The Implication of Poorly Drafted Arbitration Agreement in a Contract

By

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Introduction

Let me start by thanking the Management of the Nigerian Institute of Legislative and Democratic Studies (NILDS) and Konrad Adenauer Stiftung for inviting me to lead discussions on this topic.

Arbitration is a means of resolving disputes pursuant to an arbitration agreement – arbitration clause or submission agreement. It can also arise from a statute or treaty. It can even be customary. Quite unlike litigation that is constitutionally and statutorily prescribed, the agreement to arbitrate is fundamental to arbitration. It is critical, therefore, that the arbitration agreement is drafted properly.

Arbitration occurs, usually in private and on a confidential basis, generally pursuant to an agreement between two or more parties. Under the agreement, the parties agree to be bound by the decision to be given by the arbitrator according to law or, if so, agreed, other considerations, after a fair hearing, such decision being enforceable at law.

Arbitration has many distinguishing features and underlying principles –

- ✓ principle of party autonomy;
- ✓ principle of separability;
- ✓ principle of arbitrability – objective and subjective;
- ✓ competence of the arbitral tribunal to rule on its own jurisdiction;
- ✓ and principle of minimal judicial intervention

It can also be *ad hoc* or institutional. There are several arbitral institutions: some with their own rules like that of the London Court of Arbitration (LCIA)[1], International Chamber of Commerce (ICC)[2] and others without their own rules but adopt the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)[3].

All these attributes of arbitration will be unattainable if the arbitration agreement is poorly drafted. In this presentation, we shall examine the implications of a poorly drafted arbitration agreement in a contract.

Arbitration and Litigation Compared

Litigation is the process whereby disputes between parties are resolved by using publicly provided courts and tribunals. No specific agreement is necessary between the disputants. Indeed, the public legal system is well equipped to deal with situations where one of the parties is reluctant to take part in the proceedings.

On the other hand, agreement to arbitrate is very fundamental to arbitration. Indeed, it is the foundation stone of arbitration. In consequence, the agreement must be properly drafted, valid and enforceable. If all these requirements are met, a court before which an action that is the subject of arbitration agreement is brought shall on the request of any party, order a stay of proceedings and refer the parties to arbitration.[4]

Internationally, a court of a contracting state, when seized of an action in a matter in respect of which the parties have made an agreement to arbitrate, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void inoperative or incapable of being performed.[5]

The major differences between arbitration and litigation include:

- ✓ Place of Arbitration

[1] Available at <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> accessed 27 March, 2021
[2] Available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/> accessed 27 March, 2021
[3] Available at <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration> accessed 27 March, 2021
[4] See sections 4 and 5 of the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004.
[5] See Article II.3 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards available at https://www.newyorkconvention.org/ accessed 27 March, 2021.

- ✓ Principle of Party Autonomy
- ✓ Choice of Tribunal – can be of mixed disciplines
- ✓ Privacy and confidentiality
- ✓ Technical Matters
- ✓ Flexibility and informality
- ✓ Enforcement/Appeals
- ✓ Speed at decision-making
- ✓ Convenience of the Parties
- ✓ Commercial disputes
- ✓ Award, final and binding
- ✓ Costs

Arbitration Agreement

According to Art 7(1) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration 1985 as amended in 2006[6],

> *"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*

The agreement must also be in writing. This separates it from customary arbitration. However, the agreement can refer to an arbitration clause (future dispute) or a separate agreement (submission agreement – a present dispute).

How should this agreement be appropriately drafted to make it valid and enforceable? This can be found as follows:

a) UNCITRAL Model Arbitration Clause in the UNCITRAL Arbitration Rules, 2010
b) LCIA Arbitration Rules 2020
c) ICC Arbitration Rules 2021

[6] Available at <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 27 March, 2021

a) UNCITRAL Model Arbitration Clause

> *Any dispute, controversy or claim arising out or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules*

The parties can consider in addition, appointing authority, number of arbitrators, place of arbitration and language of arbitration. The parties should bear in mind the principle of separability – that the arbitration clause is separate and independent of the main contract.

b) LCIA Arbitration Rules 2020

> *Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.*

The parties should state the number of arbitrators, seat of arbitration, language of arbitration and governing law of the substantive contract. LCIA also has a model for existing disputes.

c) ICC Arbitration Rules 2021

> *All disputes arising out of or n connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.*

Parties are free to adapt the above clause by providing forthe number of arbitrators, place and language of arbitration and the law applicable to the merits (the governing law of the substantive contract).

