APPLICABILITY OF IMMUNITY CLAUSE TO ARBITRATION IN NIGERIA*

Abstract

This paper through desk-based research methodology examines the applicability of immunity clause to arbitration proceedings. The paper argues that the constitutional immunity provided for in section 308 of the 1999 Constitution of the Federal Republic of Nigeria (CFRN) is inapplicable to arbitral proceedings, by its nature and the express provision of the CFRN, immunity is inapplicable to arbitration. The paper examines the development, province and rationale of immunity alongside the meaning, nature and advantages of arbitration and argues that expressio unius ex exclusio alterius holds way. The paper further argues that just as a sovereign entity cast off its coat of immunity once it comes into contractual arena in order to promote fair play and sustained legitimate expectations of the parties, by no stroke of imagination can immunity be invoked to sequestrate the President, Vice President, Governor and Deputy Governor's contractual capacity to arbitrate. The paper concedes that while it may be desirable for the same reason the public officials who are beneficiaries of the immunity clause are precluded from civil and criminal prosecution to be disqualified from subscribing to arbitration, the law as it is, does not preclude them. Besides, by their oath of office, they cannot engage in transactions that would warrant them submitting to arbitration, thus, expressly precluded them would do no harm.

Keywords: *Arbitral Proceedings, Immunity Clause, Public Officer, Nigeria, Constitution*

1. Introduction

Arbitration as a dispute resolution mechanism has gain universal acceptance as a means of settling disputes particularly of commercial nature.[1] This acceptance is not unconnected to its several advantages over other disputes settlement mechanisms litigation inclusive.[2] The choice of arbitration by contracting parties put to abeyance their right to resort to other dispute settlement mechanisms subject to the extent of their agreement. Thus, arbitration by its characteristic nature is contractual.[3] In Nigeria, aside state arbitration laws, the Arbitration and Conciliation Act, 1988 (ACA) is the main legislation regulating arbitral proceedings in Nigeria.[4] By the clear provisions of the ACA, any legal entity (natural, juristic or juridical) capable of consummating a valid contract can opt for arbitration to settle any arbitrable dispute.

However, notwithstanding that dispute is an inevitable aspect of human relations, certain persons due to the functions they are expected to perform for the good of the society, are precluded from seeking redress for or against them. Thus, such public officers like the President, Vice President, Governors and the Deputy Governor are not allowed to be bored with the rigours of instituting or defending suits whether civil or criminal during the currency

* **David Tarh-Akong EYONGNDI, LL.B (Hons) UNICAL, LL.M (Ibadan) BL,** Department of Private and Commercial Law, Bowen University, Iwo, Osun State, Nigeria. Telephone Number: +2348093618996, Email: david.eyongndi@bowenuniversity.edu.ng He is currently a Doctoral candidate at University of Ibadan, Oyo State, Nigeria. His research interests are Labour and Industrial Relations law, International Commercial Arbitration and Conflict of Laws.

***Olabisi O. OJUADE LLB (Hons) LLM (UNILAG) BL,** Department of Private and Commercial Law, Bowen University, Iwo, Osun State, Nigeria. Telephone: +2348023603299, Email; bisi.ojuade@bowenuniversity.edu.ng

[1] D. T. Eyongndi, 'A Critical Appraisal of the Doctrine of Separability and Competence-Competence under the Nigerian Arbitration Law' Vol. 3, No. 2, *Chukwuemeka Odumegwu Ojukwu University Law Journal,* 2018, P. 147.

[2] D. T. Eyongndi, and C. J. Okongwu, 'The Effect of Party Autonomy on Competence-Competence in Arbitral Proceedings under the Nigerian Arbitration and Conciliation Act' Vol. 7, No. 1, *Port-Harcourt Law Journal,* 2018, P. 26. A. O. Abimbola, , 'Prospects in Arbitration: An Overview' *Diverse Issues In Nigerian Law, Essays in Honour of Hon. Justice Okanola Akintunde Boade,*A. I. Olatunbosun, and L. Laoye, (Eds.) (Ibadan, Zenith Publishers, 2013) page 27. He posits that 'There are a number of reasons that parties to international contract elect to have their disputes resolved through arbitration. These includes, the desire to avoid the uncertainties and local practices associated with litigation in national courts, the desire to obtain quicker, more efficient decision, the relative enforceability of arbitration agreements and arbitral awards (*as contrast with forum selection clauses and national courts judgments*), the commercial expertise of arbitrators, the parties freedom to select and design the arbitral procedures, confidentiality and other benefits.'

[3] D. T Eyongndi & A. O. Oluwadayisi, 'An Appraisal of Section 34 of the Arbitration and Conciliation Act and the Role of the Court in Arbitral Proceedings in Nigeria' Vol. 5, *Rivers State University Journal of Public Law,* 2018, P. 103.

