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The Applicability of Arbitration in *Abuja Environmental Protection Board v Mahaj Nigeria Limited* Viz-A-Viz The 'Doctrine of *Volenti Non-Fit Injuria*' in Arbitration Matters

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Abstract

Recently, the Court of Appeal in the case of Abuja Environmental Protection Board v Mahaj Nigeria Limited CA/ABJ/CV/200/2020 applied the doctrine of *volenti non fit injuria* which has its origin in tort law to arbitration. It is clear that this doctrine did not emanate from arbitration. This case was juxtaposed with the award in the case of *Process and Industrial Developments Ltd v The Ministry of Petroleum Resources of The Federal Republic of Nigeria.* The paper is an attempt to examine the scope of the applicability of the doctrine of *volenti non fit injuria* when tested in arbitration matters. The paper adopts the doctrinal methodology by reviewing case laws on the subject, opinion of authors and statutory provisions. The paper examined the meaning, nature and types of arbitration in order to discover whether any aspect of arbitration excluded the doctrine of volenti non fit injuria. The paper went further to dichotomise the peculiarities of arbitration when juxtaposed with litigation. The paper also examined the case *of Abuja Environmental Protection Board v Mahaj Nigeria Limited* especially as it relates to the argument of counsel in the case and the opinion of the coram with respect to the applicability of the doctrine under focus. The paper recommends a way of deepening the jurisprudence of arbitration vis-à-vis other legal doctrines without prejudice to the essence and intent of arbitration.

Keywords: Arbitration, Arbitration clause, Arbitration agreement, Volenti non fit injuria, Arbitration and litigation, Abuja Environmental Protection Board v Mahaj Nigeria Limited

1.0 INTRODUCTION

Prior to the advent of colonialism, Africans settle their disputes in an informal but effective manner. Customs and traditions ensure minimal conflict and communal cohabitation. The crime was somehow low and there exist institutions for the settlement of disputes either between individuals or communities. This has been proven to be effective. Recently, the duration for resolution of disputes in courts through litigation has in certain cases destroyed the *res* or the essence of the parties seeking conflict resolution through the court. For instance, the case of *Dielu v Iwuno & Ors*[1]lasted for 23 years. Despite the best efforts of our

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[1] (1996) 4 NWLR (PT 445) 622

court systems to improve the duration for resolution of civil disputes, the burden of proof in criminal cases, tight budgets, and other factors still create delays of years to bring a case to court in many jurisdictions. Appeals extend the time required to reach a final result still further.[2]

By the demand of the topic under reference, it is expedient to clarify the term "arbitration" while also situating it within the existential reality of *volenti non fit injuria*[3] with specific emphasis on the decision of the Court under reference. In furtherance of the above, the focus will be brought to bear on the suitability of arbitration over litigation and the conclusion will merely restate some cardinal submissions that can be deciphered from the discourse. Recently, the Court of Appeal in the case of *Abuja Environmental Protection Board v Mahaj Nigeria Limited* CA/ABJ/CV/200/2020 examined the scope of application of the doctrine of *volenti non fit injuria* when juxtaposed with submission by parties to the arbitration. The first part of this paper deals with examination of the meaning of the doctrine of *volenti non fit injuria* and arbitration. The second part examines the nature and different types of arbitration while the third part of the paper deals with the P&ID Ltd case and the case of *Abuja Environmental Protection Board v Mahaj Nigeria Limited.*[4] The third part of the paper deals with the scope of the doctrine of *'volenti non fit injuria* in arbitration matters. The paper ends with findings on the scope of the application of the doctrine under discourse vis a vis the views of the coram in the case of *Abuja Environmental Protection Board v Mahaj Nigeria Limited.*[5]

2.0 AN EXAMINATION OF THE DOCTRINE OF *VOLENTI NON FIT INJURIA*

Volenti non fit iniuria, simply put, is a common law doctrine that postulates that if a party willingly puts themselves in a position where harm might occur, knowing that some degree of harm might result, they are not able to bring a claim against the other party in tort or delict. In essence, to a willing person, it is not wrong.[6] The Black's Law Dictionary describes this doctrine as follows: 'This appears to be largely a distinction without a difference, and most courts have made general use of the one term. In its most basic sense, assumption of risk means that the plaintiff, in advance, has given his express consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone."[7] The striking words in the description above are the fact that the courts have been seen to have made 'general use of the term'. This paper by way of contribution to knowledge will delve into whether the doctrine under reference applies in a generic way from the realm of tort to arbitration. The doctrine of *volenti no fit injuria* asserts that primary assumption of risk happens when the