All the other arbitral institutions like Singapore International Arbitration Centre, or SIAC, Hong Kong International Arbitration Centre, or HKIAC, Arbitration

Institute of the Stockholm Chamber of Commerce, or SCC and International Centre for Dispute Resolution, or ICDR have their own Model Clauses.

When properly drafted, there is a duty on the courts to enforce arbitration agreement. In *Owners of the MV Lupez v NOC & Shipping Ltd*[7], the Supreme Court, per Iguh, JSC held thus:

> *The law is also settled that the mere fact that a dispute is of a nature eminently suitable for trial in a court is not a sufficient ground for refusing to give effect to what the parties have, by contract, expressly agreed to. See Re: An Application by the Phoenix Timber Company Ltd. (Appeal of V/O Sovfracht) (1958) 1 Lloyd's Rep. 305 at 308. So long as an arbitration clause is retained in a contract that is valid and the dispute is within the contemplation of the clause, the court ought to give due regard to the voluntary contract of the parties by enforcing the arbitration clause as agreed to by them. See Heyman and Another v. Darwins Ltd. (1942) Vol. 72 Lloyd's Rep. 65."*

Poorly Drafted Arbitration Agreement (or Pathological Clauses)

The expression 'pathological clauses' is used to denote defective or poorly drafted arbitration clauses. The expression was first used by Frederic Eisemann in 1974[8] and has since become a popular phrase in commercial arbitration. In his view, the expression '*denotes arbitration agreements, and particularly arbitration clauses, which contain a defect or defects liable to disrupt the smooth progress of the arbitration*'.[9]

A defective arbitration clause is an ambiguously drafted arbitration agreement that, when it comes to its implementation, may lead to a clash between its effective

[7] (2003) LPELR-3195 (SC) pp 23-24 DA

[8] Frederic Eisemann, La cause d'arbitrage pathologique, in Commercial Arbitration – Essays in Memoriam Eugunio Minoli (1974) p 129. See also Benjamin Davis, 'Pathological Clauses: Frederic Eisemann's Still Vital Criteria' in *Arbitration International*, Vol 7, Issue 4, 1 December, 1991, p 365 and Milo Molfa, 'Pathological Arbitration Clauses and the Conflict of Laws, (2007) 37 HKLJ 161

[9] Fouchard, Gaillard and Goldman, *International Commercial Arbitration* (Kluwer, The Hague, 1999) 262. See also Chikwendu Madumere. 'Dealing with Pathological Clauses in Arbitration' in *The Arbitrator, The News Journal of The Chartered Institute of Arbitrators, Nigeria Branch*, Vol 7, No 2, January-March 2016, p17

interpretation and the parties' intent to refer their disputes to an arbitral tribunal.[10] Thus, the interpretation of the clause creates problems for the parties, the arbitral tribunal and the courts.

In negotiating a contract, parties are generally more concerned with their commercial obligations than the standard terms. They see the standard terms less important and in a popular commentary, they are referred to as 'midnight clauses', that is, the last clauses to be considered in contract negotiations, sometimes late at night or in the early hours of the morning.[11]

When poorly drafted arbitration agreements are being interrogated, it is useful to set out Eisemann's criteria[12] as to the essential functions of an arbitration clause. These are four, namely,

(a) The first, which is common to all agreements, is to produce mandatory consequences for the parties.
(b) The second, is to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award.
(c) The third, is to give powers to the arbitrators to resolve the disputes likely to arise between the parties.
(d) The fourth, is to permit the putting in place of a procedure leading under the best conditions of efficiency and rapidity to the rendering of an award that is susceptible to judicial enforcement.

Thus an arbitration agreement is pathological when it deviates from anyone of the above four elements. These four conditions, formulated in 1974 are still valid today as they were in 1974.