[4] Arbitration and Conciliation Act 1988 Cap. A18 LFN 2004.

in office. This principle which is of historical relevance has been given constitutional approval by section 308 of the 1999 Constitution of the Federal Republic of Nigeria (CFRN).[5] This section which a lot of jurisprudential ink has been spilt upon by the Courts and academics forbids any process of the Court from being issued against anyone mentioned in the said section because they are immune from such. This prohibition from any proceeding, (civil or criminal) have led to the argument that, 'immunity clause is applicable to arbitral proceedings hence, the public officials contemplated under section 308 are not amenable to arbitral proceedings to settle any dispute during their currency in office whether such dispute arose before or during their tenure in office.'[6] Thus, the constitutional immunity encapsulated in section 308 of the 1999 CFRN not only applies to civil and criminal proceedings but as well as arbitration with the effect that arbitral proceedings cannot be commenced against a party covered by the said provision.

The issues however, are what is the nature of arbitration? Can it be rightly classified as a civil proceeding simply because it is short of punitive outcomes, just as proceedings such as matrimonial causes and Fundamental Rights Enforcement? Does the use of the words any 'civil or criminal proceedings' not imply that no other form of proceeding even if contacted in a judicial manner would be countenanced? Whether by its informality and flexibility and procedural laxity, arbitration is a *sui generis* proceeding just like election petition, matrimonial causes and therefore cannot be described as civil proceedings by any canon of interpretation? This article addresses these questions. It is divided into four parts. Part one contains the general introduction. Part two is a discussion on immunity clause under the 1`999 CFRN. Part three examines the nature of arbitration vis-à-vis section 308 of the 1999 CFRN while part four is the conclusion.

2. An Appraisal of Immunity Clause under the 1999 Constitution

The doctrine of constitutional immunity encapsulated in section 308(1) of the 1999 CFRN is of great antiquity traceable to the sovereign immunity of the king.[7] This sovereign immunity is a feudal principle of English origin summed up in the maxim *rex non potest paccare* meaning that the king does no wrong. The cliché that the king can do no wrong according to Oyewo[8] referring to Jaffe originally meant precisely the contrary to what it came to mean.[9] He explaining it thus 'it meant that the king must not, was not allowed, not entitled, to do wrong… it was on this basis that the king, though not suable in his court (since it seemed an anomaly to issue a writ against oneself), nevertheless endorsed on petitions let justice be done.'[10] The doctrine of sovereign immunity was received into Nigeria as part of the common law and the Petition of Rights Act, 1860; a Statute of General Application (SOGA) [11] by the Law (Miscellaneous Provisions) Ac, 1939.[12] However, the promulgation of the 1963 Republican Constitution brought to an end the sovereignty of the Crown in Nigeria.[13] This was applied in Nigeria to grant immunity to the State at various tiers against tortuous actions as in *Larstar Construction (Nig.) Ltd. v. Attorney General, Ondo State*[14] where it was held that the Court lacked the jurisdiction to grant injunction against the Government of Nigeria or the Government of any State within the federation. However, by the provisions of section 6(6) of the 1979 Constitution, the application of the doctrine in Nigeria was terminated. The Supreme Court stated this position in *Government of Imo State v. Greeco Construction & Engineering Associates Ltd.*[15] and

[5]Section 308 of the 1999 CFRN is simply referred to as the immunity clause.
[6] O. A. Ladapo, 'Constitutional Immunity and Arbitral Proceedings in Nigeria' Vol. 5, No. 1, *Nasarawa Journal of Public and International Law,* 2018, Pp. 187-198.
[7] G. C. Nwakoby, 'Arbitral Immunity' Vol. 12, *Nigerian Law and Practice Journal,* 2013, P. 176.
[8]O. Oyewo, *Modern Administrative Law and Practice in Nigeria,* Lagos, Unilag Press and Bookshop Ltd., 2016, P. 391.
[9] *Ibid.*
[10]L. L. Jaffe, 'Suits against Government and Officers: Sovereign Immunity' Vol. 77, No. 5, *Harvard Law Review,* 1963, Pp. 3-4.
[11] All statutes applicable in England before 1st October 1900 became applicable in Nigeria by the reception clause in the various High Court Laws.
[12] A. Emiola, *Remedies in Administrative Law,* Ogbomoso, Emiola Publishers, 2000, Pp. 288-317.
[13] Oyewo, (No. 9) *Op. cit.* P. 392.
[14] (1980) LRN 363.
[15] Unreported Suit No. CA/3/90/84.

Olufunmilayo Kuti v. Attorney General of the Federation[16] wherein it held that section 6(6) of the 1979 Constitution has abolished the doctrine in Nigeria and individuals can now successfully bring actions against the State or its federating unit without obtaining the prior consent of the Attorney General as it subsequently became the case as in *Shita-Bey v. Federal Public Service Commission*[17] and *Adeyemo v. Oyo State.*[18] Thus, immunity is the exemption of a person or body from legal proceedings, or liability.[19] Adaramola,[20] expatiating on Hohfeld schematized jural relations, states that 'immunity is one's freedom from the legal power or 'control' of another as regard some legal relations.' It removes liability from a person without placing a correlative duty. The rationale and scope of immunity as encapsulated in section 308(1) (a) of the 1999 CFRN has been clearly defined. The Supreme Court in *Amechi v. I.N.E.C.*[21] unequivocally stated the essence of the immunity clause in the following manner:

> Section 308 of the 1999 Constitution is not meant to deny a citizen of this country his right of access to the court. It is a provision put in place to enable a Governor, while in office, to conduct the affairs of governance free from hindrance, embarrassment and the difficulty which may arise if he is being constantly pursued and harassed with court processes of a civil or criminal nature while in office. It is a provision designed to protect the dignity of the office. Section 308 cannot be relied upon where the nature of the suit is such that the res in the dispute will be destroyed permanently with the effluxion of time. To hold that section 308 can be invoked in a matter relating to the eligibility for a political party office where the tenure of such office has been set out in the Constitution will translate into denying to a plaintiff his right of access to court. It is only in a case where a deferment of plaintiff's right of action is not likely to destroy the res in the suit that section 308 can be invoked.

