

# **IMPACT OF PARTY AUTONOMY AND FAIR HEARING ON ASSESSMENT OF EVIDENCE IN INTERNATIONAL ARBITRATION**

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*This article examines the impact of party autonomy and fair hearing on assessment of evidence in international arbitration and in consequence proffers some recommendations as a panacea for the negative impact of these concepts on assessing evidence and their consequences on award. The author is not aware of any previous studies in this area.*

*It was found that evidence is assessed at the stage when parties and their legal representatives are not involved in the process and this has resulted, in some cases, in Arbitral Tribunals overseeing party autonomy and fair hearing. This has led to disruption of arbitration and several awards being set aside with consequent wastage of time and resources.*

*The doctrinal research method was used. As a result this article examined the law in the area as it is and offered a critique in some instances and where appropriate provided an explanation of the law by placing it in a useful theoretical context. Primary sources (legislations, conventions and case-laws) as well as secondary literature in the area were studied in the theoretical and or conceptual dimensions of the articleS*

## **Introduction**

Evidence is a vital tool of dispute resolution whether in arbitration or litigation. Before parties get to the stage of presenting evidence, they must have pleaded the facts upon which their cases are based and for which evidence is required to prove, except if the facts are admitted. Pleadings are part and parcel of arbitration. The purpose of pleadings being to ascertain, for the guidance of the parties and the tribunal, the material facts in issue and to some extent, the fact relevant to the facts in issue in a particular case; while proof, which in this sense includes disproof, is the establishment of such facts by proper legal means to the satisfaction of the tribunal<sup>1</sup>.

A basic requirement of international arbitration, where the dispute is neither settled amicably nor admitted, is that for any claim to succeed, the party on whom the burden of proof lies must establish its case through evidence. Evidence of a fact is that which tends to prove it – something that may satisfy an adjudicator of the fact's existence. Arbitrators decide disputes in a judicial manner and as a result must decide on the basis of facts and not upon speculation. In the circumstance, arbitral tribunals must receive evidence from parties and such evidence which a tribunal will receive to arrive at a decision

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<sup>1</sup> MALEK, H. M.; AUBURN, J.; et al. *Phipson on Evidence*. 17<sup>th</sup> Ed. London: Sweet and Maxwell, 2010, p. 1.

is described as “judicial evidence”<sup>2</sup>. Judicial evidence consists of facts which are legally admissible, and the legal means of attempting to prove or of proving such facts<sup>3</sup>. However, international arbitral tribunals are not bound to adhere to strict judicial rules of evidence.

Concomitant with the requirement of parties’ establishing their cases through evidence is the doctrine of party autonomy. Party autonomy is the guiding and key principle that must be observed in determining the applicable law and procedure in every arbitration. The principle of party autonomy permeates every aspect of arbitration including evidentiary issues and has been approved by national laws, institutional rules and international conventions. By this doctrine, parties are free to agree, subject to such safeguards as are necessary in the public interest, on the procedure to be followed by arbitral tribunal in conducting the proceedings<sup>4</sup>.

In the same connexion, fair hearing is a mandatory pillar, the *grundnorm*, of every fair adjudication which must not only be observed but must be seen to be observed by every tribunal. This principle, whose focal point is to give parties equal opportunities of presenting their cases and responding to that of their opponent, is applicable in every aspect of arbitration. It starts from the commencement of arbitration and applies to arbitral proceedings through to award.

It is therefore indisputable that there is an interaction between party autonomy, fair hearing and assessment of evidence in international arbitration. This article discusses the interaction and its impact on assessing evidence.

## 1. Evidential matters during trial

Assessing evidence is one of the major issues in international arbitration. In arbitration, the means of evidence through which parties establish their cases are categorised into documentary evidence; witness evidence (which may be written and or oral); expert evidence (which may also be written and or oral); inspection of the object of dispute or visit of the *locus in quo* – this may include an inspection of works, of items manufactured or produced, of a piece of machinery and so on. In the course of determining whether a party established through evidence the facts it relied on the question of assessing evidence arises. It is in the context of admissibility, standard of proof, burden of proof and weight that the duty of assessing evidence is exercised.

