

DEFECTIVE ARBITRATION CLAUSES: AN EXAMINATION OF THEIR PRACTICAL CONSEQUENCES TO COMMERCIAL ARBITRAL PROCEEDINGS

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ABSTRACT

The foundation of arbitration is an arbitration agreement or clause,¹ through which parties to a commercial or investment contract consent to resolve disputes arising under or relating to such contract by arbitration. A carefully drafted arbitration clause normally yields into a smooth, expedient, and confidential dispute resolution process. However, a poorly drafted or ‘pathological’ arbitration clause often leads to prolonged litigation, where the parties are constrained to approach the court to obtain judicial interpretation and a directive on the validity, operativity, curability, legality or otherwise of the poorly drafted arbitration clause before the arbitration proceeding can even begin.

Notably, some of the defects are curable and some are incurable even upon approaching the courts. Whereas the incurability of a pathological clause makes it unenforceable, in effect, rendering the entire arbitration agreement fatal, curable defects in pathological arbitration clauses may be remedied through the tool of interpretation employed by courts of law in different jurisdictions around the world. A review of case law in this article has revealed two major consequences of pathological arbitration clauses: firstly, a pathological arbitration clause renders an arbitration clause null and void, inoperative or incapable of being performed. Secondly, although a pathological arbitration clause may be defective, the court may sustain, cure

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¹ As seen herein, while “arbitration agreement” and “arbitration clause” are technically distinct, where the former may refer to a standalone agreement and the latter to a provision within a broader contract, this article often uses the terms interchangeably. Unless otherwise specified, references to one should be understood to include the other. – [Arbitration Agreement is typically the clause mentioned in the main agreement and not a standalone agreement in itself. As such, this footnote is not required.]

and reconcile it with the implied intention of the parties to refer a dispute to arbitration, rather than resorting to litigation in court.

Where an arbitration clause is pathological, parties are trapped in a prolonged litigation process in which they spend more time, effort and finances in pursuing the prolonged court process, which would otherwise not be the case if the arbitration clauses were crafted carefully and effectively. Therefore, it is pertinent that transactional experts involved in commercial negotiations leading up to the drafting of commercial contracts that contain arbitration clauses are well-versed with the essentials of drafting effective arbitration clauses.

I. INTRODUCTION

Arbitration is universally recognised as a consensual process, typically initiated by the parties through an arbitration agreement.² It is widely accepted that parties to a contract or investment treaty are free to choose arbitration as one of the methods of settlement of disputes arising out of such contract or investment treaty.³ Parties also retain the autonomy to select the law governing the contract or treaty.⁴ It should be noted from the onset that, for arbitration to take place, parties must agree in an arbitration agreement to submit disputes arising out of the execution of a contract to arbitration.⁵ Therefore, it is important that when parties agree to insert an arbitration agreement clause in a contract, it must be drafted in a way that will expressly reflect the parties' consent to arbitrate. This presupposes that parties must incorporate all the essential ingredients in the clause and failure to do so may render the clause pathological.

² *C.N. Onuselogu Enterprises Ltd v. Afribank (Nig) Plc* (2005) 1 NWLR Part 940 page 577 ('*Onuselogu v. Afribank*').

³ See *Luganuzo Investment Company Ltd. v. The Trustee of Orthodox Church of Tanzania Holy Archdiocese of Mwanza*, High Court of Tanzania (Commercial Division), Misc. Commercial Cause No. 49/2020 (Unreported) ('*Luganuzo v. Orthodox Church*'); and *Sunshine Furniture Co. Ltd. v. Maersk (China) Shipping Co. Ltd. & Nyota Tanzania Ltd.*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 98 of 2016 (Unreported) ('*Sunshine Furniture v. Maersk*').

⁴ See *Louis Dreyfus Commodities Tanzania Ltd. v. Roko Investment Tanzania Ltd.* [2017] TLS LR 588 (CAT) ('*Louis Dreyfus v. Roko Investment*').

⁵ *Ibid*; See also *M/S Marine Services Co. Ltd. v. M/S Gas Entec Company Ltd.*, High Court of Tanzania (Commercial Division) Consolidated Misc. Commercial Causes Nos. 25 & 11/2021 (Unreported).

As considered below, the fundamental ingredients of an arbitration clause include specific disputes to be referred to arbitration, number of arbitrators, seat of arbitration, governing law of the arbitration agreement, finality of arbitral awards, procedural rules, language of the arbitration, etc.⁶

It has been held that, although there is no particular form that ‘can be laid down as universal for framing an arbitration agreement’, it is necessary to express definitive intention to arbitrate and avoid problematic words of mere possibility.⁷ As such, a carefully and duly drafted arbitration clause normally yields into a smooth, expedient, and cost-serving dispute resolution process.

