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Research Paper

Legal Appraisalof theprinciples and Practice of Evidence in International Arbitrationin Nigeria

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Abstract
An alternative means of resolving commercial disputes in Nigeria and across the worldapart from litigation is through Alternative Dispute Resolution (ADR) mechanism. Although, the cephalous and acephalous societies prior to the establishment of Courts in Nigeria developed a process for resolving commercial disputes between nationals and between nationals and non-nationals, the application of the fundamental principles and practice of evidence was literally unknown to their arbitral jurisprudence. The eventual introduction of a more structured arbitral process necessitated the tendering of evidence whether in domestic or international commercial disputes. This trajectory changed the narrativeof commercial arbitration thereby showing the importance ofevidence in international commercial arbitration.The study carried out an appraisal of the principles and practice ofevidence in international commercial arbitrationwith the specific aim to examine the procedure for taking and admitting evidence in international commercial arbitration in Nigerian. To achieve this, the study adopted the doctrinal research methodology that is, a desk-based research to examine the existing international and domestic rules which systematically analyzed the relevance and procedure for taking of evidence of witnesses in international commercial disputes.The study concluded that althoughinternational commercial arbitration has developed overtime to resolve international commercial disputes in a number of domains, such as commercial, legal, bi-lateral relationships, diplomatic, workplace, and community, the importance of evidence in all these domains cannot be over-emphasized as no fact can be established in the absence of relevant evidence.

Keywords: *Evidence, Tribunal, Arbitration, International, Dispute, Admissibility, Arbitrator*

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I. Introduction

International arbitration has emerged as a critical mechanism for resolvingdisputes particularly, disputes between individuals, business entities and States or between States. The element that renders an arbitration international are the parties, place of arbitration and nature of the business transaction.[1]The principle and practice of evidence within this context are important to ensure that arbitration proceedings are fair, efficient and just. At the heart of the evidentiary framework in international arbitration lies the principle of parties' autonomy to decide the scope and manner of evidence presentation.[2] This flexibility allows for the inclusion of certain types of evidence, such as documents, witness testimonies, expert opinion and even electronic evidence all tailored to the nuances of the dispute at hand.[3]

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[1] A.O Ajetunmobi, *Alternative Dispute Resolution and Arbitration in Nigeria* (1stedn, Princeton & Associate Publishing Co. Ltd 2017) p.163; G. Ezejiofor, The Law of Arbitration in Nigeria (1stedn, Longman Nigeria Plc 2017) p.134

[2] A.O Akanle, 'Reality of the Myth of Autonomy of Parties in International Arbitration Process' (2017) *Ekiti State University Law Journal*, 8 298-310

[3] Arbitration and Mediation Act (AMA) 2023, s. 38(1)(a)

International arbitration embraces pragmatic approach regarding legal standards on the relevance and admissibility of evidence. The flexibility of admitting evidence subject to the discretion of the tribunal enables arbitrators to focus on the relevance of the evidence rather than the strict procedural constraints. The practice of evidence in international arbitration is continuously evolving reflecting changes in technology.[4] The rise of digital evidence and sophisticated information management system has transformed how disputing parties gather, access and present electronic evidence (e-evidence)[5]to assist arbitration tribunals in navigating through the intricacies of international disputes.[6]In most cases, knotty problem lies not in the ascertainment of the applicable law but in external factors, the tendering of evidence obtained from sources external to the country[7]and proof of facts without which the rights of the claimant cannot be enforced.

In arbitration proceedings, a party who invoke an arbitration agreement to commence proceedings must ensure to establish the necessary facts to show that he is entitled to the reliefs sought[8]supporting same with relevant documents and other evidence[9]except where such facts are admitted or presumed.The question then is, how are facts in issue in any arbitral dispute proved by the Claimant or disproved by the respondent as the case may be? The usual means of proving or disproving any fact or matter in issue in an arbitral proceeding is through the tendering of relevant evidence. The law of evidence deals with the legally acceptable means of proving or disproving the facts in issue and the standard of proof required in any particular case whether in an arbitral or non-arbitral proceedings. In evidentiary jurisprudence around the world, application of the law in its substance is conditioned by the application of the rules on the admissibility of evidence.

Arbitration principlestraditionally affirm that although arbitral tribunal has the discretion to decide the admissibility and relevance of a piece of evidence without being bound to statutory provisions,[10] it does not meanit is at liberty to flout the rules of evidence which are applied by the regular courts that forms part of the fundamental principles of natural justice.[11]The principle on admissibility of evidence in arbitration may not strictly apply because it is not intandem with distinctive features of autonomy of parties in arbitration. Also,the fact that the arbitrator is frequently appointed by parties due to his expertise in the subject matter of the dispute andthe desire of the parties for an arbitral proceeding that is less formal makes certain rules and practice of evidence difficult to apply. Thus, theinformality and flexibilityof arbitral proceedings invariably water-down the strict application of legal rules and practicesparticularly, on the use and admissibility of evidence.

II. Conceptual Discussion

The understanding and management of evidence and procedure by the arbitral tribunal are essential to keeping the arbitration on track with the admission of evidence that is materially relevant while excluding the evidence irrelevant for the arbitrator to consider. Therefore, it is imperative that the arbitrator and legal representatives of parties have the basic understanding for the use of evidence and the procedural rules that apply to their use prior the initiation of the arbitral process.[12] During proceedings, the arbitrator should seek to use evidentiary rules in determining the ultimate facts and truth of the claim presented rather than to obfuscate, obstruct or delay proceedings. Finding relevant and credible evidence that would reach the merit of the claims and defence to those issues should be a major priority for the arbitrator(s).