### 1.1. Admissibility

It is a rule of evidence that evidence should be given of facts in issue and facts relevant to facts in issue. Hence, admissibility is based on the relevance of the evidence to the facts in issue or to the facts relevant to the facts in issue. Evidence may also be admissible if it is material or will affect the weight of other evidence tendered or admitted. An evidence though relevant may be excluded if it is: considered to be too remote to be material in all the circumstances of the case<sup>5</sup>; privileged; oral evidence to add, vary or subtract from a written document or an agreement reduced into writing except fraud is alleged; and if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or the evidence might mislead or result in undue waste of time<sup>6</sup>.

Various national laws provide in great details sophisticated and tested rules of evidence including rules on admissibility which their national courts must, and do, apply in determining disputes litigated

<sup>2</sup> TAPPER, C. *Cross & Tapper on Evidence*. 12<sup>th</sup> Edition. Oxford: Oxford University Press, 2010, p. 1.

<sup>3</sup> NOKES, G. D. *An introduction to Evidence*. 4<sup>th</sup> Edition. London: Sweet and Maxwell, 1967, p. 6.

<sup>4</sup> UNCITRAL Model Law on International Commercial Arbitration, 2006, Article 19(1); Arbitration Act, (UK) 1996, s. 1(b).

<sup>5</sup> Evidence Act, CAP E.14, Laws of the Federation of Nigeria, 2011, s.1 (A).

<sup>6</sup> HODGE, M. M.; et al. *Phipson on Evidence* <...>, p. 189.

before them. In arbitration, parties are to agree on the specific rules of evidence and or the rules for taking evidence and unless parties agree to follow a particular set of evidentiary rules provided by a national law or a nation's evidence act such national law will be inapplicable. Thus, if the parties have not agreed on the rules of evidence inclusive of rules of admissibility that will be determined by the arbitral tribunal. By reason of section 15(2)–(3) of the Arbitration and Conciliation Act, CAP A.18 Laws of the Federation of Nigeria, an arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence tendered before it<sup>7</sup>.

Institutional Arbitration Rules and International Conventions as well confer on arbitrators the discretion to determine admissibility of evidence. International Centre for Settlement of Investment Disputes (ICSID), for example, provides in its Rule 34(1) that the tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value. While Article 27(4) of the UNCITRAL Arbitration Rules, 2010 and Article 9.1 of the IBA Rules on the Taking of Evidence in International Arbitration, 2010, provide that the tribunal shall determine the admissibility, materiality, and weight of evidence<sup>8</sup>.

Though various national laws and institutional arbitration rules give arbitrators the discretion to determine the rules of evidence or admissibility, they do not provide guidelines to enable arbitrators exercise their discretion. Therefore, the rules governing admissibility as provided in national laws, or applied by national courts, may be followed as far as possible. An Arbitral Tribunal may however deviate from them<sup>9</sup> provided that in doing so it did not disregard the substance of justice and it must not admit or act upon evidence that is obviously inadmissible. For example, an Arbitral Tribunal must ensure that it did not admit an evidence obtained in a manner that is contrary to public policy, or an evidence which its authenticity is doubtful or questionable, or an evidence which is protected by a privilege or a secret.

However, it may be asked, which country's law or rules of evidence will a tribunal apply? Is it that of the country whose substantive or procedural laws applies to the arbitration? These questions would not arise if both the law governing the substantive dispute and procedure are of the same country. Where these questions arise, it is submitted that the evidence law of the country whose law governs the substantive dispute shall apply<sup>10</sup> because the possibility of a procedural law of arbitration not being that of a state is higher than the substantive law. Also, institutional arbitration rules do not provide for rules of admissibility; determination of the applicable substantive law is easier than in determination of the applicable procedural law particularly if this is not determined by the parties at the time of an arbitration agreement.

In contrast to national laws and conventions, the IBA Rules on Taking Evidence in International Arbitration provides some guidelines on admissibility<sup>11</sup>. The applicability of the IBA guidelines on

<sup>7</sup> See also First Schedule, Rules of Arbitration, article 25(6), Arbitration and Conciliation Act, CAP A.18 Laws of the Federation, 2004; UNCITRAL Model Law on International Commercial Arbitration, 2006, article 19(1) and (2).

<sup>8</sup> The authority of Arbitral Tribunals to determine admissibility is also affirmed by case laws. See for example, *Duke Energy International Peru Investments No.1, Ltd & Others v. Republic of Peru*, ICSID CASE No. ARB/03/28.