According to the learned authors of *Russell on Arbitration*[13], *'When drafting an arbitration agreement, care needs to be taken to ensure that it is appropriate for the particular circumstances of the case.'* The authors then gave a checklist of the matters which need to be considered including:

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[10] See Roberto Pirozzi and Rocco Ioia, 'Defective Arbitration Clauses' in *Arbitration Briefing* No 18 of 2 March, 2020 available at <http://www.3dlegal.it/wp-content/uploads/2020/04/Arbitration-briefing-no.-18.pdf> accessed 26 March, 2021.

[11] Nigel Blackaby and Constantine Partasides QC with Alan Redfern & Martin Hunter, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press, 2015) 72

[12] Frederic Eisemann, Ibid

[13] See David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration* (24th edn, Sweet & Maxwell, 2015) 61

- ✓ Proper identification of the parties
- ✓ A clear reference of the dispute to arbitration
- ✓ Is it some or all disputes that are referable to arbitration?
- ✓ Seat of arbitration
- ✓ How is the substance of the dispute to be determined?
- ✓ The law governing the arbitration agreement
- ✓ Is there a choice of the procedural rule/law?
- ✓ How will the tribunal be appointed?
- ✓ Is there any appointing authority?
- ✓ Any qualification for members of the tribunal?
- ✓ Number of arbitrators
- ✓ Are there other rules or guidelines applicable?
- ✓ Language of the arbitration
- ✓ Is waiver of sovereign immunity required?
- ✓ Any provision for multi-party arbitration, consolidation or concurrent hearings required?

Another approach to the consideration of defective arbitration clauses is an examination of Article II.3 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award. It provides thus:

> *The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said* ***agreement is null and void, inoperative or incapable of being performed.***

The principal defects found in arbitration clauses are those of inconsistency, uncertainty and inoperability.[14]

Examples of Pathological Clauses

These are examples of pathological clauses[15]:

[14] Blackaby & Partasides (n 11) 135

[15] See Badrinath Srinivsasn, 'Defective Arbitration Clauses: An Overview, Indian Institute of Quantity Surveyors Annual Insight 2015, p 52-53 also available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2664882> accessed 25 March, 2021.

a) Reference to Non-Existent Arbitral Institutions eg Singapore Chamber of Commerce. In *Sino-Afric Agriculture & Ind Coy Ltd & Ors v MFI & Ano,r*[16] the agreement contained an arbitration clause under the auspices of the ***"United States Council of Arbitration and the UNCITRAL Arbitration Rules"*** – discussed in detail below.
b) Reference to Non-Existent Rules. e.g. where the parties agreed to arbitration under the by-laws of Indian Company's Act 1956.
c) Reference to Arbitrators who are no more alive at the time of the dispute
d) Where the clause does not make arbitration mandatory e.g. *'[Parties undertake] to have the dispute submitted to binding arbitration through The American Arbitration Association [hereafter: AAA] or to any other US court (…). The arbitration shall be conducted based upon the Rules and Regulations of the International Chamber of Commerce (ICC 500).*
e) Appointing authority unable or unwilling to act e.g. '*Disputes arising in connection with this agreement shall be determined by a single arbitrator to be appointed by the Director General of the World Health Organisation*' and the Director General refuses to act as appointing authority
f) An inherently inconsistent or convoluted clause e.g. '*This arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow, Scotland. Any such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act or any statutory re-enactment*' – upheld as an English arbitration clause with Glasgow as the venue of the arbitration hearings.[17]
g) Incorrect spelling of the name of Arbitrator – Prof Paul Obo Idornijie instead of Prof Paul Obo Idornigie.[18]

More specifically, we will examine the following clauses:

