Paul J in Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd [1998] 6 MLJ 545 at p 552:

> Proceedings before arbitrators are governed by s 13 of the Act which provides for, inter alia, examination upon oath or affirmation. When witnesses are required to be examined on oath viva voce examination is intended and the taking of evidence by affidavit is not a sufficient compliance with the provisions (see Banks v Banks [1835] 1 Gale 46). It is true that rules of evidence do not apply to proceedings before arbitrators. This is provided by s 2 of the Evidence Act 1950 which reads as follows:
>
> `This Act shall apply to all judicial proceedings in or before any Court, but not to affidavits presented to any Court or officer nor to proceedings before an arbitrator.`
>
> The Evidence Act 1950 is therefore not intended to apply to proceedings before an arbitrator (see Municipal Corp of Delhi v Jagan Nath Ashok Kumar [1987] 4 SCC 497;

> Hazi Ebrahim Kassam Cochinwalla v Northern India Oil Industries [1951] AIR 230). Thus, an arbitrator is not bound by the strict rules of evidence, and it is not a valid objection to the proceedings if he has departed from some technical rule of the Evidence Act 1950 (see Suppu v Govindacharyar [1887] 11 Mad 85; Howard v Wilson 4 Cal 231). ... A departure from the rules of the Evidence Act 1950 does not per se amount to misconduct, unless the rule of evidence violated is one which is based on natural justice and an infringement of it is, therefore, repugnant to one`s sense of justice and fairness.

That the position at our common law is no different is made clear by the decision of the former Federal Court in the leading case of Tan Swee Hoe Co Ltd v Ali Hussein Bros [1980] 2 MLJ 16 , where at p 18 Raja Azlan CJ (as he then was) said:

> Although it is trite law that parol evidence is not admissible to add to, vary or contradict a written agreement, a technical way of overcoming the rule is by invoking the doctrine of collateral contract or collateral warranty. Chitty on Contracts (24th Ed) (para 674) put it this way:
>
> `An assurance given in the course of negotiation may therefore give rise to a contractual obligation, provided that an intention to be bound can be shown. The rules of evidence, however, frequently prevent such an assurance from being incorporated as part of a subsequent written agreement, since extrinsic evidence is as a general rule not admissible to vary or add to the terms of a written contract. As a result, the courts have been prepared in some circumstances to treat the assurance as a separate contract, collateral to the main transaction. In particular, they will do so where one party refuses to enter into the contract unless the other gives him an assurance on a certain point.`
>
> In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts.

**Healthcare Supply Chain (Pte) Ltd v Roche Diagnostics Asia Pacific Pte Ltd [2011] SGHC 63**

**Singapore**

Source

http://www.lawnet.com.sg/lrweb/search.do?subaction=lrLp2ViewCaseDetail&catCd=null&ncit=[2011]%20SGHC%2063&formattedQuery=%28arbitration%3CAND%3Eparol%3CAND%3Eevidence%29+%3CAND%3E+%28Priority+%3D+%22Y%22%29+&lrPortletId=lp2cm&catDesc=Singapore%20Law%20Reports

Summary

Dispute over arbitration award.

The issue referred to arbitration was whether RDAP's termination of the distribution agreement between HSC and RDAP constituted a breach of that agreement.

The case *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR(R) 1029 (*"*Zurich*") was referred to , where arbitrators allowed extrinsic evidence in order to understand the contract.

However, in this current case, the court believed that the arbitrators allowed far more extrinsic evidence than necessary in the *Zurich* case. This is because the contract in the *Zurich* case was clear and unambiguous, and that the context can be understood from the contract itself. Hence, the *Zurich* case was not applicable to the current case. The court still believes that the contract itself is more important than any extrinsic evidence used.

Relevant Material taken from Source

The extrinsic evidence in question is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context. However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. Further, where extrinsic evidence in the form of prior negotiations and subsequent conduct is concerned, we find the views expressed in McMeel's article and Nicholls' article persuasive. For this reason, there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements set out at [125] and [128]–[129] above. (We should add that the relevance of subsequent conduct remains a

controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.) Declarations of subjective intent remain inadmissible except for the purpose of giving meaning to terms which have been determined to be latently ambiguous.

**Part II: The Process of an Arbitration, Chapter 10: Approaches to Evidence and Fact Finding in Jeff Waincymer , Procedure and Evidence in International Arbitration, Volume (Kluwer Law International 2012) pp. 796**

Source

http://www.kluwerarbitration.com/document.aspx?id=KLI-KA-1226013-n

Summary

In Article 9 in the IBA Rules of Taking Evidence in International Arbitration, The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence. Hence, International Arbitration is not required to follow common law exclusionary rules, because those rules were based on the premises that jurors were unable to judge evidence by its evidence or weight.

