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Hearsay Evidence in Nigerian Arbitrations: Admissible or Inadmissible?

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Abstract

Recently, in an arbitration, opposing counsel argued strenuously that our witness' testimony was inadmissible because that testimony contravened the hearsay rule. Testimony will be considered hearsay where it is given by a person other than an eyewitness and its object is to prove the truth of a statement. Being an arbitral proceeding, that argument was not only shocking to us but was also considered untenable by the tribunal. In this piece, we have considered the position of Nigerian law on the admissibility or otherwise of hearsay evidence in arbitral proceedings and have concluded that unless otherwise expressly agreed by the parties or ordered by the arbitral tribunal, there is nothing rendering inadmissible hearsay testimonies in arbitrations.

Introduction

Hearsay evidence is the evidence of a witness who is not giving an account of his personal experience but reporting speech heard by him from another who may or may not be an eyewitness. The bases of the inadmissibility of "hearsay" testimonies in Nigeria are largely derived from two sources of law – the Evidence Act, 2011 ("the "**Evidence Act**") and case law authority, particularly the decision of the Judicial Committee of the Privy Council (the "**Privy Council**") in *Subramaniam v. Public Prosecutor* (1956) 1 WLR 965 ("***Subramaniam***"). The Privy Council, which until October 1, 1963, was Nigeria's apex Court, in *Subramaniam,* defined the scope of hearsay evidence as

> "*Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."*

Subramaniam still remains a good authority on hearsay today and has been widely cited by superior courts of record in Nigeria, both before and after the promulgation of the Evidence Act (including the repealed Evidence Acts).

The Evidence Act section 37 explains "hearsay" to mean "*oral or written statement made otherwise than by a witness in a proceeding; or (b) contained or in a book, document or any record whatever, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it*". This means hearsay could be oral or documentary. Evidence Act section 38 renders hearsay evidence inadmissible in proceedings.

Hearsay Evidence in Arbitrations

Having established the two legal roots for the inadmissibility of hearsay testimony in litigation proceedings in Nigeria, it is pertinent to consider to what extent these two bases apply to arbitral proceedings. Evidence Act section 256 provides that "*this Act shall apply to all judicial proceeding in or before any court established in the Federal Republic of Nigeria but it shall not apply to (a) proceeding before an arbitrator*". Therefore, an argument that a witness' testimony in arbitration offends the hearsay rule under the Evidence Act is not only misplaced but fallacious. This position of law is settled and generally accepted by arbitration practitioners.

If we may stretch this a little further, rules of litigation are generally not admissible in arbitration. Therefore, case-law principles in litigation on the inadmissibility of hearsay evidence in litigations are generally inapplicable in arbitrations. In *Celtel Nigeria BV v. Econet Wireless Limited* (2014) LPELR – 22430 (CA), the Court held that

> "*an Arbitral Tribunal is by nature an informal adjudicatory body lacking the sophistication and technical know-how of Judges of regular Courts. Arbitral Tribunals are also not bogged down in the procedural trappings of regular Courts. Arbitral proceedings are, therefore, treated with a broad, liberal/open mind leaning on the side of dynamism, commercial sense, latitude and common sense. In other words, arbitral proceedings are not to be subjected to scrutiny with the finesse of a toothcomb*".

For the foregoing reasons, it is untenable to argue that evidence in arbitration is inadmissible based on case-law authorities (such as Subramaniam) and the Evidence Act. Suffice it to say that all the judicial decisions in Nigeria on the hearsay rule stem from either of these two sources of law, and as such, all those decisions are not relevant or binding on an arbitral tribunal.

Why Hearsay Evidence Should be Admissible in Arbitrations

First, apart from our contention on the absence of any statutory or case-law bases rendering inadmissible hearsay testimony in arbitrations, our position is strengthened by the fact that arbitration aims to minimize formalism and technicalities but maximize efficiency and opportunities to be heard. *Celtel Nigeria BV v. Econet Wireless Limited* (*supra*). Therefore, the arbitral tribunal needs as much evidence as possible to be able efficiently and fairly to resolve the dispute submitted before it, and it should not be deprived of the pleasure of considering every relevant testimony or document simply based on the hearsay rule in court litigation.

Second, the Arbitration and Conciliation Act, 1988 (the "**Arbitration Act**"), in its long title, describes itself as "*an Act to provide a unified legal framework for the **fair and efficient settlement of commercial disputes by arbitration** and conciliation; and to make applicable the Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention) to any award made in Nigeria or in any contracting State arising out of international commercial arbitration*". (Emphasis ours.) The long title of a statute is now accepted as important enough to be relied upon in explaining its general scope. *Bello v. AG Oyo State* (1986) LPELR – 764 (SC), (1986) 5 NWLR (Pt. 45) 828; *UAC of Nigeria Plc. v. AG of Lagos State* (2010) LPELR – 5038 (CA).

Third, the basis of any arbitration is a written agreement of the parties to submit their dispute to arbitration. Arbitration Act section 1. The Arbitration Act allows parties in their arbitration agreements to decide the rules and procedure for taking evidence in their arbitrations. Arbitration Act section 19(2). Based on this, the parties may agree that hearsay evidence will not be admissible in any arbitral proceedings arising from their dispute.

Fourth, in the absence of any agreement by the parties, and considering that both the Arbitration Act and the Arbitration Rules annexed to the Arbitration Act do not make any provisions on the admissibility or otherwise of hearsay evidence in arbitrations, the tribunal is empowered by Arbitration Act section 15(2) to "*conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing*". Such power is so wide that it enables the tribunal to "*determine admissibly, relevance, materiality and weight of any evidence placed before it*". Arbitration Act section 15(3). See also Arbitration Act section 20, Arbitration Rules articles 15 and 25(6).

Therefore, an arbitral tribunal may rule that hearsay evidence be admissible or otherwise. The foregoing has also been confirmed by Prof. Idornigie in his book, "Commercial Arbitration Law and Practice in Nigeria 2015", where he confirmed at page 236 that "*the Evidence Act is not applicable to arbitral proceedings*" but

the arbitrator "*shall conduct the arbitral proceedings in such a manner as it considers appropriate so as to ensure fair hearing*".

Fifth, the International Bar Association Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**") do not consider hearsay testimonies as inadmissible in arbitrations. IBA Rules article 9 gives the tribunal the power to determine the "*admissibility, relevance, materiality and weight of evidence*". IBA Rules article 9(2) specifically lists certain instances in which the tribunal either on its own motion or at the request of a party may exclude any document or oral testimony from evidence. Most of those instances border on relevance, confidentiality, unreasonableness and so on.

Conclusion

We maintain that the principles governing the inadmissibility of hearsay evidence in litigation do not apply to arbitration. However, this does not mean that hearsay evidence cannot at all, under any circumstances, be inadmissible in arbitral proceedings. The parties may by agreement hold that hearsay evidence should be inadmissible in their arbitral proceedings, and in the absence of that, the tribunal may make directions as to admitting or excluding evidence in the interests of fairness and efficiency. Our opinion, however, is that arbitral proceedings should not be clogged by the rigid, technical, and statutory and case-law principles applicable to litigation. The aim of arbitration is to allow the arbitrator to have as much information and facts possible to enable an effective, fair and effectual resolution of the disputes before it.

Authors

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