[16] (2013) LPELR 2237 (CA). See also (2014) 10 NWLR (Pt. 1416) 515.
[17] See *Braes of Doune Wind Farm v Alfred McAlpine* [2008] EWHC 426 (TCC)
[18] See *Abang Odok v Attorney General of Bayelsa State*, Suit No. Suit No: FCT/HC/CV/610/14 (Unreported) Judgment delivered by Justice A B Mohammed on 10 January, 2017. In this case, the court order appointing the Sole Arbitrator wrongly spelt the name of the Arbitrator. On his appointment, the Arbitrator wrote to the parties notifying them of his appointment, summoned a Preliminary Meeting and conducted the arbitration. The Claimant raised no objection regarding who was the real Arbitrator. However, when the award was published, the main ground for challenging the award was the issue of the name of the Arbitrator. The court relied on section 33 of the Arbitration and Conciliation Act, 2004 and held that the Claimant had waived the right to object. See also Chikwendu Madumere, 'Case Review – Abang Odok v Bayelsa State Government' in *NIALS Journal of Business Law*, Vol 3, 2018, p 1

i. *Any dispute of whatever nature arising out of or in any way relating to the agreement or to its construction or fulfilments* ***may*** *be referred to arbitration. Such arbitration* ***shall*** *take place in USA and shall proceed in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce.*

- this is discretional as there is equivocation due to the use of the word 'may.' However, see *Sino-Afric Agriculture & Ind Coy Ltd & Ors v MFI & Anor* where the Arbitration Clause provides as follows:

In case of any dispute, difference or question arising from this Contract … the parties hereto shall meet to attempt to resolve the same by mutual agreement.

Any dispute, difference or question arising between the parties hereto which cannot be resolved between the parties by mutual agreement after thirty (30) days after one party gives written notice of the dispute, difference or question, ***may*** *be referred to arbitration by either party in accordance with the provision of the Arbitration and Conciliation Law (Cap. 19) Laws of the Federation 1990…*[19]

ii. *If at any time there arises any question, dispute or difference between the parties in relation to or in connection with this Agreement, either of them shall as soon as practicable give to the other notice in writing of the existence of such question, dispute or difference and the same shall, failing a mutual settlement, be referred to an arbitration consisting of three arbitrators one each to be appointed by the parties and the two Arbitrators so appointed shall have the right to* ***appoint a third Arbitrator who shall serve as an Umpire****. The Arbitrators shall determine the question, dispute or difference in accordance with the*

[19] Despite the arbitration clause, MOFI issued court proceedings against Sino-Africa, claiming damages for breach of contract. On its part, Sino-Africa filed an application to stay the court proceedings, pending the appointment of an arbitrator. The High Court of Kano State dismissed the application. Sino-Africa appealed to the Court of Appeal, contending that MOFI could not issue court proceedings in breach of the arbitration clause. MOFI's contention was that the reference to arbitration was not mandatory and, therefore, not binding. The Court of Appeal held otherwise.

Arbitration and Conciliation Act Cap 19 Laws of the Federation of Nigeria, 1990".[20]

- There is inconsistency here as the Arbitration and Conciliation Act has no provision on 'umpire'.

iii. *"...any conflict and/or disagreement arising out of these presents... shall be referred to a sole Arbitrator that shall be appointed by the* ***President of the Chartered Institute of Arbitrators, London, Nigeria Chapter****..."*

- The clause refers to a non-existent body. This will be discussed in detail, below.

iv. *In the event that a dispute is submitted to arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, the arbitration will be submitted to three arbitrators appointed in accordance with the said Rules and will take place in Swiss Romande: the arbitrators will be nominated by the Swiss Court of Geneva and Lausanne.*

- this is clearly invalid and inoperable

v. *This contract shall be governed by German law, place of performance is Berlin (West).* ***Jurisdiction*** *shall be one of Berlin (West). Subsidiarily, the parties agree that disputes arising in relation to this contract shall be* ***settled by the Arbitral Tribunal of the ICC****. The arbitral proceedings shall take place in Bern/Switzerland. In the arbitral proceedings, German substantive and formal law shall be applied. The award of the Arbitral Tribunal is final and binding.*

- this refers to litigation and arbitration. Is litigation a condition precedent?