Delineating the scope of section 308 (1) (a) of the 1999 CFRN, the Court further held that:

> Section 308 of the 1999 Constitution does not protect a governor from legal proceedings in a matter of his election *per se* or in a matter connected with the election even when he as a contestant has been declared duly elected or returned as governor. Election petitions and election related proceedings are special proceedings divorced and separated from civil or criminal proceedings within the intendment and context of section 308 of the Constitution. The processes leading to the election are not only justiciable at the instance of any party aggrieved in the process but the immunity under section 308 of the Constitution cannot avail a governor since the immunity is not within the contemplation of such proceedings. The constitutional immunity conferred by section 308 of the of the 1999 Constitution does not extend to elections but is limited to purely civil and criminal matters; neither does immunity create a correlative duty on the occupant of that office not to institute action (s) against any party while in that office.[22]

From the above, Constitutional immunity is not absolute or untrammeled. There are certain exceptions. Thus, it will not apply where the election of any of the beneficiary is being challenged.[23] It will only apply during the period of the beneficiary's tenure in office.[24] This is so as there are several examples of erstwhile beneficiaries of constitutional immunity who after the expiration of their tenure in office, have been prosecuted and sentenced by the Economic and Financial Crimes Commission (EFCC). E.g. Former Governors Chief Orji Kalu of Abia State, Mr. Boni Haruna, Joshua Dariye of Plateau State, Chief Lucky Igbenedion of Edo State, Chief James Ibori of Delta State, etc. It will not also apply to matrimonial causes for the simple reason that like election petition, matrimonial cause is not a civil proceeding within the context of section 308(1)(a) of the 1999 CFRN. It is a *sui generis* proceeding by nature. Likewise, section 308(1) (a) is inapplicable where the action is instituted or continued against

[16] [1985] 2 NWLR (Pt. 6) 211.
[17] (1981) 1 SC 40.
[18] (1979) 1 FNR 28.
[19] E. Malemi, *Administrative Law,* 4th ed., Lagos, Princeton Publishing Company, 2013, P. 487.
[20] F. Adaramola, *Jurisprudence,* 4th Ed., Durban, LexisNexis, 2008, P. 146.
[21] [2005] 5 NWLR (Pt. 1080) 227.
[22] See the cases of *Onitiri v. Benson* (1960) SCNLR 314; *Oyekan v. Akinjide* (1965) NMLR381.
[23] *Amechi v. I.N.E.C.* (2008) MJSC 1 at 92-93.
[24] Oyewo, (No. 9) *Op. cit.* P. 390.

the persons named in section 308(3) in their nominal or official capacity[25] and limitation period will not begin till after the beneficiary ceases from being immune. The province of section 308 does not sequestrate the right of a beneficiary to institute proceedings although he/she is immune from civil or criminal proceedings. This assertion has been given judicial impetus by the Court of Appeal in *Media Techniques Nigeria Limited v. Alhaji Lam Adesina*[26] wherein it was held that:The provision of section 308 of the 1999 Constitution that granted immunity does not constitute a disability on the person granted immunity as there is no provision to that effect, either expressly or by necessary implication in the enactment. For if the makers of the Constitution had wanted to prohibit a person holding offices as stated in the section from instituting or continuing action instituted against any other person during his period of office, nothing would have been easier that to provide expressly so. But as it is, the makers of the Constitution in their wisdom did not so provide.[27] It is apt to state that it is preposterous to contend that the immunity granted under section 308 of the 1999 CFRN is an aberration to the principle of fair hearing. The reason is there can only be fair hearing when there is a hearing which cannot be in the circumstance prohibited by section 308. This point was accentuated by the Court of Appeal in *Media Techniques Nigeria Limited v. Alhaji Lam Adesina*[28] in the following manner:

> The principle or concept of fair hearing cannot find any place in the interpretation of section 308 of the 1999 Constitution. This is because 'fair hearing' connotes that hearing has begun in the matter whereas section 308(1) of the 1999 Constitution deals with initiation or continuation of action, whether civil or criminal, against the person of the Governor, among other persons mentioned in the provision.[29]