Evidence in arbitration is all the means legally presented at proceedings to persuade the tribunal or arbitrators as to the truth of a matter in question. Evidence includes testimony by witnesses, documents, records, photographs, electronic devices and exhibits. Although evidence and proof are used interchangeably, there is a distinction between the terms. Evidence is the means by which the truth or falsity of a matter is established, and proof is the result of evidence, although not all evidence establishes proof.[13]The basic function of evidence is to ensure that justice is done and the truth is as far as practicable, ascertained. The adversary system operating in

[4] G. Kaufmann-Kohler and T. Schultz, 'The Use of Information Technology in Arbitration' (2005) available at <https://www.Ik-k.com> Retrieved 15 April, 2025

[5] International Arbitration Rules 2016, art. 12(b) ICC Arbitration Rules, art. 26(1); Stockholm Chambers of Commerce (SCC) Arbitration Rules 2017, art. 28(2); UNCITRAL Arbitration Rules 2010, art. 28(4)

[6] M. Tagiewska, 'New Technologies in International Arbitration: A Game –Changer in Dispute Resolution' (2024) *International Journal of the Semiotics of Law*, 37 (3) 851-864;

[7] G. Ezejiofor,(n1) *Ibid,* p. 135

[8] Arbitration and Mediation Act 2023, s. 36(1); UNCITRAL Arbitration Rules 2013, art. 20(2)

[9] AMA 2023, s. 36(3)

[10] International Centre for Settlement of International Dispute Arbitration (ICSID) Rules 1966, s. ????????

[11]S. Shukla, 'The Relativity of Evidence and Arbitration Proceedings' (2024) available at <https://www.viamediationcentre.org> Retrieved 15 April, 2025

[12]W.C. Turner, 'A Brief Overview of the Use of Evidence in Arbitration' (2010) available at <https://www.nvbar.org> Retrieved 15 April, 2025

[13]Gilbert Law Summaries, Law Dictionary, Harcourt & Co, 1997, p.105

Nigeria confines an arbitrator to the evidence before him adduced by the parties, and he is not allowed to take an active part in fact finding or evidence gathering through interrogation of the parties or conducting personal investigation into issues before the tribunal without the prior notice and consent of the parties.[14]

The principles and practice of evidence according to the Arbitration and Mediation Act, (AMA) 2023 and the Arbitration Rule 2023 are major factors in the arbitration of both national and international disputes. The provisions of the Act and the Rule applies generally to both international and domestic arbitration given their consistency with the weight and the tradition of evidential practice. Principles and practice of evidence under the Act and Rule affords the arbitrator broad authority regarding the application, interpretation and consideration of evidence relating to the disputes.As an unbiased umpire, it is incumbent on the arbitrator to consider the fundamental importance and evidentiary process of evidence in an arbitration proceeding. The use of evidence in arbitration assist the tribunal in managing the discovery and production of evidence, so that such evidence is not overly burdensome or irrelevant to the process. Although, arbitrators may, and should certainly followtraditional evidentiary principles and practice or rules stipulated by disputing parties, the admissibility of evidence gives a broader latitude to arbitrators in their application of the rules.[15]

In domestic or international arbitration it should be noted that evidence capable of establishing a fact or set of facts as stated in the claim are admissible subject to the evidentiary principles and practice or agreement of parties. Although, the provisions of the Evidence Act, 2011 (as amended) is does not specifically apply to arbitration proceedings, the principle and rule of relevancy and admissibility regarding evidence under the Act have been discovered to influence the decisionof arbitrator(s)on the admissibility of evidence despite the discretionary power of an arbitration tribunal regarding evidence.[16] The use and tendering of evidence in arbitration proceeding is solely the decision of the parties,parties decide by the arbitration agreement what type of evidence may be tendered and by who. The right of parties to be represented by anyone of theirchoice not necessarily a legal practitioner[17] invariably bestows the right to tender evidence through such person whether an agent or not.

The determination of the rules and practice of arbitral proceedings is at the instance of the parties. Parties, as regards evidence,decidethe procedure to be followed provided that where parties do not have arbitral agreement, the arbitral proceeding shall be in accordance with the procedure contained in the Arbitration Rule set out in the AMA. Also, where the agreed procedure and practice by parties contains no provision in respect of evidence, the arbitral tribunal is expected to conduct the arbitral proceedings in such a way that is consistent with equal treatment of parties as provided in the Act.[18] Equal treatment of parties ensures that parties are given the same opportunity to be heard and to give or tender evidence. However, this right does not imply that parties have unrestricted permission to give or tender any type of evidence.

The obligation to admit only relevant and material evidence or reject irrelevant evidence stops at the door step of the arbitrator, except where there is a contrary agreement by parties to that effect.[19]Moreover, it should be noted that apart from the parties calling witnesses to give or tender evidence, the arbitral tribunal can subpoena (ad testificandum or ducestecum)[20] a third party or an expert to give or tender evidence in an international arbitration in Nigeria. It is immaterial whether the third party or expert appointed is a foreigner or not.[21]A third party who is competent and compellable may be summoned with the help of the court to give valuable evidence material to the determination of issues before the tribunal when required, except where such witness is uncompellable or the document cannot be produced at the time of hearing.[22]At hearing, mode of presentation of evidencesubject to a contrary agreement by parties, is decided by the tribunal. The tribunal decides whether the proceeding will be conducted by holding oral hearing for presentation of evidence or oral argument on the basis of documents and other materials (evidence) or a combination of both methods.[23]

International arbitration can either be Ad hoc or Institutional. The type of arbitration proceedings elected by parties also determines the principles and practices to be administered. In institutional arbitration for instance, the institution is saddled with the responsibility of formulating the rules, and the parties to such

[14]*Stefano Berizzi Co v. Krausz* (1925) 239 NY 315
[15] W.C Turner, *Ibid,* p. 23-24
[16] Arbitration Rules, First Schedule Arbitration and Mediation Act 2023, Art. 17(3); J.F. Olorunfemi, 'Evidence in Arbitration and Contemporary Development' (2021) *Ife Journal of International and Comparative Law*, 5 103-118
[17] Arbitration Rules, *Ibid,* art. 5
[18] Arbitration and Mediation Act 2023, s. 31(1)(2)
[19] UNCITRAL Arbitration Rules 2013, art. 27(4)
[20]*Ibid,* s. 43(1)
[21] G. Ezejiofor, (n1) *Op.cit,* p. 135
[22]*Ibid,* s. 42(b);); J.F. Olorunfemi, (n15) *Ibid,* p.107
[23] Arbitration and Mediation Act 2023, s. 38(1)(a)-(c)

arbitration must conduct themselves in accordance with the procedural rules of the institution which include the rules on evidence they have elected. Although, the burden of proving the fact relied upon by parties to support their case is upon each party,[24]the tribunal may order thatparties should deliver to it relevant evidence in support of the claim or defence.[25]

III. Typologies of Evidence

The principal means by which facts in issue are established in arbitral proceedings is through evidence. Evidence may therefore be generally classified into various categories. Oral evidence, real evidence, and documentary evidence are the three main classifications of judicial evidence according to the Evidence Act.[26] It should be noted that these types of evidence provided in the Evidence Act, 2011 (as amended) are also applicable in arbitral proceedings, as such this study will consider the classification of evidence as provided for in the Evidence Act, 2011 (as amended).