[20] This was a contract between a State Government in Nigeria with an Investor. The contract contained this Arbitration Clause and at the Preliminary Meeting, the Counsel to the Claimant raised the objection that the clause was pathological as there is no provision for 'Umpire' under Nigerian Arbitration and Conciliation Act. The Arbitral Tribunal agreed with the Claimant and suspended the arbitral proceedings. I was a party-appointed Arbitrator in the matter.

vi. *Attribution of jurisdiction: in case of contestation, the parties agree to seek recourse to the arbitration of the French advertising Federation. In case of disputes, only the Seine Court will have a jurisdiction.*

- reference to arbitration and litigation at the same time

Approaches of Courts in Dealing with Defective Arbitration Agreements

Paradoxically, the idea behind drafting an arbitration agreement is to avoid resorting to litigation. Unfortunately, in disputes under agreements containing defective arbitration clauses, the parties, especially the party invoking arbitration, has no other choice but to approach courts in getting the matter referred to arbitration as the party lacks the inherent ability to force the other side to proceed with the arbitration.

However, not all 'defects' render an arbitration clause devoid of any effect. Some of these imperfections may be resolved through the tool of interpretation. The question of interpretation is a jurisdiction-specific one. For example, while some jurisdictions may hold that a clause is vague and therefore unenforceable, others may look at the intention of the parties and hold otherwise. Secondly while 'may' when used in an arbitration clause has been seen as discretional in some jurisdictions, in others, 'may' has been interpreted as mandatory. We will discuss all these hereunder.

Generally, there are three approaches available to the courts[21].

a) Courts hold the arbitration clause to be invalid or unenforceable for vagueness.[22]
b) Courts sever the defective part from the part which provides for resolution of disputes through arbitration and enforces the valid part of the arbitration clause.[23]

[21] Srinivasan, ibid

[22] See *System for International Agencies v Rahul Coach Buildings Pvt Ltd*, MANU/SC/0145/2015 where the partiers agreed to arbitration under the 'by-laws of Indian Company's Act 1956'. The Supreme Court of India held that there was no arbitration clause since the same was vague. But see *Sino-Afric Agriculture & Ind Coy Ltd & Ors v MFI & Anor, supra*

[23] In *Lucky-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd* (1993) 1 HKC 404 (Hong Kong High Court), the parties agreed to refer their disputes to arbitration under the rules of 'procedure of the International

c) Courts re-write the defective part of the arbitration clause by supplying meaning that is most reasonable in the context of the arbitration clause.[24]

We must warn however that it is trite that the duty of a court is to give effect to the intention of the parties and not re-write their contracts. How then do we determine the intention of parties in a matter? For the purpose of ascertaining the intention of the parties, regard must be had to the terms of the contract; the conduct of the parties; and the circumstances of the case. These rules, however, are mere presumptions and the law does permit parties to a contract to settle the point for themselves by any intelligible expression of their intention.[25]

Imoukhuede v Mokwuenye[26] is the Nigerian case noted for pathological clauses. Clause 3(c) of the Tenancy Agreement between the parties provided *inter alia* that:

> *"...any conflict and/or disagreement arising out of these presents... shall be referred to a sole Arbitrator that shall be appointed by the President of the Chartered Institute of Arbitrators, London, Nigeria Chapter..."*

The argument was that "the Chartered Institute of Arbitrators, London, Nigeria Chapter" is non-existent making the referral to a non-existent body unenforceable. The Supreme Court held that parties are bound by their contract. However, where such terms or expression will not be absurd or is unambiguous, the intention of the parties is read into the contract.

Furthermore, the Respondent conceded to the fact that judicial notice had been taken that only two bodies of arbitrators exist in Nigeria which are: The Chartered Institute of Arbitrators, (CIArb)(UK), Nigeria Branch and Chartered Institute of Arbitrators of Nigeria. What is basically missing or interchanged is "London" instead of "UK", which the trial Court inferentially and literally interpreted, "London is a city

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Commercial Arbitration Association'. There was no such association but the High Court severed the defective part and referred the parties to arbitration under the laws of the seat of arbitration chosen as per the arbitration clause.

[24] In *Pricol Ltd v Johnson Controls Enterprises Ltd & Ors* (2015) 4 SCC 177, the Supreme Court of India referred the parties to arbitration under the arbitration rules of the Singapore International Arbitration Centre even when the parties provided for reference to arbitration under the arbitration rules of Singapore Chamber of Commerce as there was no Centre like the Singapore International Arbitration Centre.