This simply means that the defence of fair hearing as far as section 308(a) (a) of the 1999 CFRN is concerned, is not only premature but untenable as same can never be. There must be a hearing for anyone to seek to exploit the right of fair hearing. Fair hearing is a right only exercisable when there is a hearing which is constitutionally prohibited against the persons named in section 308(3) hence, a complaint cannot be validly made. It is apposite to note that as to the reciprocity of the prohibitive effect of section 308(1) (a), the Supreme Court has taken a divisionary route. It did this by holding that a beneficiary of section 308(1) (a) as named in section 308(3) cannot institute or continue a civil or criminal proceeding and in another breath can do so. Thus, in the cases of *Bola Tinubu v. I.M.B. Securities Plc.*[30] the Supreme Court held that section 308 is absolute to the extent that no civil or criminal proceeding can be instituted or continued against the persons mentioned in section 308(4) of the 1999 CFRN and they as well cannot institute or continue civil proceedings against any person during their tenure in office as to so hold, would amount to injustice. The dictum of Karibi-Whyte JSC is illuminating.

> The interpretation of the provisions of the Constitution should be guided by the facts of the case. Appellant in the instant case was the defendant. The provision of section 308 speaks of a civil or criminal proceedings instituted or continued against a person to whom the section applies during his period of office. The provision goes on to preclude arrest or imprisonment, and issuance of process requiring or compelling appearance of such person. There is no suggestion that such person can institute actions against other persons, who cannot apply for processes against them. The provision of section 308 is a policy legislation designed to confer immunity from civil or criminal process on the public officers named in section 308(3) and to insulate them from harassment in their personal matters incurred before their election. It follows from such immunity that such persons will not be involved in ordinary transactions that will necessitate resorting to the institution of civil suit or criminal actions. The texts of section 308 are explicit and conclusive. The liberal approach to the interpretation of our constitution counseled in *Nafiu Rabiu v. The State* (1988) 12 NSCC 281, does not encourage reading the provisions to neutralize the public policy principle protected by the Constitution. It has never been allowable and the

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[25] *Governor of Lagos State v. Ojukwu* [1986] 1 NWLR (Pt. 18) 621.
[26] [2005] 1 NWLR (Pt. 908) 461.
[27] [2005] 1 NWLR (Pt. 908) 461 at Pp. 474-475, Paras. G-A.
[28] [2005] 1 NWLR (Pt. 908) 461.
[29] *Ibid.* at P. 475, Paras. G-H.
[30] [2001] 16 NWLR (Pt. 740) 670.

> sacred obligation of the courts is not to construe any of the provisions of the Constitution to defeat the obvious end the Constitution was designed to serve. To construe the provisions of section 308 in the manner suggested and thereby enable the persons named in section 308(2) to exercise the right to sue in addition to the absolute immunity conferred on them whilst in office by section 308(1)(a) will defeat the immunity designed by the Constitution, and lead to manifest injustice.[31]

However, in *Donald Duke v. Global Excellence Communications & Ors,*[32] the Supreme Court took a u-turn on the above stated position when it held per Onnoghen JSC that:

> … I am unable to construe a provision of the Constitution that granted an immunity such as section 308(a) as also constituting a disability on the person granted immunity where there is no provision to that effect, either expressly or by necessary implication in the enactment if the makers of constitution had wanted to prohibit a person holding the offices stated in section 308 from instituting or continuing action instituted against any other person during his period of office, nothing would have been easier than to provide expressly that: no civil or criminal proceeding shall be instituted or continued against any person by a person to whom this section applies during his period of office and no civil or criminal proceedings shall be instituted or continued against such person during his period in office or in like terms. The makers of the Constitution in their wisdom did not so provide. I entirely agree with the above dictum and adopt same as mine in this judgment. I consequently reject the contrary dicta of Kariby-Whte and Kalgo, JJSC in the case of Tinubu v. IMB Securities Plc… cited and relied upon by learned counsel for the appellants as the same are not in accord with the clear intention of the framers of section 308 of the Constitution. I also do not agree with the submission of learned counsel for the appellants that the a confirmation of the interpretation of section 308 of the 1999 Constitution by the lower court would lead to absurdity particularly as a contrary interpretation would be adding to the said provision what is not expressly stated or intended, or putting unnecessary strain on that section which strain the said section will be unable to bear.

The above position is *in tandem* with that in the cases of *Onabanjo v. Concord Press of Nig. Ltd.*[33] and *ICS (Nig.) Ltd. v. Balton BV.*[34] where it was held that the beneficiaries of the immunity clause can maintain civil actions against anybody but not vice versa. Despite this contradiction, the law as far as the whether a person named in section 308(3) can institute or continue civil proceeding is concerned, it is regarded as settled. The reason is that where there are two contrary decisions of the Supreme Court, the later in time prevails. Thus, the law is as contained in *Donald Duke v. Global Excellence Communications & Ors.*[35]

3. Nature of Arbitration Vis-À-Vis Section 308 of the 1999 Constitution

This section of the paper clinically appraises the nature of arbitration vis-à-vis the phraseology of section 308 which forbids the issuance of any civil or criminal proceedings against the beneficiaries of immunity under the section 308 of the 1999 CFRN. It raises and answers the question, what is the nature of arbitration? The fact that punitive (corporal punishment) sanctions are not issued from arbitral proceedings like it is in civil matters, makes arbitration a civil proceedings? To put the argument into perspective, the definition of arbitration is necessary. The reason is, the nature of arbitration can be easily discovered from its meaning, practice and procedure.[36] Nwosu[37] opined that 'arbitration is the process whereby the disputing parties appoint arbitrator (s) to hear their evidence and