[2] Akinola, O. B., Principles of Law in Practice (Professional Ethics and Skills), (2nd Edn, St. Paul's Publishing, Ibadan, 2017) p. 207
[3] Latin term for 'to a willing person, no harm is done'; a defence of consent under the law of torts.
[4] CA/ABJ/CV/200/2020
[5] Supra
[6] https://www.law.cornell.edu/wex/volenti_non_fit_injuria Accessed 11 October 2022
[7] Bryan A. Garner B. Black's Law Dictionary (Thomson West, 8th edn, 2004) p. 381

plaintiff willingly participates in an activity involving certain inherent risks and encounters one of the inherent risks; the defence is a complete bar to recovery because there is no duty of care to protect another from the risks inherent in a voluntary activity."

3.0 A BRIEF OVERVIEW OF THE MEANING OF ARBITRATION

Arbitration may be described as a process in which a dispute by the consensus of the parties to the contract is submitted to one or more arbitrators who make a binding decision on the dispute. In essence, parties opt for a private dispute resolution procedure instead of going to court. The realm of arbitration which is an interesting sphere in the alternative dispute resolution space has continued to attract the attention of not just the immediate stakeholders, that is legal practitioners, but other professionals, primarily experts have keyed into this robust and encompassing dispute resolution mechanism. The attraction is not just in its suitability among disputing parties but in the fact that it offers a wider latitude with respect to the autonomy of parties to the dispute. Arbitration is not circumscribed by the strict rules of legal practice and this has increased its preference among parties. In arbitration, parties decide the rules that govern the proceedings in so far as those rules do not offend principal legislations, subsidiary rules, and public policy.

The Blacks' Law Dictionary, defined "arbitration as a process of dispute resolution in which a neutral third-party arbitrator renders a decision for hearing at which both parties have an opportunity to be heard."[8] In *Nigeria LNG Limited v African Development Insurance Co. Ltd*,[9] Arbitration was defined *inter alia* as that which arises either out of an agreement between the parties thereto or out of terms of an Act of parliament or some other instrument of statutory force." It is the private determination of the rights and obligations of parties to a dispute by an independent third party who gives a binding decision that can be enforced against an adverse party. Ayeni opined that, although parties are at liberty to agree on the laws and rules of procedure for arbitration, there are established laws and rules of procedure that can be adopted in arbitration locally and internationally.[10] Nigeria for instance has in place the Arbitration and Conciliation Act Chapter A18, Laws of the Federation of Nigeria 2004 (ACA) and the procedural rules made pursuant to it, which is operational in the federation except for states which have their own laws such as Lagos State having The Lagos State Arbitration Law, 2009 (LSAL).[11]

In written agreements, arbitration is activated pursuant to the arbitration clause hitherto contained in the agreement executed by the parties. Arbitration can therefore be voluntary, that is, by the agreement of parties or mandatory (required by law or as directed by a Court). In tandem with the first-mentioned categorization of arbitration, an arbitration agreement may be either an express clause in a contract whereby parties agree to refer future disputes to arbitration or in a separate document (submission agreement) whereby parties agree to

[8] Ibid. (n 4) p. 321
[9] (1995) 8 NWLR (Part 416), p. 677
[10] Oludayo Ayeni, Arbitration in Nigeria: A closer Look. Africa Law Practice NG & Company. www.alp.co Accessed 6 October 2022
[11] *Ibid*.

submit their existing disputes to arbitration. An arbitration agreement is prima facie proof that the parties have consented to the resolution of their dispute by arbitration rather than the state-controlled determination of disputes via a court of competent jurisdiction.

4.0 NATURE OF ARBITRATION

The nature of arbitration has a long history of expansive academic discourse.[12] Arbitration is one of the few alternative dispute mechanisms which is binding between the parties. It is voluntarily compulsory. In order to underscore the binding nature of arbitration, the Supreme Court in the case of *Commerce Assurance Ltd v. Alli*.[13] The arbitration agreement only affects parties to the contract.[14] By its nature, arbitration entails a third-party private person adjudicating the dispute. Arbitration is a consensual submission to adjudication within a defined legal framework which could be either domestic or international. In another dimension, arbitration could be contractual in nature. This occurs when your yardstick for determining the nature of arbitration is based on the fact that the arbitration clause is inclusive of certain contractual obligations and fulfillment is in pursuance of the contract within which the dispute arose.