<sup>9</sup> Arbitral Tribunals are not bound to adhere to strict judicial rules of evidence or national laws on or of evidence as are applicable in litigation except, when chosen by the parties. See *Tradex Hellas SA v. Republic of Albania*, ICSID CASE No. ARB/94/2, Decision on jurisdiction of 24<sup>th</sup> December 1996 and Award of April 1999, cited in O'MALLEY, N. D. *Rules of Evidence in International Arbitration: An Annotated Guide*, Oxon: Informa Law from Routledge, 2014, p. 195; *Technical knowhow buyer P v. Engineer/seller A*, Final Award in ICC Case No. 7626 of 1995, in Albert Jan Van den Berg (ed.) *Yearbook Commercial Arbitration*, 1997, Vol. xx11, p. 132.

<sup>10</sup> The Rome Convention on the Law Applicable to Contractual Obligations, 1980, in its Article 10 supports the substantive law approach and many arbitrators adopted this approach. It must be noted that under common law, in conflict of law situations, certain rules of evidence or some aspects of evidence are classified as substantive to be determined by the *lex causae* while some are classified as procedural to be determined by the *lex fori (the forum)*, save in cases of legislative intervention.

<sup>11</sup> IBA Rules on the Taking of Evidence in International Arbitration, 2010, article 9(2)

admissibility is not automatic. It depends on whether it is chosen by the parties or by a tribunal. Where it is applicable, any of the reasons provided by the guideline would be sufficient to render any evidence inadmissible.

International Arbitral Tribunals do not adopt technical evidentiary rules applicable in litigation in national courts<sup>12</sup> except when chosen by parties. As a result they apply few rules to exclude evidence. In this circumstance, arbitrators have broad discretion to determine what evidence should be admitted. In determining this, arbitral tribunals are bound by the obligation that the parties are heard equally<sup>13</sup> and to avoid a possible substantiation of any likely allegation that a party was unable to present his case, as this will constitute a ground for refusing recognition and enforcement of an award<sup>14</sup> rendered therein. Arbitrators are therefore flexible on matters of admissibility. Consequently, arbitrators tend to err towards permitting parties to present whatever evidence they have but rather deal with the evidence at the stage of assessing the weight to be given to it. For example, it is at the stage of determining weight or probative value that a tribunal discovers that a statement by a witness may be that of another who was not called as a witness.

Determining admissibility at the stage of assessment rather than at the time of presentation would mean that parties will not be involved at this stage. Evidence is assessed after trial but during a tribunal's preparation of an award or analysis of facts in order to ascertain which is more probable. At this stage, none of the parties will be in attendance and as such cannot raise the issue of inadmissibility of any evidence. The tribunal will in the circumstance raise the point *suo motu* and will rely on his knowledge and expertise without the parties' input. It will be contrary to the principles of fair hearing if a tribunal determines an issue or a point not raised by the parties or investigates any matter with his personal expertise without inviting the parties "to be heard on the issue"<sup>15</sup>. This may constitute a valid ground for setting aside any award rendered thereto, particularly if, in the circumstance, a tribunal excludes a relevant evidence or admits inadmissible evidence<sup>16</sup>.

## **1.2. Standard of proof**

Standard of proof refers to the quantum of proof required of a party for his case to succeed, or put differently, it refers to the extent by which the weight or quality of the evidence adduced by a party must exceed that of his opponent in order for that party to discharge the burden of proof that lies on him<sup>17</sup>. It is also the degree or level of proof demanded in a specific case<sup>18</sup>.

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<sup>12</sup> Hearsay evidence, may not be excluded in international arbitration but arbitral tribunal will attach little or no weight to it. See ICC case No. 12124 in ICC Bulletin, Special Supplement: Decisions in ICC Arbitration Procedure, 2010, p. 33–34.

<sup>13</sup> Arbitration and Conciliation Act, CAP A.18, Laws of the Federation of Nigeria, 2004, s. 14 makes it mandatory that parties are treated equally and given full opportunity of presenting their respective cases. See also UNCITRAL Model Law on International Commercial Arbitration 2006, article 18.

<sup>14</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention, 1958, Article V (1)(b).

<sup>15</sup> *Triana Ltd v. U.T.B. Plc* [2009] 12 N.W.L.R. (Pt. 1155) 313 at 336–337.