[25] See Per IGUH, JSC in AFROTEC TECHNICAL SERVICES (NIG) LTD V. MIA & SONS LTD & ANOR (2000) LPELR-219(SC).

[26] (2019) LPELR-48996 (SC)

and not a country, reference to United Kingdom must be more correct." Can the fact that "London" was used and not "UK" necessarily mean and be inferred that it is a non-existent body? The Supreme Court held that it is reasonably inferable that this was a misnomer or a mistake, which must be read to bring in the intention of the parties.

The Supreme Court stated that the pathological arbitration clause referred to and conceded by the Respondent's learned Counsel is more probable and likely the literal and the best interpretation to be given in this matter. Any other interpretation as given by the lower Court will work out absurdity and be antithetical to the intention of the parties. Furthermore, the Respondent was a party to the Tenancy Agreement and read same before appending his signature or subscribing to be bound by same. If he knew and believed that "the Chartered Institute of Arbitrators, London, Nigeria Chapter" was non-existent, why did he agree to be bound by same?

The Supreme Court placed reliance on AGBULE V. WARRI REFINERY & PETROCHEMICAL CO LTD[27] wherein (per OGUNBIYI, JSC) it stoutly held and nailed the matter thus:

> *It goes without saying therefore that a defendant/respondent who did not protest against the name used and in fact filed processes using such interchangeably cannot now be heard to complain at this stage. This is because he is deemed to have waived his right and is therefore estoppel from contending the contrary as rightly submitted by the learned appellant's counsel. The wrong use of the name did not overreach or put the respondent to any form of disdain in the absence of any earlier complaint thereof. The use of the name in my view is, at best a misnomer and which did not occasion any negative effect.*

The Supreme Court further held that under its inherent powers, it has the jurisdiction to correct such inconsequential error which did not require any formal application to be made. A similar situation in the case of *Afolabi & 2 Ors v. Adekunle & Anor*[28] is in evidence wherein the Supreme Court in the lead judgment delivered by Aniagolu JSC approved the power of Court of Appeal to amend the capacity of a

[27] (2012) LPELR-20625(SC)
[28] (1983) 8 SC 98

party without a formal application... At pages 117 & 119 in particular, the learned jurist said-

> *It is the duty of Court to aim at, and to do, substantial justice and to allow such formal amendments, in the course of the proceedings, as are necessary for the ultimate achievement of justice and the end of litigation, ...while recognizing that the Rules of Court should be followed by parties to a suit, it is perhaps necessary to emphasize that justice is not a fencing game in which parties engage themselves in an exercise of out-smarting each other in a whirligig of technicalities, to the detriment of the determination of the substantial issues between them...*
>
> *I agree with the interpretation given by the trial Court and I stand by it. Since parties are bound by the terms of their contracts, they must also be bound by errors and mistakes they have condoned and waived. The error having been condoned by the Respondent is part and parcel of their contract and shall be interpreted so by me. The cardinal principle of interpretation of documents is that parties are presumed to have intended what is contained in a document to which they have subscribed.*[29] *This is because, it is not the function of the Court to make a contract between the two parties or to rewrite the one already made by them, but it is the Court's duty to construe the surrounding circumstances including written and oral statements to effectuate the intention of the parties.'*[30]

Another Nigerian case is *Sino-Afric Agriculture & Ind Coy Ltd & Ors v MFI & Anor, supra* though not strictly dealing with pathological clauses but the use of the word 'may' in an arbitration clause, the effect of an arbitration agreement and reference to non-existent arbitral body. In explaining the meaning of the word 'may', the Court of Appeal held thus:

> *...Also, in Nigeria, in the case of the Chief J. O. Edewor v. Chief M. Uwegba & Ors (1987) NWLR Part 50 page 313, the Supreme Court, per Nnamani, J.S.C. on the meaning of the word 'may', expressed inter-alia as follows:- "Generally the word "may" always means "may". It has long*