Unlike other ADR options, the arbitrators exercise their decision-making powers whereas mediation, conciliation are merely persuasive and non-binding. In arbitration, parties agree on the scope and territory of jurisdiction to be exercised over them within the ambit of the law. Inversely, the state by legislation delegates its jurisdictional powers to the arbitrators who exercised same in line with the terms of the arbitration agreement. The parties can influence the choice of forum for the settlement of the dispute. Consequently, the enforceability of arbitration awards cannot be based on the agreement of parties; it is primarily based on the legal framework whereby the state defines the conditions for the enforceability of arbitration awards.[15] In furtherance of the above, Arbitration proceedings occur at a faster rate as compared to litigation; therefore, it saves time for both parties.

5.0 SUITABILITY OF ARBITRATION OVER LITIGATION

Several points have been canvassed by scholars on the suitability of arbitration over litigation. Arbitration by its very nature is antithetical to the rigidity of the state-controlled litigation process. In my considered view, the following are some of the reasons I have found arbitration to be a more suitable and veritable method of dispute resolutions other than litigation:

(a) Arbitration is considered flexible than litigation as little emphasis is placed on legal technicalities and procedures. Parties agree and settle on whatever they want as

[12] Belohlavek A., The Legal Nature of International Commercial Arbitration and its Effects of Conflcits between Legal Cultures. Legal Journal of Ukraine, (2011) 2, p. 18
[13] LPELR-883(SC)
[14] Paul McMahon, Nature of Arbitration, http://mcmahonsolicitors.ie/nature-of-arbitration/ Accessed 13 October 2022
[15] *Ibid*. (n 10) Belohlavek p. 22

touching the rules to be adopted in an arbitral proceeding.[16] Regardless of their nationalities, status or interests, parties have control over the process as opposed to litigation. The voluntary nature of arbitration was reaffirmed by the Supreme Court in the case of *Commerce Assurance Ltd v. Alli*[17] held as follows: - "... it is the law that to constitute a proper arbitration which the courts can enforce there must be an agreement to submit the matter to arbitration, and any award by an arbitrator so appointed shall be binding on both parties thereto."

(b) Arbitration presents the parties with certain level of privacy with respect to their disputes unlike the conventional courts where trial is conducted in the open.
(c) Arbitration is the preferred dispute resolution mechanism for business owners, corporate organizations and entities because of the need to maintain their reputation and goodwill in the market.
(d) Arbitration is also suitable in international disputes where parties cannot have a consensus on the appropriate jurisdiction.
(e) Arbitration supports the deployment of a greater level of expertise in the resolution of a dispute. Arbitrators are largely appointed from the bunch of the professionals who have specialized knowledge of a particular trade or business and this ultimately boosts the confidence of business in proceedings as well as the resulting award.[18]
(f) An arbitral award which is the end goal of arbitration is ultimate and almost in a permanent form as a trial court is barred from delving into the merits of the case unless under exceptional circumstances. In Nigeria for example, a trial court is not empowered to determine whether or not the finding of the Arbitrators and their conclusion were wrong in law.
(g) In comparison with litigation, arbitration is less time consuming and perhaps less expensive as it aims at providing expeditious resolution than the conventional court proceedings.
(h) Arbitration awards are generally easier to enforce as compared to court verdicts.

There are however a number of drawbacks as far as the subject of arbitration is concerned and same is reproduced below:

(i) An arbitration award is largely final, there is always a limited avenue for appeals, even at that, an appeal originating from arbitration will not deal with the merits of the case.
(j) A judge in a traditional court setting is guided by specific regulations when considering evidence while under arbitration, an arbitrator can utilize any information that is brought to them.[19]
(k) Arbitration is largely not evidence-based, it is therefore not advisable to trust the experience of the arbitrator to reach a just and fair decision.

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[16] Vani Shrivastava 'Advantages of Arbitration over Litigation', https://viamediationcentre.org/readnews/Mjcz/Advantages-of-Arbitration-over-Litigation accessed 2 January 2022
[17] LPELR-883(SC)
[18] Vani Shrivastava, *op.cit*
[19] Upcounsel, 'What are the Advantages and Disadvantages of Arbitration?', https://www.upcounsel.com/what-are-the-advantages-of-arbitration# accessed 2 January 2022

(l) The level of privacy that arbitration supports could be a potential disadvantage to a party, there is an inherent level of transparency involved in litigating cases in an open court.

(m) The much-taunted cost efficiency that is associated with arbitration may not be factually supportable in the face of the huge cost of paying the arbitrators' fee, venue of arbitration and other essential logistics. Also, where the money involved is not much, then arbitrating over such dispute cannot be said to be cost-effective.