<sup>16</sup> *Compt. Comm. & Ind. Ltd. V. O. G. S. W. C.* [2002] 8 NWLR (Pt. 773) 629 at 656 para. G. However, it should be noted that an Arbitral Tribunal may refuse to admit evidence, without violating the right to be heard, if the evidence is insufficient to substantiate a contention, if the fact to be proven has already been established, if it lacks relevance or yet if the tribunal, having conducted an anticipatory evaluation of the evidence, comes to the conclusion that it is already convinced and the result of the requested probative measure would not modify its decision: "7 Janvier 2001 – Tribunal Federal, Ire Cour Civile (4P. 196/2003)" ASA Bulletin (2004) vol. 22, No. 3 pp. 592, cited in O'MALLEY, N. D. *Rules of Evidence* <...>, p. 269.

<sup>17</sup> NWADIALO, F. *Modern Nigerian Law of Evidence*. 2<sup>nd</sup> Ed. Lagos: University of Lagos Press, 1999, p. 417.

<sup>18</sup> GARNER, B. A.; et al. *Black's Law Dictionary*. 7<sup>th</sup> Ed. West Group, 1999, p.1413.

The standard of proof in civil cases is preponderance of evidence or balance of probabilities<sup>19</sup> while that in criminal cases is beyond reasonable doubt<sup>20</sup>. Balance of probabilities, in the circumstance, means that the evidence adduced by a party when compared with that of the other is more probable or that the claim is more likely than not true. However, if in a civil action one of the parties alleges commission of a crime, the standard of proof required is beyond reasonable doubt<sup>21</sup>, although within the standard of proof in civil cases the degree of probabilities varies.

The more serious an allegation the higher the degree of proof required, but it would not reach the standard of proof required in criminal cases. A civil court when considering a matter of fraud, will naturally require a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion<sup>22</sup>.

These principles of law are common law rules, which are also enacted as national laws by various common law countries. For example, in Nigeria, it is provided in the Evidence Act. The question then is, in arbitration, who determines the standard of proof and what standard of proof applies in establishing cases therein? Various national arbitration laws, institutional arbitration rules and conventions confer on arbitrators the power to determine the standard of proof. The Nigerian Arbitration and Conciliation Act in its section 15 (3) and Article 19.2 of the UNCITRAL Model Law on International Commercial Arbitration, for example, empower arbitral tribunals to determine the weight<sup>23</sup> of any evidence adduced before it.

Given that actions in arbitration are civil, the standard of proof adopted in most legal systems particularly in the common law countries is the balance of probabilities and in the civil law jurisdiction an inner conviction as to the facts or is the evidence sufficient to convince me. The standard of proof in common law and civil law jurisdictions is seen as having a little difference<sup>24</sup>. Consequently, the standard usually applied in international arbitration is balance of probability<sup>25</sup>. However, where there is an allegation of fraud or bribery, several arbitrators applied a higher degree of probabilities. The tribunal in *Westinghouse International Company v. National Power Corporation*<sup>26</sup>, for example, found that the standard of proof in USA in civil cases with an allegation of fraud is “clear and convincing evidence” which is a higher degree of probability and accordingly applied that standard therein.

By the doctrine of party autonomy, parties are to agree on the standard of proof necessary in their respective cases<sup>27</sup>. A tribunal’s right to decide the standard of proof arises where the parties failed to agree on this<sup>28</sup>. Though arbitrators are conferred with the right by national arbitral laws and conventions, none of the laws or conventions provide the stage at which arbitrators would do this.

The question of the level of proof which a party’s evidence must meet in order to exceed that of his opponent and to discharge the burden of proof on that party will arise and be determined by the tribunal

<sup>19</sup> *Amukamwo v. Audu* [1985] 1 NWLR (Pt.3) 530; *Odulaja v. Haddad* [1973] 11 SC 357.

<sup>20</sup> Evidence Act, Cap E.14, Laws of the Federation of Nigeria, 2011, s. 135(1); *Woolmington v. D.P.P.* (1935) A.C.462.

<sup>21</sup> Evidence Act, CAP E.14, Laws of the Federation of Nigeria, 2011, s. 135 (1).

<sup>22</sup> *Board of Customs & Excise v. Barau* [1982] 10 SC 23 (Reprint) at p. 43–44 lines 20–25.

<sup>23</sup> Weight of evidence in legal parlance refers to and or is determined by the standard of proof.