[29] See MAXIMUM INSURANCE COY. LTD VS. OWONIYI (1996) 1 NCLC (NIGERIAN COMMERCIAL LAW CASES) (PT. I) 141 AT 145

[30] See OMEGA BANK (NIG.) PLC V. OBC LTD. (2005) ALL FWLR (PT.249) 1965 at 1967

been settled that may is a permissive or enabling expression. In Messy v. Council of the Municipality of Yass (1922) 222 SRNSW 494 per Cullen, C.J at pp 497, 498 it was held that the use of the word "may" prima facie conveys that the authority which has power to do such an act has an option either to do it or not to do it. See also Cotton, L. J in Re Daker, Michel v. Baker (1800) 44 CH.D 282. But it has been conceded that the word may acquire a mandatory meaning from the context in which it is used. See Johnson's Tyre Foundary Pty Ltd v. Shire of Maffra (1949) A.L.R 88. The word may also acquires a mandatory meaning from the circumstances in which it is used." (underlining mine) Further in Ude v. Nwara & Anor. (1993) 2 NWLR Part 278 page 638, Nnaemeka-Agu, J.S.C., opined that it is now the invariable practice of the Courts to interpret the word 'may' as mandatory whenever it is used to impose a duty upon a public functionary the benefit of which enures to a private citizen. Even in the case of Kurobo v. Zach Motison Ltd (1992) 5 NWLR Part 239 page 102 at 115 - 117, Tobi, J.C.A., (as he then was), in dealing with an arbitration clause recognized that there are known instances when the word "may" could be constructed as "shall."

Per ORJI-ABADUA ,J.C.A (Pp. 26-27, para. B)

In emphasizing the binding effect of an arbitration agreement, arbitral award and reference to non-existent arbitral body, the Court of Appeal held thus:

In Ogun State Housing Corporation vs. Engineer Olu Ogunsola (2000) 14 NWLR Part 687, this Court, per- Adamu, J.C.A, held that parties to a written contract agreement are bound by the terms of a contract which the parties in their free-will mutually adopted and signed provided such terms are not illegal or contrary to public policy. Further in C. N. Onuselogu Enterprises Ltd v. Afribank (Nig) Plc (2005) 1 NWLR Part 940 page 577, Galadima, J.C.A. (as he then was) in highlighting how to couch an arbitration clause as stated in the book titled the Hand of Arbitration Practice page 18, then expressed that arbitral proceedings are recognized means of resolving disputes. He said that there must be an agreement to arbitrate which is a voluntary submission to arbitration, therefore, arbitral proceedings should not be taken lightly

by both Counsel and the parties. They are recognized means of resolving disputes. Arbitration is said to be conventional process; a party cannot be forced to arbitrate a dispute unless he agrees to it. It is generally perceived that by any agreement containing an arbitration clause it is an indication that the contract requires the parties to resolve their disputes through an arbitration process. Undoubtedly, arbitration is usually encouraged because arbitration clauses reduce the burden on Court systems to resolve disputes. ***It is said that in keeping with the informality of the arbitration process, the law is generally keen to uphold the validity of arbitration clauses even when they lack the normal formal language associated with legal contracts.*** *In Travelport Global Distribution Systems BV v. Belleview Airlines Ltd 2012 WL 3925856 (SDNY Sept. 10 2012), Travelport, a Dutch Company, entered into a Distribution Agreement with Belview, a Nigerian company, to provide a computerized travel reservation system in Nigeria.* ***The agreement contained an arbitration clause under the auspices of the "United States Council of Arbitration and the UNCITRAL Arbitration Rules****. When a dispute arose between the parties, Travelport terminated the contract and Bellview initiated an action in the Nigerian Federal High Court. Travelport argued that the dispute should be submitted to arbitration pursuant to the Distribution Agreement, but Bellview refused to terminate the Nigerian suit. Bellview argued that the arbitration clause contained in the Distribution Agreement was inapplicable because the specified arbitral body was "non-existent." Travelport responded by filing a petition in the Southern District of New York, seeking an anti-suit injunction in respect of the Nigerian suit and a Court order compelling arbitration.* ***Bellview argued that arbitration was not mandatory because the Distribution Agreement used discretionary language. The Court disagreed and concluded that the use of the permissive word "may" is not sufficient to overcome the presumption that the parties agreed to arbitrate. Bellview also argued that the arbitration agreement was invalid because it referenced the "United States Council of Arbitration", a non-existent institution. The Court found this argument without merit and held that a technicality would not***