5.0 TYPES OF ARBITRATION

There are different types of arbitration when viewed from the standpoint of parameters such as custom, subject matter, jurisdiction, statutory requirements, applicable rules, and institutional affiliation. Premised on this, we have the following types of arbitration: Customary Arbitration, Domestic Arbitration, International Commercial Arbitration, International Arbitration, Ad-hoc Arbitration, Fast-Track Arbitration, and Institutional Arbitration.

5.1 CUSTOMARY ARBITRATION

Customary arbitration is largely unwritten and it is applicable in traditional settings. In fact, its application survives till this present time. It is distinctive and the agreement to arbitrate is usually oral and its proceedings, as well as 'awards', are hardly ever recorded in writing. In consequence, of this and as an example, customary arbitration is not regulated by Arbitration and Conciliation Act.

The applicability of the customary arbitration procedure is quite popular in customary land matters and the Nigerian Courts have not failed to accord this procedure its due recognition by virtue of their instructive pronouncements bothering over same. In *Umeadi v Chibunze*[20] the Supreme Court found that where parties who believe in the efficacy of juju resort to oath-taking to settle a dispute, they are bound by the result and so the common law principles in respect to proof of title to land no longer apply since the proof of ownership of title to the land will be based on the rules set out by the traditional arbitration resulting in oath-taking. The Court held further that where customary arbitration is pleaded and proved, it is binding on the parties and capable of constituting estoppels.[21]

[20] (2020) 10 NWLR (Part 1733) 405

[21] Emmanuel Ekpeyong, Serah Sanni and Jude Otakpor 'Nigeria: Is Customary Arbitration The Solution To Congestion of Cases in Nigerian Courts?', www.mondaq.com/nigeria/arbitration-dispute-resolution/1070316/-is-customary-arbitration-the-solution-to-congestion-of-cases-in-nigerian-courts accessed on 2 January 2022

Customary arbitration is volatile given that the decision of customary arbitration may be the subject of litigation and may be set aside by the court unlike in modern arbitration where the decision of the arbitrator is final and binding.[22]

5.2 DOMESTIC ARBITRATION

Domestic Arbitration is one involving parties that are resident or doing business in the same country and the contract is subject to be performed in the same country and subject to local statute; in this case, Arbitration and Conciliation Act**.** Essentially speaking, these ingredients must be present before an arbitration is classified domestic namely:

(1) Both parties to the arbitration agreement are the nationals or residents of the same country.
(2) The agreement provides for arbitration in the country of the parties to the arbitration agreement.[23]
(3) The place of performance of the contract and the facts giving rise to the dispute will all relate to the same jurisdiction.

In domestic arbitration, the cause of action for the dispute are all governed by the domestic or municipal laws or where the parties are subject to domestic jurisdiction. It is a credible option for the settlement of disputes. In domestic arbitration, the parties as well as the arbitral tribunal are bound by the provisions of the Arbitration Rules in the first schedule.[24]

5.3 INTERNATIONAL COMMERCIAL ARBITRATION

International commercial arbitration as the name suggests reaches beyond the borders of a single jurisdiction. In a broader context, national laws of different jurisdictions determine that an arbitration comes within the frame of an international commercial transaction if the dispute concerns cross-border commercial activity or the nationality of a party to the dispute, his domicile/place of business is different from where the cause of action arose. International commercial arbitration takes place either within a national jurisdiction or outside of it in cases where there are ingredients of foreign origin relative to the parties or the subject matter of dispute.

The context of international commercial arbitration can also be viewed in the light of the following pre-defined criteria:

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[22] Olorunfemi J. F. and Ibe K., Application of Customary Arbitration in the Settlement of Inheritance Disputes in Nigeria. *Redeemer's University Law Journal*, (2022) Vol. 1, Issue I, p. 1

[23] Agneskv, 'Difference between International and Domestic Arbitration in the light of various decided Case Laws', www.legalservicesindia.com/article/511/Domestic-&-International-Arbitration.html accessed on 2 January 2022

[24] Umahi O. T. and Nwano C. T., Procedural aspect of Arbitration in Nigeria. https://www.researchgate.net/publication/235932992_Procedural_Aspect_of_Arbitration_in_Nigeria/link/0fcfd514707fc4a2fa000000/download. Accessed 5 October 2022

(a) The subject matter or the procedure or the organization in which the dispute has been submitted for arbitration is international, or
(b) The diversity of the nationality or place of business of the parties to the dispute; or
(c) There is a combination of the (a) and (b) above.