Parol evidence should be admissible without an agreement on the applicable law. Parol evidence should be admissible because 1) rules of evidence in court proceedings should not naturally apply to arbitration; 2) flexibility promotes equality and satisfies the parties' needs; and 3) helps to bridge cultural gaps.

Relevant Material taken from Source

International arbitration would not be expected to follow common law exclusionary rules of evidence. Those rules were largely developed because jurors as decision-makers were not trusted to have the ability to deal with the relevance and weight of material that could have a strong prejudicial value as compared to its probative value. In doing so, the common law favoured liberty over truth, being concerned to exclude relevant material of modest value where the prejudicial effect is likely to be significant. While that is the base position, there will from time to time be exceptions. Inadmissibility would usually be based on general unreliability or because of a higher prejudicial to probative value. At other times, public policy may be a reason for excluding otherwise probative evidence, for example, privileged or otherwise confidential information, or illegally obtained evidence. The following sections deal with some of the more significant categories of contentious evidence.

10.16.4. Parol Evidence

As noted, some systems treat some evidentiary questions as substantive or quasi-substantive. For example, if a contract dispute was subject to common law of contract, a parol evidence rule

may apply, restricting entitlement to look at extraneous evidence to modify express terms of the contract. Lew, Mistelis and Kröll suggest that treatment of parol evidence is ‘in the grey zone between substance and procedure’.

Even if a substantive approach is to apply, if the document to be interpreted is an arbitration agreement in a contract subject to a common law choice of law clause, it needs to be understood that without clear wording, such a choice of law does not necessarily apply to the arbitration clause itself, although it may. Similar questions would arise with respect to other agreements that purport to impact upon arbitral rights. Absent an agreement on applicable law, Lew, Mistelis and Kröll argue that modern lex arbitri do not constrain arbitrators to follow any national approach. They refer to three reasons why a broader approach is to be preferred. First, rules of evidence in court proceedings in the Seat of arbitration should not naturally apply to arbitration. Secondly, allowing for flexible and incremental development of appropriate rules on a case-by-case basis promotes equality and satisfies the parties' needs and expectations. Thirdly, such an approach can help bridge cultural gaps.

**Problems of Proof in Arbitration**
**Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators**
**San Juan, Puerto Rico; January 24-27, 1966**
**Edited by: Dallas L. Jones**
**Chapter X, Page 300**

Source

http://www.naarb.org/proceedings/pdfs/1966-295.pdf

Relevant Material from Source

A. Parol evidence is not admissible if the language of the contract provision in question is plain and unambiguous. It is admissible if the language in question is ambiguous. It is for the arbitrator to determine, in the last analysis, whether or not the disputed words are ambiguous and he may receive evidence on that question.

B. Parol evidence is admissible in testimony concerning reformation of the agreement if the arbitrator has jurisdiction of the issue involving reformation.

C. In the absence of a requirement in the written agreement that it can be modified only in writing, evidence of an alleged subsequent oral agreement which was intended to change or modify the contract is admissible.

D. Evidence of an alleged oral agreement made contemporaneously with a written agreement and which modifies or varies that written agreement with respect to a subject intended to be covered by the agreement's terms is not admissible.

**Evidence and Proof in Arbitration**
**Cornell University Press, 1977 - 39 pages**
**By Martin F. Scheinman**
**Page 18**

Source

books.google.com.sg/books?id=vQzj9LlWgI4C&lpg=PP1&pg=PA18#v=onepage&q&f=false

Summary

Parol evidence should be used when it helps to explain the parties' intentions of the agreement. It is allowed because the arbitrator is empowered to help the parties interpret the contract as they intended it. However, it should not be admissible if trying to clarify a claim that is not ambiguous.

Relevant Material from Source

Parol evidence that helps to explain the parties' intent should be used. This is because the arbitrator has been empowered to interpret the contract as the parties intended it, and hence does not violate the standard prohibition against making an agreement.

Parol evidence should not be admissible if trying to clarify or explain a contractual clause, especially when a provision is clear and unambiguous. However, many arbitrators still accept parol evidence, even though the contract provision is not muddled.

**Pilar Perales Viscasillas and David Ramos Muñoz, CISG & Arbitration in Miguel Ángel Fernández-Ballesteros and David Arias (eds), Spain Arbitration Review | Revista del Club Español del Arbitraje, (Wolters Kluwer España 2011 Volume 2011 Issue 10 ) pp. 63 - 84**

Source

http://www.kluwerarbitration.com/document.aspx?id=KLI-KA-1115105-n

Summary

Arbitration agreements are not procedural contracts. Hence, breaching such an agreement has to be resolved by finding a uniform interpretation through parol evidence. Hence, parol evidence should be admissible.