3.1 Oral Evidence

Oral evidence is a person's viva voce testimony or an assertion made by a person and submitted as proof that what is asserted is true. It is also the testimony of a witness, typically given under oath or by affirmation of his own words while testifying. This is usually known as testimonial evidence.[27] Section 125 of the E.A. states that "all facts, except the contents of documents, may be proved by oral evidence" for this purpose. In addition, Section 126 of the Act specifies that oral testimony must always be straightforward. It is the method of building a case in court that is the most reliable. Oral evidence comprises gestures or body language used by a witness who is unable to speak.[28] Oral evidence is the most common type of judicial evidence and it is given through examination-in-chief, cross-examination and re-examination. It is settled law that oral evidence must, barring few exceptions, be direct and not hearsay. Oral evidence, no matter how well stated, cannot prove or disprove the content of a document.

An advantage of oral evidence is that the court will be able to observe the witness' demeanour or manner and determine if he is a witness of truth or not. It gives the opposing party the chance to question the witness (es) directly,[29] and to test the credibility as well as the veracity of the witness testimony in the open court.

3.2 Real Evidence

Another category of evidence is real evidence. It relates to the submission of tangible items other than documents created for the court's inspection. It is anything that is produced and put under scrutiny by a court or tribunal as evidence. It is derived by the court from the examination of tangible objects other than documents, which may be a location, a person, an animal, or things. It is an objective or demonstrative. The following are some of the types of material objects used as real evidence: the weapon used in the commission of the crime, the appearance of persons tape recordings, fingerprints, photographs, films, video recordings, handwritings, documents (when presented as chattel rather than for their contents) and blood tests.[30]

Therefore, real evidence can be produced in court for examination if it is portable otherwise inspection can be done outside the court at the place where the object is,[31] to see first-hand the object being referred to for the proper resolution of disputed issues. Real evidence has to do *inter alia*, with the court in some cases adjourning proceedings to a particular disputed place (called visit to *locus inquo* in civil cases and *locus criminis* in criminal cases) to view things for itself,[32] with or without witnesses giving evidence thereat; or ordering such

[24] Regional Centre for International Commercial Rules 2008, art. 27(1)
[25] American Arbitration Association Rules 1926, art 16-20;
[26] Evidence Act 2011, Part V and VII
[27]*Nammagi v. Akote (*2021) 3 NWLR (Pt. 1762) at 170;
[28] This can be gathered from the Evidence Act 2011, s. 176(1)(2)which is to the following effect: Section 176 (1) - A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open court. Section 176 (2) - Evidence so given shall be deemed to be oral evidence: See also the meaning of 'statement' under section 258(1) of the Evidence Act.
[29]F. Nwadialo,*Modern Nigerian Law of Evidence* (2nd edn, Ethiope Publishing Corporation 1999)
[30]. A Fagbemi, 'Admissibility of Computer and other Electronic Stored Information in Nigerian Courts: Victory at Last' (2011) *University of Ibadan Law Journal*, 1 (2) 150 -163
[31]Evidence Act, 2011, s. 127(2); See *Lyon v. Taylor* (1862) 3F & F.731.
[32]*Obi &Ors v. Mbionwu* (2002) 14 SCM 189 at 204, where the Supreme court held that; It has been said that the purpose of an inspection of a locus is not to substitute "the eyes for the ear" but rather to clear any ambiguity' that may arise in the evidence or to resolve any conflict in the evidence as to physical facts. In other words, the

material things to be produced in court for visual or aural examination.[33] It is agreed that real evidence is the best modes of establishing or disproving a fact in a given trial.[34]

3.3 Documentary Evidence

Documentary Evidence is the third category of evidence as described under the Act. This is the assertion made in a document that is submitted to the court as evidence of fact in issue. Such assertion i.e. documentary evidence may either be primary or secondary evidence. However, three main rules have to be complied with before a document will be admissible: (a) the assertion contained in the document must be relevant and admissible; (b) its authenticity must be proved; and (c) the original document must normally be produced.

Primary evidence is the document itself produced for examination by the court. It is usually preferred to as the Best Evidence Rule.[35]It is the best or highest type of evidence, regarded by the law as providing the highest level of certainty on the fact in issue.[36]The production of the original document or evidence of an acknowledgment of its content by the person against whom it is made, is therefore considered primary evidence in the context of documentary evidence.[37] Therefore, if many duplicates or copies are made of the same document by the same process, for example, typing with carbon paper each copy including the copy, is a primary evidence of the document.[38]

While primary evidence emphasizes the creation of the document, secondary evidence can either be a mechanically created replica of the original,[39] or duplicates created from the original, or counterparts of papers used in disputes between parties who have not signed them. When a proper explanation for its absence has been provided, it is evidence that may be used in place of that better evidence. This class of evidence includes certified copies provided in accordance with the provisions hereinafter contained, copies made from the original by mechanical processes that in themselves ensure the accuracy of the copy, and copies compared with the original, copies made from or compared with such copies, counterparts of documents as against the parties who did not execute them, and oral accounts of the contents of a document provided by someone who has actually seen it.[40]

Thus, it should be noted that the term secondary evidence is, however, limited to documentary evidence and deals only with the means of proving their contents, which issue that cannot arise until the document itself is admissible.