To simplify criterion (a) above further, the international commercial interest or the cross-border element of the underlying contract, or the fact that the dispute is referred to a verified international arbitration institution such as the International Chamber of Commerce (ICC), The London Court of International Arbitration among others would be sufficient for the arbitration to be termed international.[25]

The French Code of Civil Procedure elaborates on the preceding point above by stating in article 1492 that "arbitration is international if it implicates international commercial interest". This also have found fortification by a significant body of French case law, prominent among which is the case of *Chantiers Modernes v CMGC*[26] where the Courts gave a liberal scope of international commercial arbitration to entail a dispute involving the economies of more than one country. It was emphasized by the Paris Court of Appeal that;

> The international nature of arbitration must be determined according to the economic reality of the process during which it arises. In this respect, all that is required is that the economic transaction should entail a transfer of goods, services or funds across national boundaries, while the nationality of the parties, the law applicable to the contract or the arbitration, and the place of arbitration are irrelevant.

5.4 INTERNATIONAL ARBITRATION

Strictly speaking, international arbitration arises from controversies between sovereign states that are not settled by diplomatic negotiation or conciliation, and such controversies are now referred, often, by agreement of both State parties to the decision of a third disinterested party who arbitrates the dispute with binding force upon the disputant parties. The basis for international arbitration is to be seen in a number of multilateral treaties which usually contain ample provisions for the settlement of international disputes by arbitration. International arbitration can also loosely be defined as arbitration between companies or individuals in different States, usually by including a provision for future disputes in a contract. Generally, arbitration agreements and arbitral awards are enforced under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

There are difficulties to the acceptance of international arbitration especially in cases in which disputes between governments and foreign private parties are involved. In such situations, the State being dragged before an arbitral proceeding will insist that its own local remedies; administrative and judicial processes have been exhausted. The government of the national who advances a claim against a foreign government will require evidence that

[25] Agneskv, *op.cit*
[26] 1989 REV. ARB. 111, 2d decision

the injured party has pursued all remedies in the foreign country before pressing for a claim under international arbitration.[27]

5.5 AD-HOC ARBITRATION

Ad-hoc arbitration is an arbitration agreed to and arranged by the parties themselves without recourse to any institution. The proceedings are conducted and the procedures are adopted by the arbitrators as per the agreement or with the concurrence of the parties. Ad-hoc arbitrations are conducted without the oversight of an arbitral body or institution. An ad-hoc arbitration agreement could simply state "*Disputes between the parties shall be arbitrated in Nigeria*." This arbitration arrangement will only be operational if Nigeria as a jurisdiction chosen has a structured arbitration legislation. As a result, the parties will be responsible for all aspects of the arbitration, including the number of arbitrators, who to select them, the applicable law and the way the arbitration will be conducted.[28] In achieving this arrangement, parties can do either of the following:

(a) Contractually design a set of rules that will be applied for a specific situation, or
(b) By opting for already-existing rules of procedure and legislations (such as the United Nations Commission on International Trade Law, UNCITRAL Arbitration Rules and ACA, LFN 2004).

It is noteworthy that ad-hoc arbitration is quite popular and it is suitable for all types of claim, no matter how big or small. Large corporations may choose ad-hoc arbitration since their in-house legal departments are vast and skilled in the technical know-how of arbitration hearings. Ad-hoc arbitration is also cost-effective in that the parties to the dispute only pay fees of the arbitral tribunal, lawyers and other accompanying costs of the arbitration venue. In addition, in ad-hoc arbitration, the arbitrator will be well advised to conform to the parties' wishes. However, there can be exceptions.[29] For example, where the proceedings are getting badly out of hand, the obvious need for intervention by the arbitrator may justify deviation from the parties' procedural ground rules.

6.0 INTERNATIONAL COMMERCIAL ARBITRATION: *PROCESS AND INDUSTRIAL DEVELOPMENTS LTD v THE MINISTRY OF PETROLEUM RESOURCES OF THE FEDERAL REPUBLIC OF NIGERIA* AS A CASE STUDY.