Relevant Material taken from Source

As a consequence, arbitration agreements are not procedural contracts; and, as such, subject to procedural laws. Rather, they are private law contracts (typically commercial contracts), subject to CISG provisions on form and formation when included in an international sales contract. The distinction is important, for it influences the different rules to be applied, not only to the form of the arbitration agreement (Art. 11 CISG) but also to the consequences of the breach of the arbitration agreement, if considered a breach of contract, in particular the damages provisions. To this extent, one might add that the distinction between procedural and substantive issues is made in different ways throughout the world and that those concepts within CISG have a uniform and international meaning.[39]

[39]To this regard Koch, pp. 276-280, rightly points out that the issue has to be resolved looking at the CISG as a whole and the need of finding a uniform interpretation. See on this issue: Clara Giovannucci, 'Procedural Law Issues and Uniform Law Conventions', Uniform L Rev (2000) 23 (23 et seq). In CISG case law court decisions holding that the parol evidence rule does not apply in a CISG context include U.S. Federal District Court of Illinois 27 October 1998 Mitchell Aircraft Spares v. European Aircraft Service (Pace); and U.S. Federal Appellate Court 11th Circuit 29 June 1998, MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino.

**Pilar Perales Viscasillas and David Ramos Muñoz, Part III: Legal Education, Chapter 43: From Competition to Symbiosis: Commercial Context and Commercial Law and their Importance in Legal Education in Stefan Michael Kröll , Loukas A. Mistelis , et al. (eds), International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, (Kluwer Law International 2011) pp. 773 – 810**

Source

http://www.kluwerarbitration.com/document.aspx?id=KLI-KA-1143544-n

Summary

Contracts have to be understood contextually, within that space and time. Hence, parol evidence is necessary to understand the contract fully.

Relevant Material taken from Source

Even if other rules rely on the contract as a spot transaction, these provisions put that spot within space and time coordinates[24]

[24]As a consequence of them, in cases where the CISG is deemed applicable (although the conclusion may be extended to the UPIC, or PECL) legal doctrines such as the parol evidence rule; which considers evidence not in writing irrelevant to determine the contents of the contract, are inapplicable. See Federal District Court of Illinois, 27 October 1998, Mitchell Aircraft Spares v. European Aircraft Service (Pace); and U.S. Federal Appellate Court 11th Circuit, 29 June 1998, MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino.

**Singapore Evidence Act (Chapter 97)**

Source

http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=6c3848ad-ea49-4ff2-a07d-9be9a00f63bb;page=0;query=Id%3A%228644301c-4fcd-4f0f-978c-c15eaf12ef18%22%20Status%3Ainforce;rec=0#pr2-he

Summary

The “Exclusion of evidence of oral agreement” (parol evidence rule), found in Part II, is only applicable to all judicial proceedings, but not to arbitration.

Relevant Material taken from Source

Parts I, II and III shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

**International and Domestic Arbitration in Singapore - Arbitral Procedure**

Source

http://www.singaporelaw.sg/content/arbitration2.html#section2

Summary

Rules against extrinsic evidence do not have application in an arbitration, because the arbitral tribunal is empowered to determine the admissibility, relevance, materiality and weight of any evidence.

Relevant Material taken from Source

4.2.20 Arbitrators in Singapore are not bound by judicial rules of evidence. The Evidence Act, which applies to all proceedings in court, expressly excludes its own application to arbitral proceedings. Rules such as those against hearsay, extrinsic evidence or illegally obtained evidence do not have application in an arbitration. The power to determine the admissibility, relevance, materiality and weight of any evidence lies with the arbitral tribunal.

**Solymar Investments Ltd. v. Banco Santander S.A., A contribution by the ITA Board of Reporters, Kluwer Law International**

**United States**

Source

http://www.kluwerarbitration.com/document.aspx?id=KLI-KA-1231564

Summary

Arguments over arbitration clause in contract.
The contract was complete, and hence parol evidence need not be considered.

Relevant Material taken from Source

Here, the Court of Appeals rejected the Holding Corporations' challenge to the formation of the Exchange Agreement, holding that the Exchange Agreement was complete on its face and refusing to consider parol evidence offered to prove that it was not a complete agreement. The court further held that, to the extent the Holding Corporations' arguments challenged the validity or enforceability of the Exchange Agreement, they were addressed to the agreement as a whole, rather than specifically to the arbitration clauses, and therefore were properly reserved for the arbitrator. The court accordingly affirmed the dismissal of the complaint.