3.4 Circumstantial Evidence

Circumstantial evidence is another type of evidence, although not expressly stated in the Act.[41] Circumstantial evidence is a number of circumstances which when established make a whole and continuous chain of evidence. By this, it means fact not in issue, but other facts from which the fact in issue can be inferred[42]. It is evidence that does not directly prove the existence of a fact or happening, but an undersigned coincidence that can support a preposition with precision of logical inference.[43] It is typically challenging to obtain direct evidence, thus, recourse may be heard to circumstantial evidence with a view to establishing a case in court. It is to be noted, however, that, before an accused can be convicted on incidental evidence such evidence must irresistibly and mathematically prove that the accused committed the crime for which he/she is standing trial. This type of evidence is typically juxtaposed with direct evidence.[44]

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purpose of an inspection of a locus in quo is primarily for the purpose of enabling the court to understand the question that are been raised at the trial and to follow the evidence and apply such evidence.

[33]S.T Hon, *Law of Evidence in Nigeria* (1st edn, Port-Harcourt: Pearl Publishers, 2012) p.10

[34]*Ibid*.

[35]*Omichund v. Barker* (1744) Willes 534, 550, where Lord Hardwicke said *"The judges and sages of the Law have laid it down that there is but one general rule of evidence, the best that the nature of the case allow".* This rule emanated from the old rule of the English common law which requires that the best evidence must be given; *Nammagi v. Akote* (*Supra*)

[36]*Omichund v. Barker(Supra)*

[37]*Jacob v. Attorney General of Akwa-Ibom State* (2002) FWLR (Pt. 86) 578 at 590

[38]*Esso W.A Incorporated v. Oladiji*(1968) NMLR 453

[39]Evidence Act 2011, s. 87

[40]*Aina v. Jinadu*(1992) 4 NWLR (pt.233) 91

[41] Evidence Act, 2011

[42]G.D Nokes, *An Introduction to Evidence*(4th edn, Sweet & Maxwell 1964)11; *Ahmed vs. State* (2002) FWLR (Pt. 421) 797 at 817 S.C

[43]*Ayodele v. State* (2021) Legalpedia 14181 (CA)

[44]*Adeniyi vs. The State* (2001) FWLR (Pt. 57) p. 80, - The accused was the last person seen with the deceased alive. He was with the deceased car a day after they were both seen together. Upon investigation, he led the

3.5 Direct Evidence

Direct evidence is testimony about facts that a witness actually observed using one of his senses.[45] It is the evidence of a fact actually in issue.[46] This is evidence put out by a witness to support the veracity of the claim made by him. When an eye witness cannot testify directly, the court may draw inferences from the evidence to demonstrate the existence of other facts that may be logically inferred. Direct evidence is evidence which if believed proves a fact in issue without the court resulting to inference or presumption.

3.6 Material Evidence

Material evidence is that which, because to its logical connection to the issue, tends to decisively affect the establishment of the fact in question.[47] Thus, if any party fails to tender evidence which is material to his case, such party would be assumed to be suppressing such evidence.[48] This type of evidence is also called vital evidence; and if animated, is called a vital witness. A vital witness is a witness whose evidence may determine a case one way or the other.[49] In other words, he is a person that knows something significant about the case and failure to call such witness is fatal to the case of the party who ought to have summoned him.

3.7 Electronic/Digital Evidence

Electronic evidence is evidence that is produced by a mechanical or electronic equipment or procedure. Any data that can show that a crime was committed or offer a link between a crime and its victim or a crime and its perpetrator has been classified as digital evidence.[50] The conventional way of preserving records and communications in written documents is quickly being replaced by the use of computers and other types of electronic storage and communication technologies.[51] Examples of electronic evidence are computer print-outs, information storage devices such as disks, tapes and microfilms, telegraphic transfers, faxes, electronic funds transfer.[52]

The general description for specific forms of evidence processed, stored, or created from computers, computer-based devices, or electronic communication systems is "electronic and computer-generated evidence." This class of documents' main distinguishing feature is that, unless printed, they are paperless and, despite being housed inside of tangible objects, are visible but intangible.[53] These would include various forms of bankers' books, emails, call logs, text messages, digital cameras, mobile phones, letters, or other documents processed by computers or other electronic devices or kept on computer-based storage devices.[54]

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police to a place where the skull and bones of the deceased were recovered together with the lose material she wore and a necklace with the pendant insignia "R" which stands for Regina, the name of the deceased. In that circumstance, he was convicted for the murder of the said Regina. See *also ChiomaEjiofor v. The State* (2001) FNLR (Pt. 49) p. 1457

[45] S.T Hon, (n31) *Op.cit,* p. 10

[46]*LawalNasiru v. State* (2022) LCN/5024 (SC)

[47]*Ikemson vs. State* (1989) 3 NWLR (Pt. 110) 455; also *Akpa vs. State* (2007) All FWLR (Pt. 351) 1560 C.A

[48]*N.A.S Ltd v. U.B.A* (2005) All FWLR (Pt. 284) 275 S.C

[49]*Dogo vs. State* (2012) All FWLR (Pt.613) 1942 C.A

[50]E. Casey, 'Foundation of Digital Forensics'in E. Casey (ed),*Digital Evidence and Computer Crime*(3rdedn, Elsevier Inc 2011); The definition proposed by the Standard Working Group on DigitalEvidence (SWGDE) is any information of probative value that is either stored or transmitted in a digital form. - Another definition proposed by the International Organization of Computer Evidence (IOCE) is information stored or transmitted in binary form that may be relied upon in court. However, these definitions focus too heavily on proof and neglect data that simply further an investigation. Additionally, the term *binary* in the later definition is inexact, describing just one of many common representations of computerized data. A broader definition proposed by the Association of Chief Police Officers is information and data of investigative value that are stored on or transmitted by a computer. A more general definition proposed by Brian Carrier is digital data that support or refute a hypothesis about digital events or the state of digital data.