In 2019, Nigeria, a sovereign state heavily come under the weight of international commercial arbitration proceedings instituted against it by P&ID at an independent London tribunal. The facts of P&ID case briefly stated are that in 2010, P&ID entered into a 20-year agreement with the Nigerian Government to build a gas processing facility that would refine wet gas generated from oil drilling into a lean gas that could be used for electricity

[27] Martin Domke, The Editors of Encyclopaedia Britannica, 'International arbitration' https://www.britannica.com/topic/arbitration/international-arbitration accessed on 2 January 2022
[28] Nandini Shivhare, 'All you need to know about ad-hoc arbitration', https://blog.ipleaders.in/need-know-ad-hoc-arbitration/?amp=1 accessed on 2 January 2022
[29] Lewis M. Gill, The Nature of Arbitration: The Blurred Line between Mediatory and Judicial Arbitration Proceedings. Case Western Reserve Law Review, (1989) Vol. 39, Issue 2, p. 545

generation. P&ID would refine the gas and give it to the Nigerian government at no cost while P&ID would make its profit from selling the by-products (Natural Gas Liquids) on the international market. In return, the Nigerian government would guarantee the supply of wet gas and construct pipelines and other infrastructure to transport the gas to the processing facility.[30]

By mid-2012, neither party had done anything in furtherance of its obligation under the agreement. P&ID viewed the failure of the government to construct the facilities to begin the deal as a renouncement of its obligations per the agreement and began an arbitration proceeding against the government pursuant to the arbitration clause/agreement detailed in the contract as the means of resolving disputes that may arise from the contract.

Also, the United Kingdom, precisely, London was named as the seat of arbitration in the contract and despite the Nigerian government's contesting the place of arbitration to be within the country, a three-man tribunal comprising one representative appointed by each party and an independent member was set up to assess the case in Nigeria.

At the end of the tribunal's proceedings, it was held in a 2-1 judgment that the Nigerian government was liable in damages for breach of contract and consequently awarded in favour of P&ID the sum of $6.6 billion in damages at an annual rate of 7% from the time of contract which further shot the figures to $9.6 billion. This award was subsequently confirmed by a United States District Court and in a judgment of the High Court of Justice of England and Wales[31], same was enforced in favour of P&ID.

Without prejudice to the manifestly faulty foundation of the contract which may mean a scrutiny of the merits of the case which is not my intention here, it is important to note that the contract stipulated that the Arbitration and Conciliation Act, CAP A18, LFN 2004 would govern it. Interestingly, the provision of Section 57(2) defined the scope of international arbitration (more appropriately in my considered view, international commercial arbitration) thus:

> An arbitration is international if-
> (a) the parties to an arbitration agreement have, at any time of the conclusion of the agreement, their places of business in different countries; or
> (b) one of the following places is situated outside the country in which the parties have their places of business-
> (i) the place of arbitration if such place is determined in, pursuant to the arbitration agreement,
> (ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

[30] Fikayo Akeredolu 'Nigeria and P&ID: The story behind the $9.6 billion judgment', https://www.stearsng.com/article/nigeria-and-pid-the-story-behind-the-96-billion-judgement?amp-content=amp accessed 2 January 2022
[31] [2019] EWHC 2241

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country; or
(d) the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial arbitration shall be treated as an international arbitration.
Section 57(3) which completes the scope states that "For the purposes of subsection (2) of this section-
(a) if a party has more than one place of business, the place of business shall be that which has the closest relationship to the arbitration agreement;
(b) if a party does not have a place of business, reference shall be made to his habitual residence.

6.1 KEY DETERMINATION OF THE COURT IN THE P&ID'S CASE

The High Court of Justice of England and Wales in the determination of the proper seat of arbitration in the P&ID's case, considered some relevant provisions of the ACA as follows:

> Section 15(1) "The arbitral proceedings shall be in accordance with the procedure contained in the arbitration rules set out in the schedule to this Act"
>
> Section 16(1) "Unless otherwise agreed by the parties, the place of the arbitral proceedings shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties"

Pungent on the above provisions also is the Arbitration Rules contained in the ACA which provides in Article 15 that

"Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

Article 16(1) which provides for the place of arbitration states as follows:

"Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration"

With the above considerations, the court held that in the light of the fact that the parties had disagreed on the issue of the seat of the arbitration, and that P&ID had asked it to determine this, the London arbitral tribunal was entitled to make a ruling as to seat.[32] With regards to this ruling, the Court was simply giving effect to the arbitration clause contained in the Gas

[32] Judgment of the High Court of Justice of England and Wales [2019] EWHC 2241-16 August 2019, https://jusmundi.com/fr/document/decision/en-process-and-industrial-development-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-judgment-of-the-high-court-of-justice-of-england-and-wales-friday-16th-august-2019 accessed on 2 Jan 2022

Supply and Processing Agreement (the "GSPA") which named London as the seat of arbitration in the event of a dispute.