**Henri Alvarez, M. J. Oppenheim v. Midnight Marine Limited, Miller Shipping Limited, Supreme Court of Newfoundland and Labrador Court of Appeal, 10/7, 22 October 2010, A contribution by the ITA Board of Reporters, Kluwer Law International**

**Canada**

Source

http://www.kluwerarbitration.com/document.aspx?id=KLI-KA-2010005

Summary

Arguments over arbitration clause.
Contracts cannot removed from its context. Hence, parol evidence needs to be taken into consideration to attain a better interpretation of the contract.

Relevant Material taken from Source

The construction and interpretation of a written instrument, leading to a determination of its legal effect, is a question of mixed law and fact. See Atlific (Nfld.) Ltd. v. Hotel Buildings Ltd. and Newfoundland, (1994), 120 Nfld. & P.E.I.R. 91 (NFCA) at p. 101 (leave to appeal to Supreme Court of Canada refused, (1995), 139 Nfld. & P.E.I.R. 90). A contract will rarely be able to be interpreted in the abstract, divorced from the evidentiary milieu within which it was created. Words take their meanings from their context. Thus, evidence of the factual matrix surrounding the making of the agreement and of the genesis and aim of the transaction will be relevant to a proper interpretation, in addition to the actual words used (Atlific), so as to enable the court to apply it to the facts which the parties were negotiating about. This is so whether the parol evidence rule has application or not. To ask an applications judge to strike a claim by determining the legal rights of the parties based on a sterile interpretation of a document (which is, itself, merely a piece of evidence), in the absence of any other relevant evidence or an agreed statement of facts pertaining to it, is to ask him or her to do an incomplete job.

**US No. 702, Eres, N.V. (Belgium) v. Citgo Asphalt Refining et al., Citgo Petroleum Corp. et al. and others, United States District Court, Southern District of Texas, Houston Division, Civil Action NO. H-09-879; Civil Action NO. H-08-3627, 14 May 2010 in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration 2010 - Volume XXXV, Volume XXXV (Kluwer Law International 2010) pp. 540 - 542**

**United States**

Source

http://www.kluwerarbitration.com/document.aspx?id=KLI-KA-1052076-n

Summary

Dispute about content in contract.
If contracts are not ambiguous (is not subject to two or more reasonable interpretations), parol evidence will not be admissible because parol evidence may give the contract a meaning different from the text.

Relevant Material taken from Source

"Texas courts construe contracts to give effect to 'the true intentions of the parties as expressed in the instrument'. J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003). Contract terms are given 'their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning'. Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp., 294 S.W.3d 164, 168 (Tex. 2009). Courts interpret multiple documents relating to a single transaction together, see Fort Worth Indep. Sch. Dist. v. City of Fort Worth, 22 S.W.3d 831, 840 (Tex. 2000), and ensure that all provisions are given effect, and none rendered meaningless. Cedyco Corp. v. PetroQuest Energy, LLC, 497 F.3d 485, 490 (5th Cir. 2007). If the contract is subject to two or more reasonable interpretations, it is ambiguous, which creates a fact issue on the parties' intent. Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd., 940 S.W.2d 587, 589 (Tex. 1996). However, a contract term is not ambiguous merely because the parties offer conflicting interpretations. Id. 'Determining whether a contract is unambiguous and interpreting an unambiguous contract are questions of law.' Cedyco, 497 F.3d at 490 (citing Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 121 (Tex. 1996)). The SPA and Assignment Agreement are unambiguous and are therefore subject to being construed as a matter of law.[4]

[4]"The parties submit extensive evidence regarding the negotiations and drafting of the SPA and Assignment Agreement, but '[a]n unambiguous contract will be enforced as written, and parol evidence will not be received for the purpose of creating an ambiguity or to give the contract a

meaning different from that which its language imports'. David J. Sacks, P.C. v. Haden, 266 S.W.3d 447, 450 (Tex. 2008)."

**Henri C. Alvarez, PetroKazakhstan Inc. v. Lukoil Overseas Kumkol B.V., Alberta Court of Queen's Bench, 2005 ABQB 789, 18 October 2005, A contribution by the ITA Board of Reporters,**

**Canada**

Source

http://www.kluwerarbitration.com/document.aspx?id=ipn80643

Summary

Dispute over approval of agreement to acquire a company.

The language of the agreement gives rise to two contrary interpretations. There are also several complex and interrelated arguments that need to be analysed. Hence, parol evidence can be considered to analyse the agreement.

Relevant Material taken from Source

Even if this Court were inclined to consider the issue, which I expressly decline to do, I would note that the determination of the allegations raised by Lukoil are well beyond the scope of this application. The positions of the parties demonstrate that the language of the Shareholders' Agreement may admit of two contrary interpretations of the pre-emptive rights provisions. They also illustrate that there are several complex and interrelated arguments that need to be analysed, possibly with the assistance of parol or other evidence.