[51]Y.OAli, 'The Nigerian Evidence Act and Electronically Generated Evidence: A Need to Fast Track the System' inA. Onigbinde and S. Ajayi (eds), *Contemporary Issues in Nigerian Legal Landscape* (Goldmine Communications Limited, 2010)

[52]*Ibid.*

[53]P.A Anyebe, 'Appraisal of Admissibility of Electronic Evidence in Legal Proceedings in Nigeria' (2019) *Journal of Law, Policy and Globalization,* 92 1- 12

[54]H.C Lee and E.M Pagliaro, 'Forensic Evidence and Crime Scene Investigation' (2013) *Journal of Forensic Investigation,* 1 (1) 1-5

3.8 Opinion Evidence

The provision above provides an exception to the general rule that a witness is only permitted to testify on facts which he observed in person, not on inference deduced from those facts.[55] It states that a certified expert may offer his judgement on a subject requiring the competence he possess. Opinion evidence involves various types of scientific area such as Foreign Law, Science, Art, Handwriting, Fingerprint, Footprint, Medical Science, Ballistic Expert and DNA Expert. Under the Act, evidence with forensic nature is categorized under opinion evidence which is intended to provide decision-makers with information which is outside their experience or knowledge. In applying such evidence, the tribunal is expected to consider whether the testifier is in any superior place than the judge, to form an opinion or to draw inference from the fact.[56]

In arbitral proceedings, the arbitrator is empowered subject to the agreement of parties to appoint experts in specific fields relating to specific issues before the tribunal to report to it. In international arbitration, the expert could either be a foreigner or a native, and where so appointed, the expert shall participate in hearings to give opportunity to parties to cross examine and present other witnesses to testify on their behalf on the points at issue.[57] The essence of cross examination and presentation of other witnesses is to determine the evidential value of the report and testimony of an expert. It is general principle of law that opinion evidence of an expert on a scientific information furnished to a Court or tribunal and which is outside the experience of the arbitrator is admissible but not indispensable especially where there are direct evidence in proof of facts stated.[58]Although, the tribunal is expected to treat expert opinion evidence with respect and condor, it is not invariably bound to accept the evidence particularly, where the opinion is contradictory, inconsistent and unduly prejudicial.[59] Where there are no contrary opinion to discredit the evidence, the tribunal is bound to accept the expert's report and thereby attach the required weight.[60]

IV. Principles of Evidence in International Arbitration

In International Arbitration, especially in quality arbitrations, it is usual to find an express or implied agreement to abandon the rules of evidence, and the tribunal will often assume this even where no such agreement is specifically proved. However, our focus of discuss is on a situation where the rules of evidence in international arbitration are not abandoned.The Evidence Act 1938, the Civil Evidence Act 1968[61] and the Civil Evidence Act 1972 applies by reference to International Arbitration.

4.1 Admissibility of Evidence in International Arbitration

In international arbitration, an arbitrator is bound by the same rules of evidence as those in the conventional court, unless the parties to the reference have otherwise agreed. Each party must be allowed to adduce all his evidence and must be fully heard. But the arbitrator may take the evidence of a particular witness at any moment as may be convenient and expedient. The arbitrator decides all questions of admissibility of the evidence before him under the rules and practice of the tribunal, this includeadmissibility of, privilege information; illegally obtained evidence; hearsay evidence; evidence obtained by State through its Police power and new evidence obtained after the commencement of the proceedings.[62]The arbitrator may adjourn the reference if he is satisfied that additional evidence is of importance, but is not yet available.[63]

The arbitrator when he decides on any matter which concerns the admission of evidence must act in a strictly judicial manner. If he makes an error on the question of the admissibility of evidence, this does not of itself constitute misconduct and his award would not be set-aside on that ground.[64] However, when an arbitrator wrongly admits evidence which goes to the root of the question submitted to him, he is guilty of arbitral misconduct and his award may be set-aside.In *Walford, Baker and Co v. Macfie& Sons*[65], the arbitrator consulted a document which was not included in the contract before him and which was wholly inadmissible

[55] Evidence Act 2011, s. 67
[56]*All Nigerian Peoples Party & Anor v. AlhajiSaiduNasamu Usman &Ors* (2008) 12 NWLR (pt.1100) 1 at 73
[57] AMA 2023, s. 42(1)(2)
[58]*R. v. Turner* (1910) 1 KB 346
[59]*R. v. Bengert* (1980) 1 CR 49
[60] Arbitration Rules 2013, art. 28(5)
[61] Civil Evidence Act 1968, ss.10(3) (4), 18(1)(b), (2), 20(2)
[62] A. William, 'Admissibility of Evidence' (2024) available at <https://www.jusmundi.com> Retrieved 17 April, 2025
[63] E. A. Marshall, *The Law of Arbitration* (3rdedn, Sweet & Maxwell, 1990) p. 69
[64]*Macpherson Train & Co Ltd v. J.Milhem& Sons* (1955) All E.R 262
[65] (1915) A.C.247

and went to the root of the question submitted to him. This decision was followed in *Agro Export EnterpriseD'Etat Pour lo Commerce Exterieur v. N.V.Goordn Import Cy.S.A*[66]

4.2 Competence and Compellability of Witnesses and Expert

Generally, the rule of evidence specifically provides that all persons who are competent to be called as witnesses, are compellable to give evidence. However, it should be noted that not all competent persons are compellable owing to some legal restraints such as, infancy, lunacy (person of unsound mind) and other special reasons. Such persons are considered not to be able to understand the proceeding or the nature of the oath, or to speak the truth, and give evidence in a rational manner.[67] In any case, for a witness to be compellable, he must first be competent to testify.

An expert witness if required to testify can be compelled just like every other witness to testify. However, where the expert is entitled to professional privilege under the provisions of the agreement, such expert shall not be compelled, save he waives such privilege. This privilege covers confidential communication between the parties and other expert, but does not cover documents and other evidence that such expert based his opinion.

4.3 Receiving Evidence of Collateral Matters

The arbitrator is authorized to inquire into matters not submitted to him, if that inquiry is necessary to enable him to decide rightly upon the questions before him; and even if he receives evidence on matters not properly affecting the points upon which he has to decide, the objection only amounts to the reception of improper evidence, and is no such excess of authority as to induce the court to set-aside the award.[68]The arbitrator should hear all the evidence material to the question which the parties choose to lay before him. He must do this even though he may be of the opinion that sufficient evidence has been produced, for declining to receive evidence is an unwise step to take and may be fatal to his award.[69] The award may be impeached if the arbitrator makes his award without having heard all the evidence or having allowed the parties a reasonable opportunity of proving their whole case.