6.0 THE SCOPE OF THE DOCTRINE OF *VOLENTI NON FIT INJURIA* IN ARBITRATION MATTERS

As earlier hinted, it is imperative to consider the possibility of the *doctrine of volenti non fit injuria* manifesting as a cardinal contributory outcome for an award of an arbitral tribunal. It is important to underscore the fact that this legal maxim is more notorious in the law of tort and simply means a voluntary assumption of risk. It is one of the special defences which can exculpate a defendant from liability because the victim freely gave his consent to the commission of such an act.

Two essential elements are however required to be specifically proved by the defendant in order for this defence to stand namely:

(a) The plaintiff had knowledge of the risk
(b) He, knowing same, agreed to suffer the harm.[33]

Going forward, narrowing down the applicability of this doctrine in the realm of arbitration is more of a theoretical construct than a practical construct. An insight into this doctrine was gained from the unanimous decision of the Court of Appeal in *Abuja Environmental Protection Board v Mahaj Nigeria Limited*[34] Coram Hon. Justice Olasumbo Olarenwaju Goodluck who delivered the lead judgment with Hon. Justice Stephen Jonah Adah and Hon. Justice Mohammed Lawal Abubakar concurring with the well-reasoned judgment.

For clarity, the facts leading to the main appeal as well as the cross-appeal briefly stated, are that parties before the Court entered into a solid waste collection and disposal agreement dated the 1st August 2009. The agreement contained an arbitration clause in the event of a dispute arising from the cleaning contract. A dispute eventually arose and parties referred same to arbitration which gave a final arbitral award in favour of the claimant (Mahaj Nigeria Limited).

Not satisfied with the award, the respondent at the arbitral tribunal (Abuja Environmental Protection Board) as applicant proceeded to the High Court of the FCT via an originating motion dated 20th January, 2019 wherein it prayed the court for an order setting aside the Final arbitral award rendered on the 2nd November, 2019.

It is to be noted that the final arbitral award as rendered *inter alia* awarded the sum of N475,845,089 (Four Hundred and Seventy-Five Million, Eight Hundred and Forty-Five Thousand, Eighty-Nine Naira) to the claimant, Mahaj Nigeria Limited.

[33] Adarsh Singh Thakur 'Volenti Non Fit Injuria', https://blog.ipleaders.in/volenti-non-fit-injuria accessed on 2 Jan 2022
[34] Unanimous decision of the Court of Appeal in CA/ABJ/CV/200/2020 Per Olasumbo Olarenwaju Goodluck JCA

The learned trial judge however in his judgment upheld the awards in terms of reliefs a, b, and f whilst the reliefs in award c, d, and e which are in relation to recoverable costs, interests and general damages ordered by the arbitral tribunal were set aside.

Still aggrieved by the above decision of the High Court of the FCT, the applicant (Abuja Environmental Protection Board), now appellant filed a Notice of Appeal dated the 30th June, 2020(sic) while the respondent cross-appealed.

4.0.1 DECISION OF THE COURT OF APPEAL (MAIN APPEAL)

The Court of Appeal conflated the three sets of issues for determination submitted by respective Counsel and treated them as the same for the purpose of reaching its decision and it held inter alia as follows:

"I have read the appellant's brief of argument for the umpteenth time and I am unable to find any basis for setting aside the award pursuant to Section 30(1) and (2) of the Arbitration and Conciliation Act or for any reason whatsoever. The Appeal fails and is hereby dismissed"

4.0.2 JUDGMENT IN THE CROSS-APPEAL

As noted earlier, the respondent in the main appeal cross-appealed the decision of the High Court upholding the final arbitral award as per reliefs a, b, and f while setting aside the award in c, d, and e. The cross-appellant formulated a lone issue for determination as follows:

"*Whether the Learned Trial Judge was right to have set aside reliefs c, d and e of the Arbitral Award…"*

Allowing the cross-appeal, the Court after determination of the issue as formulated by the cross-appellant held *inter alia* as follows:

"The considerations for setting aside the awards in part, by the trial judge, are not influenced by the enabling provisions of the Arbitration and Conciliation Act, particularly, Sections 29 and 30 of the Act which empowers the Court to set aside an arbitral award. The order of the trial court setting aside the awards c, d and e are hereby set aside. The award of the tribunal in respect of the awards c, d and e are hereby reaffirmed…"

Having carefully perused the entire 38-page well-articulated judgment of the Court of Appeal, one cannot fail to infer from a section of the judgment, the apparent damage that a voluntary assumption of risk can cause a disputing party in a domestic arbitration proceeding.