<sup>24</sup> PATOCCHI, P. M.; MEAKIN, I. L. Procedure and the Taking of Evidence in International Commercial Arbitration – The Interaction of Civil Law and Common Law Procedures. *International Business Law Journal*, 1996, Vol. 7. p. 889.

<sup>25</sup> *Ioannis Kardassopoulos & Others v. The Republic of Georgia*, ICSID case No. ARB/05/18, Award of 3<sup>rd</sup> March, 2010 – available at [www.encharter.org/.../Award\\_-\\_Ioannis\\_kardassopoulos\\_vs\\_Georgia.pdf](http://www.encharter.org/.../Award_-_Ioannis_kardassopoulos_vs_Georgia.pdf) [Access on 10<sup>th</sup> June, 2015]. See also ICC case No. 12596, Final Award, in ICC Bulletin (2010) vol. 21 (No. 1) pp. 84–85 and host of others. Note however that arbitral decisions are not precedent to other arbitral tribunals, though, they may be of persuasive authority.

<sup>26</sup> ICC CASE NO.6401 – cited in Mealey’s *International Arbitration Report* (1992) 3; 1. p 17 & 18.

<sup>27</sup> UNCITRAL Model Law on International Commercial Arbitration, 2006, Article 19(1).

<sup>28</sup> UNCITRAL Model Law on International Commercial Arbitration, 2006, Article 19(2).

at the time of making an award – being the appropriate stage of weighing the evidence presented by the parties. At this stage, parties would have presented their evidence without knowing the required standard of proof. A tribunal determining at this stage, without the parties' input, the level of proof a party's case will meet to succeed, and whether it met it, would be contrary to the tenets of fair hearing and fair trial. In litigation, unlike in arbitration, rules of evidence, including standard of proof, are statutorily provided. This gives any party intending to litigate an opportunity to know, even before commencing a suit in the court, the standard of proof required for its case to succeed.

### **1.3. Burden of proof**

This means the burden or obligation to establish a case. It is an obligation on a party, in civil cases, to persuade a tribunal on preponderance of evidence that the material facts which constitute his entire case are true and consequently to have the case established and an award rendered in his favour. This burden is usually called the general burden, burden on the pleadings, legal burden, and persuasive burden<sup>29</sup>.

The term burden of proof also means the burden to adduce evidence on a particular fact or issue and this is known as evidential burden. It is in this sense that the term is more generally used. Under this, evidence adduced must be sufficient to prove the fact or issue. Unlike the burden on pleadings, this burden is not static. It shifts from one party to the other. By this, when a party on whom evidential burden lies has discharged that burden by adducing the requisite evidence on the particular fact, then the evidential burden shifts to the opponent to either disprove the fact or neutralise the evidence by proving other facts<sup>30</sup>.

Therefore, with regard to proof of allegations by the parties in the course of proceedings, the burden of proof rests upon each party in relation to the fact it alleged<sup>31</sup>. Thus, while the initial burden of proof lies exclusively on the party whose claim will fail – the claimant – if no evidence is given, both parties are under procedural duty to adduce evidence of the existence of facts alleged by reason of the evidential rule of he who asserts must prove<sup>32</sup>.

The evidential rule that he who asserts must prove applicable in common law jurisdictions also applies in arbitration. To this end, Article 24(1) of the First Schedule to the Arbitration and Conciliation Act, CAP A.18 Laws of the Federation of Nigeria provides that “each party shall have the burden of proving the facts relied on to support his claim or defence”<sup>33</sup>. The UNCITRAL arbitration rules, which most countries have adopted, also provide that each party shall have the burden of proving the facts it relied on in support of its claim or defence<sup>34</sup>.

Neither Article 24 (1) of the First Schedule, Arbitration Rule of the Arbitration and Conciliation Act nor Article 27 (1) of the UNCITRAL Arbitration Rules provides for shifting of burden of proof. Shifting of burden of proof does not, however, mean that the parties take alternate turns in unlimited or unrestricted succession in proving and disproving the facts relied on in support of their respective cases. As a general rule, each party has only a chance to present his case in its entirety, except, where there is a surprise by either of the parties, which a tribunal allows. This is because through pleadings parties know before trial the various issues involved and on whom the onus of proving or adducing

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<sup>29</sup> Lord Denning. Presumptions and Burdens. *Law Quarterly Review*, 1945, vol. 61, p. 379.