In *Williams v. Wallis and Cox*[70]arbitration arising out of a dispute over a repair of premises it was vital to the issue the arbitrator had to decide whether the condition of the demise premises was worse when the tenant went out than when he entered in 1906. It was alleged that the arbitrator excluded evidence as to the condition of the premises in 1906. It was held that refusal to hear such evidence would amount to a refusal to decide the very issue submitted to arbitration, and would be such misconduct as to justify setting aside the award.

Objections to a decision of the arbitrator as to whether or not to admit evidence may be waived like other objections to the manner in which the proceedings are conducted. A party to arbitration cannot be allowed to lie by and then, if the award is unfavourable, seek to set it aside on the ground that during the proceedings the arbitrator gave a ruling on the decision contrary to the rules of evidence which the party during the proceeding took no steps to question.[71]In order to make out a case entitling the party to impeach the award, the evidence must be distinctly tendered to the arbitrator at hearing. It is not enough to put an abstract proposition to an arbitrator, and upon his answer to decline, give evidence or proffer a claim.

4.4 Decision on Evidence Admissible

An arbitrator must decide on every evidence put before him by the parties and not upon extraneous materials obtained outside the process. In particular, he must not make use of knowledge acquired in a different capacity.[72] Like the normal rules of evidence in the law court, every evidence tendered in proof of a particular fact or set of facts must be considered and a decision given upon it. Where evidence is tendered and a decision is not given upon it, it is regarded as irrelevant in proof of material fact.Where a person of expert skill and special knowledge has been appointed arbitrator by the parties or nominated on their behalf on account of such skill, and they authorize him to use such knowledge then this is proper. The tribunal will presume such authority from the mere fact of his employment. In such a case, the award cannot be objected to, and would not be set-aside,

[66] (1956) K.B.879
[67] Evidence Act 2011(as amended), s. 175(1)
[68]*Eastern Counties Ry v. Robertson* (1843) 1 D. & L. 498; 6 M.& G.38
[69]*Nickalls v. Warren* (1844) 6 Q.B. 615
[70] (1914) 2 K.B .478
[71]*London Dock Co v. Shadwell* (1862) 7 L.T. 381
[72]*Owen v. Nicholl* (1948) 1 All E.R. 707

should the evidence tendered by the parties be insufficient to support the award, and if there is knowledge which the arbitrator himself could have supplied to make up for such insufficiency.[73]

Also, where the expert arbitrator is authorized to use his knowledge, and his capable of deciding a point in issue because of it, he may refuse to accept additional evidence tendered by the parties on the ground that it is unnecessary and this will not invalidate his award.An arbitrator must not, unless so authorized by the parties, decide upon a view or inspection of premises or goods at which they have had no opportunity to be present. But it will seem that in the case of arbitrators authorized to decide upon their own expert knowledge, such further authority might be presumed by a court.

V. Practices of Evidence in International Arbitration in Nigeria

The issue of evidence taking has of course become particularly relevant in the light of increasing use of documents in the fast growing international relationships. The practice of taking evidence in international arbitration include; attendance of witnesses, competence and compellability of witnesses, false evidence and examination of witnesses.An arbitrator has the power, unless the arbitration agreement expressly provides otherwise, to examine on oath or affirmation the parties and witnesses in the reference.[74] However, the arbitrator is not compelled to take evidence on oath unless the agreement stipulates that he should do so, in which case the examination must be conducted accordingly. Where noobjection is raised to evidence been received otherwise than on oath, when it is expressly provided for in the agreement, that is in itself a waiver of the right of objection.[75]

In addition, when witnesses are required to be examined on oath by an express term in the agreement, this implies an oral examination and the taking of evidence by documents or other materials is not sufficient. However, subject to a contrary agreement by the parties, the tribunal has the power to order that evidence in an arbitration be given by holding oral hearing, on the basis of documents or other materials.The normal practice is to administer the oath to all witnesses before they give evidence. Part II of the Oaths Act, 1978 provides as follows;

i. If an oath has been administered in a manner other than that prescribed by law, the person who has taken it is never the less bound by it if it has been administered in such form and with such ceremonies as he may have declared to be binding.
ii. The fact that the person taking the oath had no religious belief does not affect the validity of the oath.
iii. A person who objects to been sworn is permitted to make a solemn affirmation instead of taking an oath, and a solemn affirmation has the same force and effect as an oath.

5.1 Attendance of Witnesses

A witness in arbitration proceedings may be summoned by a subpoena that is, by a writ of *subpoena ad tesificandum or subpoena ducestecum*. This application ensures that, at the hearing, the presence of witnesses who are within the jurisdiction of the court.[76] Also, a court may order the issue of a writ of subpoena to compel an attendant before an arbitrator of a witnesses who is anywhere outside the jurisdiction of the tribunal.[77]

Section 43(2) of the Act,[78]provides that a Court or Judge in chambers may order the writ of *habeas corpus ad testificandum*to bring a prisoner up for examination before an arbitrator or umpire. It should be noted however, that willful disobedience to a writ by a person within the jurisdiction amount to contempt of court, for which a person may be committed.For a person lawfully sworn as a witness in arbitration to make a statement from the witness book which is material and which he knows to be false or does not believe to be true is perjury.[79] If a person manufactures false evidence with the intention to deceive and mislead an arbitrator at the reference, even though he does not bring in such evidence, such person is guilty of misdemeanor. If the statement is made inadvertently or by mistake, and not willfully or deliberately such is not a misdemeanor.

[73]*Mediterranean & Eastern Export Co v. Fortress Fabrics Ltd* (1848) 2 All E.R 186 - In action relating to a sale of goods, the arbitrator awarded damages for wrongful rejection. The claim having been framed incorrectly has a claim for the price, neither side tendered any evidence as to damages; but the arbitrator had been chosen has having an expert knowledge of the subject matter.
[74] UNCITRAL Arbitration Rules 2013, art, 28(2); Arbitration and Mediation Act (AMA) 2023, s. 38(5)(a)(b)
[75] AMA 2023, s.63
[76] AMA 2023, s, 43(1)
[77]*Ibid*, s. 43(3)
[78] AMA 2023
[79]Perjury Act 1911, s. 1(1)(2)

5.2 Examination of Witnesses

The examination of witnesses orally consists of: (a) Examination-in-Chief by the party calling him; (b) Cross-Examination by the other party opposing him; (c) Re-Examination by his own party. In all cases the parties may be represented by counsel or solicitor. The opposing party is not entitled to cross-examine a witness who is called merely to produce a document or to identify it.