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[31] See *Rotimi v. Macgregor* (1974) 11 SC 123.
[32] [2007] 16 NWLR (Pt. 1059) 22.
[33] (1982) 2 NCLR 398.
[34] [2003] 8 NWLR (Pt. 822) 223.
[35] [2007] 16 NWLR (Pt. 1059) 22.
[36] Nwakoby, *The Law and Practice of Commercial Arbitration in Nigeria,* 2nd Ed., Enugu, Snaap Press Ltd., 2014, P. 3-5.
[37] N. K. Nwosu, 'The Role of Lawyers in Fostering Alternative Disputes Resolution (ADR) in the Multi-Door Courthouse' Vol. 12, *Nigerian Law and Practice Journal,* 2013, P. 46.

decide the dispute for them. In arbitration, the parties surrender their decision-making powers to the arbitrator (s), but retain control over the process.' Idornigie and Adewopo[38] state that 'arbitration is a procedure for settlement of disputes under which the parties agree to be bound by the decision of an arbitrator whose decision is in general final and legally binding on both parties.' The process derives its force principally from the agreement of the parties and in addition from the state as supervisor and enforcer of the legal process.[39] Oweazim[40] opined that arbitration is one of the dispute resolution processes available to individuals, group of persons, corporations and entities; other than litigation. It is a method of where two or more people agree to settle their civil dispute (s) privately, by referring such dispute (s) to a person or persons who would hear the parties and resolve the dispute in a judicial manner, by entering into a decision known as an arbitral award, which shall be binding on the parties.[41] Obiozor[42] simply defined arbitration as a process by which a dispute is resolved in a judicial manner by a person or persons other than the regular courts.[43] Explicit from these definitions, is the fact that commercial arbitration is contractual. Where there is no agreement either expressly or by necessary implication (for instance where a party signs a contract having a clause making reference to arbitration without containing the arbitration clause), there cannot be arbitration. The arbitration award is the centre of gravity which pulls the parties to arbitrate pursuant the occurrence of a dispute.[44] Thus, without the agreement to arbitrate, there cannot be arbitration.[45] Hence, arbitration is a contract; the arbitration agreement entered into by the parties either before or after the occurrence of the dispute they are submitting to arbitration contains some or all that the arbitration would thrive upon as was held by the Supreme Court in *M. V. Lupex v. N .O. C. & S Ltd.*[46] It specifies the seat of arbitration, the number and qualification of arbitrator (s), the *lex arbitri,* the *lingua franca* to be used in conducting the proceedings, its possible duration, the method to be adopted in conducting the proceedings, etc.[47] By reason of arbitrability, certain disputes cannot be settled through arbitration particularly criminal disputes due to public policy consideration.[48] Hence, the outcome of arbitration is civil (civil here is used in the restrictive sense of no corporal outcome).

The above, may persuade one to conclude that arbitration is a civil proceeding. However, this conclusion is erroneous. However, before any further elucidation, it is apposite to state that the judicial powers of the federal Republic of Nigeria per section 6 of the 1999 CFRN, resides in the judiciary comprising in the Courts listed under section 6(5) and 254A of the 1999 CFRN (Third Alteration) Act 2010. This does not mean that aside the Courts listed in section 6(5), other bodies do not exercise some sort of judicial functions as section 36(1) of the 1999 CFRN recognizes other bodies than the Courts. Arbitral tribunal could subjectively fit in. There are some proceedings that are civil in nature in the sense that they do not take the form of criminal trials but their form is civil and cannot therefore be regarded as civil *per se.* for example, proceedings such as matrimonial causes, election petition and fundamental human right enforcement procedure are civil to the extent that they lack the

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[38]P. O. Idornigie & A. Adewopo, 'Arbitrating Intellectual Property Disputes: Issues and Perspectives' Vol. 7, No. 1, *The Gravita Review of Business and Property Law Journal*, 2016, P. 1. See also O. Abifarin, *Resolving Domestic Violence in Nigeria through Alternative Dispute Resolution,* Vol. 6, University of Ilorin Law Journal, 2010, P. 164, G. Ezejiofor, *The Law of Arbitration in Nigeria,* Ikeja, Longman, 2005, P. 3.

[39]J. Tackaberry & A. Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice,* Vol. 1, London, Sweet & Maxwell, 2003, P. 15.

[40]S. O. Oweazim, 'The Status and Impact of a *Functus Officio* Arbitrator in Settlement of Disputes' Vol.4, No. 1, *Nasarawa Journal of Public and International Law,* 2017, P. 171.

[41] See section 63 of Lagos State Arbitration Law, 2009.

[42]C. A. Obiozor, 'Does Arbitration Clause or Agreement Oust the Jurisdiction of the Courts? A Review of the Case of the M. V. Panomos Bay v. Olam (Nig.) Plc. Vol. 6, No. 1, *Nigerian Bar Journal,* 2010, P. 166.