<sup>30</sup> *Felix O. Osawaru v. Simeon O. Ezeiruka* [197] 6–7 SC 135 at 145.

<sup>31</sup> *Asian Agricultural Products Ltd. (AAPL) v. The Republic of Sri Lanka*, ICSID case No. ARB/87/3, final award of 27 June in Albert Jan Van den Berg (ed.), *Yearbook Commercial Arbitration* (1992) vol. xvii p. 121.

<sup>32</sup> O'MALLEY, N. D. *Rules of Evidence <...>*, 2014, p. 203; UNCITRAL Arbitration Rules, 2010, article 27(1).

<sup>33</sup> The exception to this being admissions or notorious propositions that requires no proof.

<sup>34</sup> UNCITRAL Arbitration Rules, 2010, article 27 (1).

evidence lies in respect of every issue. A party must as a result, at the time of presenting its case, adduce *prima facie* evidence necessary to enable it discharge the burden cast on it on every issue and to discredit his opponent's case.

Burden of proof may be shifted by contractual rules and standards and by asserting in defence the affirmative of an issue. It is trite that the burden of proof is on a party who asserts the affirmative of an issue and this is because a negative is more difficult to establish than the affirmative<sup>35</sup>. Thus, in *Marvin Feldman Karpa v. United Mexican States*, ICSID case No. ARB/99/01, final award of 2002, the tribunal held that: "Various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."<sup>36</sup>

It may however, be presumed that article 27 (1) of the UNCITRAL Arbitration Rules presupposes the existence and applicability of the doctrine of shifting of burden of proof in arbitration given that by the necessity to call contrary evidence, the evidential burden of proof shifts to the opponent. The necessity of this presumption is inferable from the trite principle that a tribunal's failure to determine rightly on which party the burden of proof lies is a veritable ground for setting aside an award as same constitutes an error in law<sup>37</sup>. The consequences of an error on the part of a tribunal as to where or on whom the burden of proof lies can be grave and devastating and such an error is bound to affect the tribunal's view of the evidence. Such a misdirection can affect credibility of a witness and as well lead to a miscarriage of justice<sup>38</sup>.

Should the presumption be rebuttable or not permissible, parties must under the rules of fair hearing be allowed a reasonable opportunity of meeting their opponents' case, particularly in a circumstance where a contrary evidence is necessary to discredit or disprove an opponent's case.

#### **1.4. Weight**

This refers to the probative value or cogency of evidence. Once a piece of evidence is admitted, the tribunal will consider what weight to attach to it, and what it proves in the context of the issues in controversy between the parties. The fact that a piece of evidence, oral or documentary, is admissible does not mean it has weight, it may not have any probative value.

The weight to be attached to evidence is a matter of inference to be drawn from established facts<sup>39</sup>. There is no canon for weighing evidence and drawing inferences from it. It depends mainly on common sense, logic and experience<sup>40</sup>. Each case presents its own peculiarities and in each case, common sense and shrewdness must be brought upon facts elicited which a judge of facts has to weigh and decide<sup>41</sup>.

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<sup>35</sup> MALEK, H. M. & AUBURN, J.; et al. *Phipson on Evidence* <...>, p. 151.

<sup>36</sup> *Marvin Feldman Karpa v. United Mexican States*, ICSID case No. ARB/99/01, Final award of 2002, para. 177.

<sup>37</sup> *Milan Nigeria Ltd. v. Angeliki B. Maritime Company* [2011] EWHC 892 (Comm.) at paras 14 and 23–24. There, the English High Court, per Mrs. Justice Gostier, DBE, set aside an arbitral award on the basis that the tribunal adopted the wrong approach to the burden of proof – it identified the burden of proof of establishing the cause(s) of the damage as being placed on Milan.

<sup>38</sup> *Sanusi v. Amoyegun* [1992] SCNJ 177 at 189–191.

<sup>39</sup> *Udeze v. Chidebe* [1990] 1 NWLR (Pt. 125) 141 at 160 per Nnaemeka Agu J.S.C.

<sup>40</sup> MALEK, H. M.; et al. *Phipson on Evidence*, <...>, p. 196.

<sup>41</sup> *R. v. Madhub Chunder* [1874] 21 W.R. Cr. 13 at 19 per Birch J.