Specifically, on page 19, the Court of Appeal upheld the Respondent's counsel submission that the Appellant and or its counsel never raised an objection to the proceedings, they stood by and duly participated from the inception to the end. The Court held that the case of *Matari v Leigh*[35] was quite fortifying on the point. For context, it is reproduced below:

[35] (2019) 3 NWLR (Part 1659) p. 332 at 368H

"… A party must make a quick, effective and spontaneous decision in relation to the way and manner Counsel handles his case, otherwise, he must bear the consequences of his ineptitude, negligence or any act of God be falling his counsel…"

The decision above resonates with the point being made that a party who voluntarily consents whether expressly or impliedly to the ineptitude of his counsel or neglects to raise an objection to the proceedings, either by him or by his counsel will invariably be caught in the web of *volenti non fit injuria.* The voluntary assumption of risk on the part of the party or his counsel as in this instant case precludes them from bringing a claim against the other party in derelict.

This term is quite potent to the extent that where parties have agreed to some rules to govern the arbitration proceedings, there can never be a departure from such rules even if the dispute goes on appeal. This again underscores the primacy of the principle of party autonomy in arbitration as opposed to litigation where rules can change.

It is also respectfully submitted that the Latin maxim, *"Vigilantibus non dormientibus uitas subvenit"* which means equity aids the vigilant and not the indolent" can equally apply in the context of this case.

Furthermore, on the issue of impropriety of the procurement of the arbitral award, the appellant's counsel stated that the document only procedure precluded him from eliciting vital evidence under cross examination regarding salient facts bothering on the subject matter of the Arbitration. Again, the Court of Appeal, in this case, was right in upholding that the learned trial judge rightly held that the arbitrator cannot be flawed in the conduct of the arbitral proceedings by the document only procedure in so far it is shown from the record of proceedings that there was no refusal of any application for a change of procedure from the purely documentary evidence-based arbitral proceeding to a full-scale trial or any other appropriate circumstance.

Furthermore, the Court of Appeal was right in the way it handled the unethical and unhelpful attempt by the counsel for the Appellant to discredit the Respondent's counsel (claimant/applicant's counsel at the arbitration proceeding) as lacking arbitration experience which the arbitral panel should have taken into consideration before rendering its award. The Court of Appeal in expressing its disapproval of such an unethical move aligned itself with the pronouncement of the trial judge at page 107 of the record of appeal by holding as follows:

> …With due respect, I hold that this argument cannot hold water and does not appeal to me in the least. This is because the Counsel to the Claimant/Applicant need not be an Arbitrator to have knowledge of Arbitration being a lawyer if he does not know what it meant he ought to have raised an objection and if the objection was not considered that would have been another issue that the Court would have looked into to ground misconduct of the arbitrators, is the Learned Silk raising this on the mere fact that the Counsel representing the Claimant/Applicant hadn't an arbitration experience or not being an arbitrator…

The above well-articulated reasoning of the Court is highly instructive as it is indicative of the fact that an Appellant or his counsel who fails to raise an objection to any perceived abnormality as to procedure or qualification in an arbitration proceeding is barred from contending same later at the trial court. In this regard, such appellant or his counsel will be caught in the web of the legal maxim "*Volenti non fit Injuria*" and the consequences to be faced later by the Appellant or his counsel would not have arisen if it was timely raised at the arbitration proceeding and if same was not considered, it would have been looked into as a possible ground to establish a case of misconduct of the arbitrators. As righted posited by the Court, "it is too late in the day" to cry that the award was improperly procured.

6.0 SUMMARY OF FINDINGS

It is clear from the above analysis of the judgment in *Abuja Environmental Protection Board v Mahaj Nigeria Limited*[36] that the doctrine of *volenti non fit injuria*, though, applicable ab initio, is not peculiar to the real of tort law alone. A party who voluntarily submits itself to arbitration should not be allowed to renege from its promise to be bound by arbitration.

7.0 CONCLUSION

The foregoing discourse has attempted in an extensive manner, a general clarification of the term 'arbitration', alongside some of its categorization or types. The paper brought into focus was the intellectually stimulating decision of the Court of Appeal delivered by Hon. Justice Olasumbo Olarenwaju Goodluck provoked my curiosity as to the existential possibility of the application of the doctrine of *volenti non fit injuria* in arbitration matters. The same was briefly contextualized in this discourse and it is respectfully submitted that from a theoretical point of view, it is an emerging legal perspective. It is expected that wider discussions on this preceding point will broaden the horizon of arbitration practice as touching the defences that can avail a defendant against an arbitration claim.

[36] Supra