The arbitrator may at any time permit recall of a witness for further examination-in-chief, but this of course permits the right of further cross-examination, and re-examination on the particular matters for which the witness was called. Should a witness, after giving evidence, subsequently become incapable, or die, his evidence remains admissible and good. Both examination-in-chief and cross-examination must be confined to the facts in issue, or to the facts relevant to the issue. The test is whether the answer to a question put to a witness will assist, aid or abet, or is pertinent to, or bears on, the point in issue.

In international arbitration, the location of the seat of arbitration and the distance of witnesses to the seat of arbitration occasionally causes delay in proceedings. To resolve this challenge, the arbitration tribunal may direct that such witness, including expert witnesses be examined through means of telecommunication that do not require the physical presence of the witness. This means of examination of witnesses permit the use of video or virtual conferencing and other technologically approved means of communication.[80] This provision dispenses off with the physical presence of a witness however, not deviating from the principles and practices of examination of witnesses.

The whole essence of examination of witnesses is to put before the tribunal all the relevant and material facts which the witness knows about the case. This is however subject to a number of rules which must be mastered thoroughly to ensure that the testimony is smooth and impressive.[81] Leading question are those question which suggest a desired or expected answer or questions which suggest as facts the point at issue. They must not be asked of a witness by his own party, or own counsel, either in examination-in-chief or re-examination, except by express permission of the arbitrator. But such question may be put to a witness if they are merely introductory or relate to matters on which there is no dispute.

Leading question may also be put to contradict evidence already given by a witness on the other side or for the purpose of identifying persons or things, or when it is impossible to put a question except in the manner of a leading question. It is better to obtain permission of opposing counsel, before leading questions are put in this way. It requires great skill to examine in chief; in order to bring out clearly just so much as is wanted and no more.[82] In no circumstances may a party, or his counsel, attack the character of a witness whom he has himself called, nor may he call evidence to discredit him. But he may call evidence to contradict him upon a fact which is material and not merely collateral, or where the parties are compelled by the law of the land to call a witness. Sometimes an arbitrator may allow a witness, who has given evidence adverse to the party calling him to be treated as a hostile witness, and he may then be cross-examined and contradicted, and asked leading question, but not if such a witness merely gives evidence which is unfavourable to the party calling him[83]

A witness must always state what happened according to his own personal knowledge, and not according to what he has subsequently been told. But he is allowed to refresh his memory by reference to note or memoranda made at the time of the event, if they were made by him, or read and recognized by him as correct immediately afterwards. The opposing party is entitled to look at a document from which a witness has refreshed his memory and to cross-examine him on it, but not on an irrelevant matter in the note. The note must be original and not copies.[84] An arbitrator is not entitled to hear secret information.

In international arbitration, after a witness had been led in chief by the party who called him, the adversary if he so desires, is entitled to put questions to him.[85] These questions are called cross-examination. Cross-examination is an act. It is not a text to be memorized but a skill to be acquired and marshalled.The party or his counsel has more freedom in cross-examination, and leading questions may be asked as frequently as desired. He need not confine his questions to the facts in issue, and he may attack the character and the credit of the witness, although he should be on guard when he does so. It rests with the arbitrator whether vexatious and irrelevant questions are allowed, especially where the credibility of the witness is concerned.[86]

The person who conducts cross-examination should test the source of knowledge or means of re-collection, or foundation of the judgment of the witness. He may show that the witness is an interested party, that he is biased and partial and that he has made previous statement inconsistent with his present evidence.

[80] Arbitration Rules 2013, art. 29(4)
[81] A. Babalola*Law and Practice of Evidence in Nigeria* (1st edn, Sibon Books Ltd, 2001) p.423
[82] E.A. Marshall, (n63) *Op.cit,* p.72
[83] *Ibid.*
[84] *Burton v. Plummer* (1834) 8 B & C, 14
[85] Regional Centre for International Commercial Rules 2008, art. 28(8)
[86] A. Walton and M. Vitoria, *The Law of Arbitration* (20th edn. London Stevens & Sons, 1982) p.278

Cross-examination should be particularly directed to that part of the examination in chief of the witness which is in dispute. Failure to cross-examine would amount to acceptance of the evidence given therein. Any fact which the cross-examiner intends to plead should be put to the witness in order to give him the chance to deny such fact. Additional or irrelevant evidence should not be included in cross-examination on matters which the opposing party has failed to support.

There are certain questions which a witness cannot be compelled to answer, either in cross-examination or in examination-in-chief:

a) Where any answer would incriminate the witness;
b) Communication between husband and wife during marriage; and
c) Communications between client and solicitor

The object of re-examination is to give witnesses a further chance to explain any inconsistency in their previous answers. They may also state the complete truth as to previous matters referred to, but not fully dealt with, in cross-examination. A party or his counsel may not ask, when re-examining a witness, any question which did not arise out of cross-examination, except with consent.

5.3 Time to Tender Evidence

In arbitration proceedings like the conventional Courts, parties customarily at the point of examination of witnesses tender relevant documentary and other forms of evidence in proof of their claims or defence. However, the arbitral tribunal where it considers it appropriate, may require a party to deliver to the tribunal or the other party within such a period of time as the tribunal shall decide, a summary of document or other evidence which that party intend to present in support of facts in issue set out in the point of claim or point of defence. The arbitral tribunal may at any time or stage during the proceeding order that the parties should produce documents, exhibits and other evidence to the tribunal.[87]The implication of this provision to the practice of evidence in arbitrationis that, parties are permitted to tender evidence whether documentary or not at any stage of the proceeding before the award is given. The arbitral tribunal in exceptional circumstances may also order where it considers it necessary, decide s*uomotu*or upon application of either party to re-open hearings at any time before the award is made,[88] even for the purpose of tendering evidence.