Though there is no canon for weighing evidence, there are in existence some judicial and statutory guidance which may be followed. Thus, in estimating the weight, if any, to be attached to a statement rendered admissible as evidence, regard may be had to all the circumstances drawn as to accuracy or otherwise of the statement, and in particular: to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent fact<sup>42</sup>; and in the case of a statement contained in a document produced by a computer, the question whether or not the information which the statement contained, reproduces or is derived from, was supplied to it contemporaneously with the occurrence or existence of the facts dealt with in that information and whether the person supplying the information had any incentive to conceal or misrepresenting facts<sup>43</sup>.

Before a tribunal prefers the evidence of a party to that of the other, it must after a summary of all facts, put the two sets of evidence – the parties' evidence – on an imaginary scale and then weigh them together and establish which is heavier. The evidence that will go onto the scale and be compared are credible evidence, usually evidence of the same quality. Direct evidence, for example, cannot be compared with hearsay or speculative guess work<sup>44</sup>. The weighing of evidence on an imaginary scale is only applicable in civil matters and in determining which is heavier, the tribunal will have regard to whether the evidence is admissible, relevant, credible, conclusive, and whether it is more probable than that given by the other party<sup>45</sup>.

The above enunciated principles being principles that emerged from judicial decisions and statutes which arbitral tribunals are not bound to apply, save by parties' choice, it follows that arbitrators will rely on their common sense, logic, experience and shrewdness in ascribing weight to any piece of evidence<sup>46</sup>.

Arbitral tribunals tend to rely more on documentary evidence particularly documentary evidence existing and relating to the time of dispute. Consequently, tribunals attach more weight to the best evidence obtained from contemporary documents. As regarding oral testimonies, tribunals attach more weight to testimonies that are tested through the rigours of cross-examination or that of a witness examined by the tribunal itself, and less weight to uncorroborated oral testimony.

An indispensable condition of arbitration is party autonomy. Parties are by statute, rules and conventions free to agree on the procedure or rules to be followed in their arbitration including the rules of evidence vis-a-vis the weight to be attached to evidence or how to determine the weight to be attached to evidence and failing such agreement the power is conferred on the tribunal<sup>47</sup>. Given the dominance and role of party autonomy in arbitration, and that in weighing evidence and drawing inferences from it, there are no fixed rules but rather it depends mainly on common sense, logic, experience and shrewdness of the arbiter; the question is, would parties agree on weight of evidence and how would they arrive at that? It is submitted that given the nature of this area of arbitration, in practice, parties do not usually agree on the weight or how to determine the weight to be attached to evidence gathered and presented in their arbitration.

Consequently, arbitral tribunals are usually left with the duty of deciding the weight or how to determine the weight that will be attached to the evidence presented to them. The issue of weight is

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<sup>42</sup> Evidence Act (Nigeria) 2011, s. 34(1)(a).

<sup>43</sup> Evidence Act (Nigeria) 2011, s. 34 (b)(i)(ii).

<sup>44</sup> *Ekwunife v. Wayne (WA) Ltd* [1989] 5NWLRL (Pt. 122) 422 at 438.

<sup>45</sup> *Mogaji v. Odofin* [1978] 4SC 91 at 93–95.

<sup>46</sup> Some Principles which international arbitral tribunals have considered and applied in weighing evidence may be a guide, particularly those that have been upheld by courts upon Challenge, although there is no *stare decisis* in arbitration but decisions of arbitral tribunals are of persuasive guidance on similar matters. For some of the principles applied by international arbitral tribunals, see O'MALLEY, N. D. *Rules of Evidence* <...>, p. 199–201.

<sup>47</sup> UNCITRAL Model Law to International Commercial Arbitration, 2006, Article 19(1) & (2).

determined at the time of assessing evidence. This is done at the completion of and closing of trials when parties and their attorneys are dispersed.

It is beyond dispute that arbitrators rely on their common sense, shrewdness, experience and logic in deciding the weight to be attached to a piece of evidence since there is no hard and fast rule to be followed. An arbitrator relying on his expertise or skill to determine an issue or a dispute between parties may be contrary to the rules of fair hearing if an arbitrator does that without informing the parties and allowing them the opportunity to contribute to or address the tribunal either negatively or positively on the issue before resorting to the use of his expertise<sup>48</sup>.