preclude enforcement of the arbitration agreement, because the parties clearly expressed their intention to resolve the dispute through arbitration*. It needs to be echoed that parties generally should not be encouraged to circumvent arbitration agreement since both parties manifested their respective intention in the contract agreement signed by them to refer the matter to arbitration when dispute arises.* ***Therefore, arbitration agreements are enforceable even if vague, so long as the parties' intention to arbitrate as a final and binding mechanism for the resolution of their dispute is evinced therein. The arbitration agreement in the instant appeal cannot be said to be improperly or inconclusively drafted****. According to some Courts, however, this traditional line reasoning is no longer the trend in the context of arbitration provision in construction contracts. In TM Delmarva Power v. NCP of Virginia, the Supreme Court of Virginia held that the parties' use of the word "may" in the dispute resolution provisions of their construction contract required mandatory participation in the arbitration at the election of one of the parties. It held that the provision i.e. arbitration clause was mandatory at the election of one of the parties.* ***It further held that the word "may" means that either party may invoke the dispute resolution procedures, but neither is compelled to invoke the procedures. But once a party invokes the arbitration provision, the other party is bound to arbitrate".*** *The Court reasoned that dispute provision would be rendered meaningless if the word "may" was interpreted as permissive because parties to a commercial contract can always choose to submit their disputes to arbitration. Given the trend that Courts have interpreted the term "may" as "shall" in the context of arbitration agreements, parties to a contract must be careful in understanding both the plain ordinary meaning and the legal meaning of the particular words used. If the parties want arbitration of disputes to be permissive and non-mandatory, they should clarify that in their contract by including more explicit language (i.e. "any and all disputes, upon mutual agreement, may be arbitrated or with consent of the other party, either party may commence arbitration)."*

Per ORJI-ABADUA ,J.C.A (Pp. 27-30, paras. C-G). (Emphasis added).

Consequences of Defective Arbitration Agreements

The consequences include –

- ✓ Such clauses defeat the purpose of resorting to arbitration
- ✓ Considerable wastage of time, money and efforts in fighting litigation in court, sometimes up to the highest court
- ✓ Forum shopping – initiation of court proceedings in any jurisdiction other than the one chosen by the parties
- ✓ Possibility of multiple proceedings in different jurisdictions
- ✓ A corollary of multiple proceedings may lead to inconsistent decisions on the enforceability of the arbitration agreement.

Concluding Remarks

The agreement to arbitrate is the foundation stone of arbitration. Care should be taken in drafting the agreement. We do not need to re-invent the wheel. There are standard arbitration clauses that can be used. If they are to be adapted, care should be taken in doing this so as to avoid pathological clauses. A defective arbitration clause may undermine parties' intent to seek recourse to arbitration rather than the courts.

Pathological clauses have implication for the parties, the arbitral tribunal and the courts. If an arbitration clause is defective, can parties not draft a submission agreement to cure the defect? Secondly, resolving them can be very expensive since resort will be to litigation up to the highest court while the substantive dispute is kept in abeyance. As an arbitral tribunal, case management techniques are critical. Can the arbitral tribunal not request the parties to re-draft or convert the defective arbitration clause to a submission agreement? For the courts, there is the need to be less technical and do substantial justice. The court should be less technical once the intention to arbitrate can be evinced. Our courts should seek to give effect to the parties' intention to arbitrate 'except in cases of hopeless confusion.[31]

[31] David St John Sutton and Others (n 13) 69

I share the views of my Lord, Hon Justice Aniagolu, JSC thus: '***Since parties are bound by the terms of their contracts, they must also be bound by errors and mistakes they have condoned and waived.***'

Thank you for your attention.

BEING A PRESENTATION AT THE CAPACITY BUILDING FOR THE DIRECTORATE OF LEGAL SERVICES OF NATIONAL ASSEMBLY ON BILL DRAFTING AND DISPUTE RESOLUTION: ABUJA: MARCH 29-31, 2021

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