

CONDUCTING A TRANSFER PRICING TRIAL

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Glossary of Terms

“**Best Evidence Rule**”¹ – The Best Evidence Rule requires the original document, recording, or photograph to prove its content in court. The rules of evidence provide that the “original writing, recording, or photograph must be provided to prove its content unless the original is lost, destroyed, or otherwise unobtainable.”

This undergirding principle of evidentiary law is called the *Best Evidence Rule*, also referred to as the *original writing rule*. The foundation of the Best Evidence Rule is that the original writing, recording or photograph is the ‘best’ way to prove the actual content of the evidence. This is because requiring best evidence ensures that litigants provide evidence that will best facilitate a court’s task of accurately resolving disputed issues of fact. Other evidence of the writing, recording, or photograph will be admissible only if the original document is not available.

A photocopy is generally considered the same as the original unless there is a genuine concern that the photocopy is not genuine. The original documents rule serves to exclude documents that paraphrase or re-state the original.

Exceptions to the Best Evidence Rule exist. The original writing, recording or photographic evidence is not required when:

- 1) All the originals are lost or destroyed and not by the party offering the evidence acting in bad faith;
- 2) The original cannot be obtained by any available judicial process;

¹ <https://www.lawshelf.com/shortvideoscontentview/best-evidence-original-documents-rule> (last accessed 7 February 2024). This explanation references the United States codified Federal Rules of Evidence which provides good general guidance of the applicable evidence principles.

- 3) The party who the original document would be offered against had control of the original, was put on notice that the original would be a subject of proof at the trial or hearing, and fails to produce it; or
- 4) The writing, recording or photograph is not closely related to a controlling issue in the case.

Once a party shows that one of these four exceptions is applicable, the content of the writing, recording or photographic evidence can be shown through secondary evidence.

The Federal Rules of Evidence contain three further rules that are not necessarily exceptions to the rule, but provide clarification on non-applicability of the rule to some categories of evidence.

A party does not need to introduce an original public record into evidence because removing the original of a public record is simply not practical and could be an inconvenience. Public records can be proven with a copy of an official record, or of a document that was recorded or filed in a public office, when:

- 1) The record or document is otherwise admissible; and
- 2) The copy is certified as correct; or a party who has compared the copy to the original testifies that the copy is correct.

Large or voluminous writings, recordings or photographic evidence are also treated differently because reviewing the originals would be inconvenient to the court. For this type of evidence, the party offering it may provide a summary, chart or calculation to prove its content. The party offering the summary, chart or calculation must make the original or a duplicate available for examination. Thus, a party may provide a summary of a large book to the court, while providing notice that the original book is available, and any party can examine it.

Finally, a party may use the testimony, deposition, or written statement of an opposing party to prove the content of a separate writing, recording or piece of photograph evidence when that evidence is being offered against that party.

“Business Records Exception” is a statutory exception to the rule against hearsay evidence. The exception allows parties to enter regularly compiled records within an organization that meet a certain level of trustworthiness, and this exception often plays an important role in business litigation. While called the business records exception, the exception actually applies to records of organizations broadly, including non-profits like churches and hospitals.

“Certiorari” means a writ or order by which a higher court reviews a case tried in a lower court.

“Discovery” - To begin preparing for trial, both sides engage in discovery. This is the formal process of exchanging information between the parties about the documentary evidence they will present at trial relevant to the tax dispute. The parties are expected to discover all relevant documents, and failure to do so can elicit a court order compelling them to do so. If one party suspects the other party has certain relevant documentary evidence relevant to the tax dispute, they can give notice for that documentary evidence to be produced. Discovery enables the parties to know before the trial begins what evidence may be presented. It is designed to prevent "trial by ambush," where one side does not learn of the other side's evidence or witnesses until the trial, when there is no time to obtain answering evidence. Discovery gives each party the opportunity to review (oftentimes extensive documents) documentary evidence from the other side in preparing for trial. This is sometimes where the "smoking gun" can be uncovered!

“Documentary Evidence” means documentary evidence is evidence that contains a record of some kind. Documents may be admitted as evidence in court, but there are rules in place to determine their admissibility, and to help the court to decide what the documents prove.