An arbitrator inviting parties to contribute to the use of his expertise and skill in determining the weight to be attached to their evidence may disrupt arbitration and or will occasion delay and increase costs in terms of the arbitrator's fee and the cost of legal representation. A party may in the process discover that no weight or that a lesser weight may be attached to its evidence and may as a consequence seek to amend its pleadings and tender fresh evidence. Consequently, parties may re-open their respective cases. Arbitral tribunal may, if it considers it necessary owing to exceptional circumstance, after trial is closed decide either on its own or upon an application by a party to re-open hearing at any time before an award is made<sup>49</sup>. This may mean that there is no end to arbitration contrary to the public policy expressed in the legal maxim *interest reipublicae ut sit fioris litium*<sup>50</sup>.

## 2. Recommendation

Non observance of party autonomy and or rules of fair hearing in admitting and assessing evidence, or in determining whether a party has discharged the burden of proof that lies on it, or in determining whether the evidence meets the level of proof required by a tribunal may result in an award being set aside on any of these grounds. Given the stage at which a tribunal decides the issue of admissibility, weight, standard and burden of proof, as is shown above, it may be extremely difficult if not impossible for an Arbitral Tribunal to observe rules of fair hearing in determining the aforesaid evidential issues. To obviate the likely breach of fair hearing and its consequences on award, it is recommended, with effect to admissibility, that an Arbitral Tribunal should allow or prompt parties to raise the issue of admissibility at the time of presentation of evidence but will determine that at the assessment stage; or the tribunal may, at the assessment stage, invite the parties to address the tribunal either orally or in writing in respect of admissibility of any given evidence, although inviting the parties at this stage may occasion delay and increase in costs.

With regards to standard of proof, it is preferable and thus advisable that arbitral tribunal inform the parties at the onset of the level of proof their evidence should satisfy for their case to succeed. Although, the question of level of proof will arise and be determined by the tribunal at the time of making the award – being the appropriate time of weighing the evidence adduced by the parties – informing the parties at the beginning will enable them prepare their cases and decide the type of evidence to present.

Concerning the question of shifting of the burden of proof, it is opined that the tribunal gets the parties to agree at the preliminary stage whether the burden of proof should shift where a contrary evidence is necessary to discredit or disprove an opponent's case, particularly where a set of evidence

<sup>48</sup> MBADUGHA, J. N. M. (2015) *Principles and Practice of Commercial Arbitration*. Lagos: University of Lagos Press, p. 137.

<sup>49</sup> MBADUGHA, J. N. M. *Principles and Practice* <...>, p. 198.

<sup>50</sup> This is an important judicial policy – public policy – that there should be an end to litigation [arbitration] for the common good. See the cases of *Yusuf v. Adegoke* [2007] 11 NWLR (Pt. 1045) SC 332; *Akande v. Nigerian Army* [2001] 8 NWLR (Pt. 714) 1 at 19.

was not contemplated or made known by pleadings. If the parties failed to agree on this, it is advisable that a tribunal allows a party to present a contrary evidence at the appropriate situation, if a party so request.

With respect to weight, given the intricacies associated with determining the weight of evidence or attaching weight to evidence, it is suggested that a tribunal should give the parties the opportunity of determining the weight to be attached to their evidence with a *proviso* that parties' failure to agree on that constitutes a waiver of their right to objecting – on grounds of fair hearing or on any ground whatsoever – to a tribunal deciding that without their input. Alternatively, rules of arbitration, convention and national statutes may be amended to the extent that an arbitrator determining the weight of evidence when the parties failed to agree on that does not amount to a breach of duty of fair hearing.

## Conclusion

Arbitration rules and laws give broad authority to arbitrators regarding burden of proof, standard of proof, admission and weighing of evidence. However, they neither provide the procedure for admission and evaluation of evidence nor provide any criteria for determining the burden and standard of proof, admissibility and evaluation of evidence.

In deciding the burden and standard of proof as well as admissibility and evaluation of evidence, arbitrators have to grapple with the doctrine of party autonomy and rules of fair hearing. As shown above, it is extremely difficult, if not impossible, for an arbitral tribunal in the circumstance not to breach either or both doctrines with the likely consequences of the tribunal's award being set aside. However, if the recommendations proffered above are followed, a tribunal will obviate the likelihood of breaching any of the rules and thus save its award from being set aside for breach of fair hearing and party autonomy.

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