[43] D. T. Eyongndi, 'The Arbitration and Conciliation Act, 1988 and International Commercial Arbitration in Jet Age: The Imperative for Urgent Review' Vol. 1, No. 1., *LASU Law Journal,* 2018, Pp. 119-121.

[44] A. A. Daibu & L. A. Abdulrauf, 'Challenges of Section 20 of the Admiralty Jurisdiction Act to International Arbitration Agreements*',* Vol. 6, No. 4, *The Gravitas Review of Business and Property Law*, December, 2015, P 17.

[45] A. J. Orojo & M. A. Agomo, *Law and Practice of Arbitration and Conciliation in Nigeria,* Lagos, Mbeyi & Associates (Nigeria) Limited, 1999, P. 38.

[46](2003) 15 NWLR (Pt. 844) 469 at 487, Paras. A-B.

[47]S. I. Aderibigbe, 'An Inquiry into the Formal Validity Requirement of Arbitration Agreements' Vol. 1, No. 1, *Afe Babalola University Law Journal*, 2014, P. 93.

[48]M. O. Ajayi, D. T. Eyongndi & K. O. N. Onu, 'Arbitrability and the Doctrine of Party Autonomy under Nigerian Arbitration Law: Same or Strange Bed Fellows?' Vol. 6, *University of Ibadan Journal of Public and International Law,* 2016, P. 171.

element of criminality which is their main difference from criminal litigation but in procedure and outcome. The same is applicable to arbitration. Arbitration like these proceedings; is not civil in nature but rather in form. It practice and procedure follows the form of civil proceedings. The dichotomy here as to form and nature is not ephemeral or vague. Form here refers to the means through which arbitration is effectuated. The way a thing is done is different from what that thing is. Form here is the way arbitration is done why nature is what arbitration is. The Supreme Court in *Mainstreet Bank Capital Ltd. & Anor v Nigeria Reinsurance Corporation Plc*[49] on the nature of arbitration held that 'a major feature of arbitration is that it is consensual. The parties have a choice. They may decide to have their dispute resolved by a court of law or they may choose to have it decided by an arbitrator.'

It is contended that arbitration though takes the form of a civil proceeding in its effectuation, like matrimonial cause of election petition is *sui generis.* It is a special class of civil proceeding totally different from the traditional or orthodox civil litigation or proceedings contemplated under section 308(1) of the 1999 CFRN. The *sui generis* nature of arbitration, aside the fact that it is regulated by special rules of practice and procedure and has its own statutory framework (Arbitration and Conciliation Act)[50] can be garnered from its characteristics. Arbitration is reputed as being flexible and informal. It is so flexible and informal that everything subject to sparing mandatory rules is subject to the agreement of the parties. At any stage of the proceedings, the parties are at liberty to change the course of the proceedings. Everything rises and falls on their agreement. The concept of party autonomy is almost absolute and untrammeled. Some well established civil litigation practice and procedures which are immutable in civil litigation are mutable in arbitration. For instance, it is trite law that in civil proceedings (as well as other court proceedings including the *sui generis* ones), the question of jurisdiction can be raised at any stage of the proceedings even at the Supreme Court for the first time, thus, a party is not foreclosed from raising the question of jurisdiction.[51] However, in arbitration this trite principle of law applies differently. Where a party fails to raise the issue of jurisdiction before the arbitrator or arbitral tribunal within the time stipulated in the Arbitration and Conciliation Act, he/she is not permitted to raise same at the High Court where the award or any aspect of the proceedings becomes a subject of litigation. The Supreme Court gave judicial approval to this assertion in *Nigerian National Petroleum Corporation v. Klifco Nigeria Limited.*[52] Per Rhodes-Vivour JSC when it held that:

> The position of the law on issue of jurisdiction applicable in the usual way or in regular courts does not apply to arbitral proceedings. In arbitral proceedings the issue of jurisdiction to hear and determine a dispute is raised before the arbitral panel within the time stipulated in the Arbitration Act. A party who did not raise the issue of jurisdiction before the arbitral panel is foreclosed from raising it for the first time in the High Court. The reason being that the foundation of jurisdiction in an arbitration is submission.

Concomitantly, parties can and usually confer jurisdiction on the arbitrator or arbitral tribunal but in court proceedings, jurisdiction is as conferred by the enabling statute and parties cannot by the agreement, confer nor take away jurisdiction from a court.[53] Also, in Court civil proceedings, as contemplated under section 308 of the 1999 CFRN, where the Court admits inadmissible evidence which goes to the root of the issue, a verdict arrived pursuant to such evidence would be upturned on appeal whether its admission was objected to or not because lack of objection would not make inadmissible evidence admissible. While this principle is applicable to arbitration howbeit, a party to an arbitration proceeding who did not object to the admission of inadmissible evidence, cannot challenge its admissibility on appeal from the tribunal. This was the position taken by the Supreme Court per Ayoola JSC (as he then was) in *Comptoir Commercial & Ind. S. P. R. Ltd. v. Ogun State Water Corporation.*[54]

The phraseology of section 308(1) (a) and (c) of the 1999 CFRN is clear and unambiguous and does not admit of any other interpretation than a literal one. Two categories of proceedings are mentioned therein, civil and criminal proceedings. Subsection 1(c) in particularizing subsection 1(a), provides that 'no process of any Court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued.' Thus, it is safe to conclude that the kind of civil proceedings the beneficiary of the immunity clause is immune from is one that would require the application and or issuance of a court process conversely the criminal and not just a proceeding that has some element of civility like arbitration. The law is that in interpreting the provisions of a statute

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[49] [2018] 14 NWLR (Pt. 1640) 423 at 444, Para. C.