“Expert Witness” means an expert witness is a person with specialized knowledge, skills, education, or experience in a particular field who is called upon to provide their

expertise in legal proceedings to assist the court with understanding complex technical or scientific issues. Each party selects their own expert witness, and those experts are usually paid a fee for their consultation and their testimony. A person who is designated as an expert witness must be qualified on the subject of their testimony.

“Factual Witness” means a person with knowledge about the relevant facts in a particular case who appears before an arbitral tribunal, through a witness statement and potentially in person, to provide testimony pertaining to the facts.

“in limine application” means a pretrial motion that seeks the exclusion of specific evidence or arguments from being presented during a trial. A motion *in limine* is a strategic legal tool used to manage and control the evidence presented in court, to address and resolve evidentiary and procedural issues before the trial, ensuring a fair and efficient judicial process.

Examples:

- Challenging the admissibility of evidence obtained unlawfully.
- Raising objections to the jurisdiction of the court.
- Addressing issues related to procedural fairness.

“interpretation” involves scrutinizing legal texts such as the texts of statutes, constitutions, contracts, and wills.

“interpretation notes” refers to the juridical understanding of legislation and case law, rules and principles used to construct its meaning for judicial purposes. Broadly speaking there are three means by which and through which to construe statutory law: linguistics or semantics, common law and jurisprudence. Although statutory interpretation usually involves a personal predisposition to the text, the goal is generally to "concretise" it: to harmonise text and purpose. This is the final step in the interpretative process. Statutory interpretation is broadly teleological, comprising as it does first the evaluation and then the application of enacted law.

“jurisdictional facts” are facts which must objectively exist before a statutory power can be exercised by a decision-maker. They are created by and operate in the context of government authority produced by a statute and are linked to the legal concept of jurisdiction.

“legitimate expectation” in public or administrative law, a legitimate expectation is a clear, unambiguous and unqualified assurance, understood by those to whom it is given that a particular course of action will be taken or a particular procedure will be followed. If a failure to do so would be unfair or an abuse of power, it may be susceptible to judicial review. Broadly, a legitimate expectation may be either procedural or substantive.

“habit evidence” is a term used in the law of evidence in the United States to describe any evidence submitted for the purpose of proving that a person acted in a particular way on a particular occasion based on that person’s tendency to reflexively respond to a particular situation in a particular way. Habit evidence must be distinguished from character evidence, which seeks to show that a person behaved in a particular way on a particular occasion based on that person’s prior bad acts, or based on the opinion of a witness, or based on that person’s reputation in the community. Such character evidence is generally inadmissible.

“hearsay evidence” is an out-of-court statement offered to prove the truth of whatever it asserts. Hearsay evidence is often inadmissible at trial. However, many exclusions and exceptions exist. For something to be hearsay, it does not matter whether the statement was oral or written.

“hearsay evidence exceptions” some key hearsay exceptions in U.S. law, which are similar in many common law jurisdictions, including the U.S. Federal Rules of Evidence, South Africa and England:

- **Present Sense Impression:** A statement describing or explaining an event or condition made while the declarant was perceiving the event or immediately thereafter.
- **Excited Utterance:** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
- **Then-Existing Mental, Emotional, or Physical Condition:** A statement of the declarant's then-existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, or bodily health).
- **Statements for Medical Diagnosis or Treatment:** Statements made for purposes of medical diagnosis or treatment describing medical history, or past or present

symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to diagnosis or treatment.

- **Recorded Recollection:** A record that is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately, made or adopted by the witness when the matter was fresh in the witness's memory and accurately reflects the witness's knowledge.
- **Records of a Regularly Conducted Activity (Business Records):** Records of acts, events, conditions, opinions, or diagnoses made at or near the time by—or from information transmitted by—someone with knowledge, kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit.
- **Absence of a Record of a Regularly Conducted Activity:** Evidence that a matter is not included in records kept in accordance with the business records exception if the evidence is admitted to prove the matter did not occur or exist.
- **Public Records:** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, matters observed pursuant to duty imposed by law as to which matters there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law.
- **Public Records of Vital Statistics:** Records or data compilations in any form of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.
- **Absence of Public Record:** Evidence that a matter is not included in public records, reports, statements, or data compilations, in any form, if the evidence is admitted to prove that the matter did not occur or exist.
- **Ancient Documents:** Statements in a document that was prepared before January 1, 1998, and whose authenticity is established.
- **Market Reports and Commercial Publications:** Market quotations, lists, directories, or other compilations generally used and relied upon by the public or by persons in particular occupations.