5.4 Arbitrator calling Witnesses

At any stage in the proceeding, an arbitrator may put any question to a witness, for in this respect he is acting in a judicial capacity nevertheless an arbitrator may not himself call a witness as to questions of fact unless the consent of the parties is obtained. In *Re Enoch v.Zaretsky, Bock & Co*[89], the court of appeal held that an arbitrator had no power himself to call witnesses to fact against the will of either of the parties except where a person went into the witness box by permission of the judge as a witness for neither party. The only exception to that rule if it can be so called is that when a witness has been called by a party and has left the box, then an arbitrator may recall such a witness.

The true role of the expert witness is to offer the court the best assistance he can in getting at the truth. He may, in addition to refreshing his memory by reference to note, refer to his own previous report, and specialist books on the subject before the arbitrator. He may do this to support his opinions, and may quote other law cases and judgments in which he gave evidence which was accepted. Nevertheless, the arbitrator may still decide what evidence and expert witness may or may not bring before him.

In *British Celanese Ltd v. Courtaulds Ltd*[90] a patents case concerned with thread manufacturing, the House of Lord's considered the function of expert witnesses and the nature of the questions which might be put to them, and held that an expert witness is entitled to give evidence as to the state of the art and the meaning of technical terms, to give an opinion whether, on a hypothetical interpretation of a specification, a skilled worker could carry it into effect, and generally to explain scientific facts, but he cannot be asked (even as engineer or chemist) what a specification means.In *Morton v. Hargreaves Motors*[91] a claim for damages for injuries sustained in a traffic accident, the Court of Appeal held that each side should have leave to call both an engineer and a metallurgist on the defendant's undertaken to disclose their experts' reports to the plaintiff.

5.5 Receiving Evidence from other Jurisdictions

International arbitration by its nature is used for resolvingdisputes particularly, disputes between individuals, business entities and States or between States. The element that renders an arbitration international

[87] Arbitration Rules 2013, art. 28(3)(4); Regional Centre for International Commercial Rules 2008, art. 27(3)
[88] Ibid, art. 39(2)
[89] (1910) 1 CH, 457
[90](1935) 2 All ER 135
[91](1963) 2 All ER 38

are the parties, place of arbitration and nature of the business transaction leading to the proceedings. Where parties to an arbitration dispute are of different nationalities with place of business located in different jurisdictions, there is usually the challenge of receiving evidence from the different jurisdictions of parties. In arbitral proceedings, parties may be ordered to produce certain evidencehowever, it has been discovered that in most cases parties withhold or refuse access to such relevant evidence in an attempt to frustrate the proceedings particularly, where evidence is outside jurisdiction.

In international arbitration, parties place of business are usually in different countriesand as such, evidence relating to the dispute might be located in different countries.The practice of evidence in international arbitration subject to the agreement of parties permits gathering of such evidence from those jurisdictions outside the seat of arbitration. The arbitrator is allowed subject to the prior consent of the parties gather relevant evidence from within and outside the jurisdiction of the tribunal, so far it will assist the tribunal in making its final decision. However, it is immaterial how this evidence is obtained, as long as it is material to the subject-matter and the just determination of the dispute, it can be used by the tribunal.

The discretionary power of the arbitral tribunal to receive evidence from outside jurisdiction extends to granting interim measures (Antom Pillar or Mereva Injunctions) to preserve assets, maintain or restore the status quo pending the determination of the dispute.[92]Where an evidence is with the adverse party or outside jurisdiction, and there is the likelihood of either party withholding or refusing access to such evidence or the absence of such evidence would prejudice the arbitral process, the arbitral tribunal is empowered to grant an interim order to preserve the *res.* Granting interim measures ensures that evidence relevant and material to the resolution of the dispute is preserved and brought within the jurisdiction of the tribunal when it is observed that harm not adequately reparable by an award of damages is likely to result if the measure is not ordered.[93] The mereva injunction or measure specifically grant access to a party to inspect and recover relevant and material evidence to the subject-matter from the property of the adverse party whether within or outside the jurisdiction of the tribunal.

VI. Conclusion/Recommendation

Parties and Institutions from all over the world often select international arbitration for the resolution of international disputes. Over the last decade, the number of international arbitration proceedings has grown drasticallyand as well the practice and rule of evidence in international arbitration. As important as the giving of evidence is in a trial, so also is it in an arbitral proceeding. Its importance cannot be overemphasized, for no facts can be established in the absence of relevant evidence. The success or failure of any arbitral tribunal largely depends on evidence acquired by the arbitrator and its relevancy to the set of facts sought to be proved or disproved.One can only conclude at this point that the rules and practice of evidence in international arbitration are not just designed to create nauseating bumps or clog to the wheel of justice, they are technical handmaids to an arbitrator in the attainment of justice, and as such, waiving evidence into extinction by saying arbitral tribunals are not bound by the rules of evidence appears to be entirely misleading and likely to produce very great injustice in arbitration.

The study therefore, recommend that although the use, practice and procedure of evidence in international arbitration is at the exclusive discretion of the parties to the arbitration, arbitration tribunalswhere permitted by parties to admit and rely on relevant evidence in the determination of a dispute should ensure that the practice and procedure of evidence adopted for the arbitration process is in line with the provisions of the applicable Evidence Act of the *lex loci arbitri,* as agreed by parties. Where the practice and procedure on evidence agreed by parties is inconsistent with the provisions of the extant law on evidence, the agreement of parties to the extent of its inconsistency should be made subject to the provisions of the Evidence Act of the *lex loci arbitri,* more so that the applicable laws for arbitration proceedings include the Law of Evidence of the place of arbitration. Also, the study further recommend that, the Arbitration and Mediation Act, 2023 which is applicable to international arbitration in Nigeria should be amended to accommodate more contemporary provisions on the use, types, relevancy and admissibility of evidence. Although, the Act made scanty provision on the presentation of evidence (with no distinct section on evidence), it is inadequate to cater for contemporary evidence such as, digital and forensic evidence. Advancement in technology has brought about new disputes, as such, provision on evidence gathering and presentation in this regard should be considered in the Act.

[92] Arbitration Rules 2013, art. 26(2); Regional Centre for International Commercial Rules 2008, art. 29(1)(a)
[93]*Ibid*, art. 26(3)(a)