[50] Arbitration and Conciliation Act Cap. A18 LFN 2004.

[51] *Mega Progressive Peoples' Party v. Independent National Electoral Commission & 3 Ors (No. 1)* [2015] 18 NWLR (Pt. 1491) 207.

[52] [2011] 10 NWLR (Pt. 1255) 209 at 239 Paras. D-F.

[53] *Oruobu v. Anekwe* [1997] 5 NWLR (Pt. 506) 618 at 637; *National Bank of Nigeria Ltd. & Anor. v. John Akinkunmi Shoyoye & Anor.* (1977) 5 S.C. 181 AT 190-191; *Yakubu v. Governor of Kogi State* [1997] 7 NWLR (Pt.511) 66 at 87.

[54] [2002] 9 NWLR (Pt. 773) 629 at 656-657 Paras. F-A.

(especially the Constitution), clear and unambiguous words must be given their ordinary grammatical meaning unless doing so would amount to judicially legislating absurdity. This principle has been held in *Awolowo v. Shagari*[55] and *Attorney General, Bendel State v. Attorney General of the Federation.*[56]

Besides, section 308(1) is not absolute and untrammeled as the persons mentioned in section 308(3) can be sued in their nominal capacity. Aside this, matrimonial causes, election petition[57] and Crimes Against Humanity (CAH) or War Crimes (WC) under international law are permissible detractions from section 308(1) of the 1999 CFRN as was held by the English Court in *R (on the application of Alamieyeseigha) v. Crown Prosecution Service*[58] wherein Chief D. S. P. Alamieyeseigha jointly investigated by the Economic and Financial Crimes Commission (EFCC) and Proceeds of Corruption Unit of the Metropolitan Police in the United Kingdom which led to charging him with three counts of money laundering. A worldwide criminal restraint order was sought and obtained by the Prosecution against his assets and to prosecute him in London, he sought to have the order quashed contending that as a Governor in Nigeria he enjoys immunity under section 308(1)(a) of the 1999 CFRN. The Court rejected the argument and held that only the President of the country enjoys immunity and not a governor of a constituent State. Also, where the beneficiaries of immunity are sued in their official or nominal capacities immunity is not applicable.[59] Thus, it is needless for us to contend that since the beneficiaries of section 308 (1) (a) can legally institute legal proceedings against anyone according to the Supreme Court in *Donald Duke v. Global Excellence Communications & Ors.*[60], where they commence or someone commences arbitration proceedings against them, to the extent that court intervention is needed, they (and not the other party), can approach the Court with regards to the arbitral proceedings. For instance, they can bring an application before a court to compel a witness to appear before the arbitrator or tribunal or seek any other form of assistance from the court.

The question may be asked, what is the appropriate interpretative technique to be adopted for the interpretation of section 308 of the 1999 CFRN vis-avis the susceptibility or otherwise of the beneficiaries thereof to arbitration?[61] The court in exercise of its constitutional power of adjudication, have formulated various canons of statutory interpretations.[62] These include the literal or golden rule[63], golden rule[64], mischief rule[65], presumptions, statutory definitions, etc. The literal or plain meaning rule is to the effect that clear and unambiguous words in a statute or document should be given their common grammatical meaning as was enunciated by Tridal C.J. in *Sussex Peerage Case.*[66] Unless where the adherence to the simple grammatical meaning of the word would amount to legislating absurdity as was stated in *Bronik Motors Ltd. v. Wema Bank Ltd.*[67] would the Court deviate from it.[68] This interpretation to preclude absurdity is also known as the golden rule.[69] It allows the court to give to a statute a secondary meaning which would capture the intention of the legislature as same is not apparent.[70] It is however vehement contention that section 308 is best interpreted using the literal rule of interpretation.[71] Thus, it is trite law that the literal rule is the basic interpretative technique for interpreting the Constitution. Thus, section 308 (1) (a) (b) (c) provides that:

> Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section- no civil or criminal proceedings shall be instituted or continued against a person to whom this section applied during his period of office. A person to whom this section applies shall not be arrested or imprisoned during that period either on pursuance of the process of any court or