- **Statements in Learned Treatises, Periodicals, or Pamphlets:** Statements in a treatise, periodical, or pamphlet if the statement is established as a reliable authority by the testimony or admission of an expert witness or by judicial notice.
- **Reputation Concerning Personal or Family History:** A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.
- **Reputation Concerning Boundaries or General History:** A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.
- **Reputation as to Character:** A reputation among a person's associates or in the community concerning the person's character.
- **Judgment of a Previous Conviction:** Evidence of a final judgment of conviction if the judgment was entered after a trial or guilty plea, the conviction was for a crime punishable by death or by imprisonment for more than a year, the evidence is admitted to prove any fact essential to the judgment, and when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.
- **Judgment as to Personal, Family, or General History, or Boundaries:** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter was essential to the judgment and could be proved by evidence of reputation.

In South African and English law, the hearsay rule and its exceptions are governed by similar principles but are codified differently.

South African Law: Under the Law of Evidence Amendment Act 45 of 1988:

- Hearsay evidence may be admitted if the court is of the opinion that it should be admitted in the interests of justice, considering the nature of the proceedings, the

nature of the evidence, the purpose for which the evidence is tendered, the probative value of the evidence, the reason the evidence is not given by the person upon whose credibility the probative value depends, any prejudice to a party which the admission of such evidence might entail, and any other factor which should be taken into account.

English Law: Under the Civil Evidence Act 1995 and Criminal Justice Act 2003:

- Hearsay evidence is generally admissible in civil proceedings if it is relevant, and in criminal proceedings under certain conditions such as if the maker of the statement is unavailable, the statement is in a document, or the statement is made in circumstances which would make it reliable.

In all these legal systems, the underlying principle is to balance the need for reliable evidence with the practicalities of litigation, ensuring that justice is served through fair and consistent application of the rules.

“judicial review” means the power of the courts of a country to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the Constitution.

“letter of findings” means a letter or document setting forth the determination to be made by a Revenue Authority at the conclusion of a tax audits with proper reasons for the proposed determination (or decision to issue revised/amended tax assessments).

“OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations” provides guidance on the application of the “arm’s length principle”, which is the international consensus on transfer pricing, i.e. on the valuation for tax purposes of cross-border transactions between associated enterprises. In a global economy where multinational enterprises (MNEs) play a prominent role, transfer pricing continues to be high on the agenda of tax administrations and taxpayers alike. Governments need to ensure that the taxable profits of MNEs are not artificially shifted out of their jurisdiction and that the tax base reported by MNEs in their country reflects the economic double taxation that may result

from a dispute between two countries on the determination of the arm's length remuneration for their cross-border transactions with associated enterprises.

"Parol Evidence Rule" prevents the introduction of evidence of prior or contemporaneous negotiations and agreements that contradict, modify or vary the contractual terms of a written contract when the written contract is intended to be a complete and final express of the parties' agreement. Even if parties later agree that they had a conversation creating, for example, a "side agreement" that was not included in the original written contract, and the side agreement contradicts the written contract (e.g. by changing the delivery date or price of a purchase), the additional or different terms included in the side agreement may not be enforced by the court. There are two exceptions to the parol evidence rule: the collateral contract exception and the ambiguity exception.

"secondary evidence" is evidence that has been reproduced from an original document or substituted for an original item. For example, a photocopy of a document or photograph would be considered secondary evidence.

"transfer pricing legislation" means in country legislation promulgated to implement transfer pricing provisions usually allowing the revenue authority to impute "fictitious" income where the offending taxpayer has failed to properly account for an "arm's length" price or amount to be attached to a transaction ascribing the "arm's length" price or amount to that offending taxpayer.

"UN Transfer Pricing Guidelines" provides guidance from the United Nations on the application of the "arm's length principle", in line with the "OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations".

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