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[55](1979)6-9 SC 51.
[56](1981) 9 SC 1 at 78-79.
[57]*Obasanjo v. INEC* [2004] 7 SC (Pt. 1) 117.
[58] [2005] EWHC 2704.
[59] *Incorporated Trustees of Catholic Diocese of Ekiti State v. Attorney General, Ekiti State & Anor.* (2018) LPELR-43510 (CA).
[60] [2007] 16 NWLR (Pt. 1059) 22.
[61] *Martin Schroder & Co. v. Major & Co. Ltd.* [1989] 2 NWLR (Pt. 12) 1.
[62] See Lord Denning in *Seaford Court Estate Ltd. v. Asher* (1949) 2 K.B. 481.
[63] *Okeke v. Attorney General of Anambra State* [1992] 1 NWLR (Pt. 453) 60.
[64] *Becke v. Smith* (1836) 150 E.R. 724..
[65] *Heydon's Case (1584)* 96 E. R. 638.
[66] (1844) II cl. & Fin. 85 at 143.
[67] (1983) 1 S.C.N.L.R. 296.
[68] *Adegbenro v. Akintola* (1962) 1 All E.R 465.
[69] *Ejor v. Inspector General of Police* (1963) 1 N.L.R. 250.
[70] *Adamolekun v. Council of the University of Ibadan* (1967) 1 All NLR 213.
[71] J. O. Asien, *Introduction to Nigerian Legal System,* 2nd ed., Lagos, Ababa Press Ltd., 2005, P. 65.

otherwise, and no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued.

The foregoing provisions are not only clear but very precise and must therefore be interpreted according to their ordinary grammatical meaning. Court as defined in Black's Law Dictionary[72] is 'a governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice, it is a permanent organized body, with the independent judicial powers defined by law, meeting at a time and place fixed by law for the judicial public administration of justice.' A Court as provided for under section 308(1) (c) (which explicates the fact that the civil and criminal proceedings contemplated under section 308(1) (a) is that which takes place before a statutorily created court.) is a Court as provided for under section 6(5) (a)-(k). Besides, if the draftsmen had intended that any other body aside Courts established by law should be captured under section 308, they would have included it. Hence, it is argued that the provisions of section 308 are incapable of being interpreted through any other cannon of interpretation aside the literal rule because their clarity is very obvious. Hence, any attempt to use any other interpretative technique, is an unnecessary venture. It is apposite to note that as far as arbitration is concerned or commercial transactions in general, even the doctrine of sovereign immunity which had availed sovereigns and their entities is inapplicable. In *African Reinsurance Corp. v. AIM Consultant Ltd.,*[73] the Nigerian Court of Appeal rejected the Respondent argument that an arbitral award in favour of the applicant could not be enforced against it as it was immune from legal processes. It held that once a sovereign comes into the arena of commercial transaction, it does so casting off its coat of immunity for there to be fair play.[74] This position is *n tandem* with that of the English Court of Appeal in *Trendex Trading Corp. v. Central Bank of Nigeria*[75] particularly the dictum of Lord Denning MR.[76]

4. Conclusion

Conclusively, it is obvious that arbitration has become an acceptable means of dispute resolution in Nigeria particularly disputes of a commercial nature where relationship fostering is important. Arbitration evolved as a compliment and not a substitute to litigation and cannot be totally divorced from litigation so far as there is also the need to seek assistance from the Court particularly in the enforcement of the award or compelling of a witness. Thus, commercial arbitration by its characteristic nature is consensual (i.e. contractual) since it is the product of the agreement of the parties involved contained in an arbitration clause/agreement. Though arbitration adopts a civil procedure in its proceeding, it is not, *strictu sensu,* a civil proceeding as contemplated under section 308 (1) (a) of the 1999 CFRN which prohibits the institution or continuation of any civil of criminal proceeding against the persons named in section 308 (3) of the section. Thus, Oladepo's contention that section 308 is applicable to arbitral proceeding is with due respect, misconceived because civil proceeding as used in the section is in its strict legal sense which is a proceeding before a competent court of law established under a statute with spelled out civil jurisdiction and not just any body that has civil *modus operandi* in adjudication. Section 308 (1) (a) is not sacrosanct or untrammeled, it is only applicable during the tenure of the beneficiary in office, it therefore does not apply to suit brought against the beneficiary in his official or nominal capacity, matrimonial cause (since same is a *sui generis* and not a civil proceeding *per se*) election petition and where the *res* is of an nature that waiting till after the beneficiary's tenure lapsed the *res* would be irrecoverably damaged. Its essence is to ensure that the beneficiaries are not harassed, intimidated and distracted with the rigours of court actions during their tenure so that they will be able to concentrate on the all important business of governance. Thus, immunity clause as contained in the 1999 CFRN, does not detract from the principle of fair hearing as one cannot talk of fair hearing where *ab initio,* there is no hearing which is what section 308 (1) (a) provides. While the beneficiaries of the section 308 (1) (a) are immune from civil and criminal actions, they can bring civil actions against anyone anywhere or place they so choose.

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[72] B. A. Garner (ed), *Black's Law Dictionary,* 8th ed., Dallas, West Publishing Co., 2004, P. 378.
[73] [2004] 11 NWLR (Pt. 884) 223.
[74] *Ibid.* at 242-246, Paras. F-H.
[75] [1977] 1 QB 529.
[76] See also the exposition of J. N. M. Mbadugha, *Principles and Practice of Commercial Arbitration,* Lagos, University of Lagos Press and Bookshop Ltd., 2015, Pp. 38-40.