Nevertheless, where an arbitration clause is poorly or defectively drafted (i.e., a “pathological” arbitration clause),⁸ it may result in failure of arbitration. Notably, a poorly drafted or pathological arbitration clause often results in a prolonged litigation process in order for the parties to obtain a judicial interpretation and directive on the validity, operativity, curability, legality or otherwise of the poorly drafted clause.⁹ As considered in this article, a defective or pathological arbitration agreement is a clause that lacks in one or some of the essential elements of a duly drafted arbitration clause.¹⁰ Whereas courts in some jurisdictions have nullified entire pathological arbitration clauses, others have merely denied their judicial enforceability.

Therefore, this article argues that all those experts (including transactional lawyers)¹¹ involved in the drafting of arbitration clauses are duty-bound to ensure that said clauses are drafted in a way that renders them sacrosanct, as envisaged under international arbitration law and practice.¹² Apart from considering the scope and essential ingredients of an arbitration clause, this article also critically examines pathological agreements, particularly their instances, court’s approaches

⁶ Srinivasan, B., ‘Defective Arbitration Clauses: An Overview,’ *Indian Institute of Quantity Surveyors Annual Insight*, 2015, pp. 52-53.

⁷ *Jyoti Brothers v. Shree Durga Mining Co.*, AIR 1956 Calcutta 280 (‘*Jyoti v. Shree Durga*’).

⁸ Madumere, C., ‘*Dealing with Pathological Clauses in Arbitration*,’ THE ARBITRATOR (The News Journal of the Chartered Institute of Arbitrators, Nigeria Branch), Vol. 7 No 2, January-March 2016, p. 17.

⁹ Samra, H.J. and R. Ramachanderan, ‘A Cure for Every Ill? Remedies for ‘Pathological’ Arbitration Clauses,’ UNIVERSITY OF MIAMI LAW REVIEW, Vol. 74 No. 4, 2020, pp. 110-1123, at 1111. Available at: <https://repository.law.miami.edu/umlr/vol74/iss4/6> (accessed 12 March 2023).

¹⁰ Srinivasan, op. cit.

¹¹ Traditionally, transactional lawyers work in generally less adversarial than litigation legal work. They basically counsel individuals and organizations on non-litigious legal issues generated by their business dealings, including assisting clients in drafting and negotiating commercial contracts; See Harvard Law School, ‘Transactional Law,’ available at <https://hls.harvard.edu/bernard-koteen-office-of-public-interest-advising/about-opia/what-is-public-interest-law/public-interest-work-types/transactional-law/> (accessed 6 March 2023).

¹² See *Cable and Wireless v. IBN United Kingdom Ltd* [2002] EWHC 2059 (‘*Cable & Wire v. IBN*’); *Luganuza v. Orthodox Church*, op. cit; and *Shamji v. Treasury Registrar Ministry of Finance* [2002] 1 EA 273 (‘*Shamji v. Treasury Registrar*’).

against them and their consequences to future commercial arbitration. The article concludes by shedding light on the possible way forward and offers recommendations for ensuring that transactional experts draft arbitration clauses that incorporates all the essential ingredients. This is crucial to preserving the integrity and enforceability of arbitration agreements and avoiding situations where their validity is undermined.

II. CONCEPTUALISING AN ARBITRATION CLAUSE

An arbitration agreement is often referred to as the ‘foundation stone’ of arbitration.¹³ Legally defined, an arbitration clause 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.’¹⁴ Case law and the practice of drafting arbitration clauses indicate that the envisaged disputes to be referred to arbitration may be those ‘arising under’ or ‘arising out of’ the contract containing such clause or where those specifically referred to arbitration.¹⁵

Mainly, an arbitration agreement encompasses an agreement by two or more parties to submit to arbitration¹⁶ either: (i) ‘future’ disputes that may arise where the agreement is set out in the substantive agreement between the parties (*i.e.*, in an arbitration clause), or (ii) ‘current’ disputes

¹³ LexisNexis, ‘*Practice Notes: Arbitration Agreements—Definition, Purpose and Interpretation*,’ available at <https://www.lexisnexis.co.uk/legal/experts/practice-areas/arbitration> (accessed 10 February 2023).

¹⁴ See Section 3 of the Kenya Arbitration Act, Cap. 49 Revised Edition 2012; Section 2(1)(c) of the Uganda Arbitration and Conciliation Act, Cap. 4 of 2000; Section 3 of the Tanzania Arbitration Act, Cap. 15 R.E. 2020; and Section 7 of the India Arbitration and Conciliation Act, 1996; Kumar, D., “Essential Ingredients of an Arbitration Agreement,” April 11, 2016; available at <https://vakilsearch.com/advice/essential-ingredients-of-an-arbitration-agreement/> (accessed 11 February 2023).

¹⁵ Whereas in *Heyman v. Darwins Ltd.* [1942] AC 356, 399, Lord Porter said that the former had a narrower meaning than the latter; in *Union of India v. E.B. Aaby’s Rederi A/S* [1975] AC 797, Viscount Dhorne (at p. 814) and Lord Salmon (at p. 817) held that they could not see the difference between these terms. However, in *Overseas Union Insurance Ltd. v. AA Mutual International Insurance Co. Ltd.* [1988] 2 Lloyd’s Rep 63, 67, Evans J said that there was a broad distinction between clauses which referred “only those disputes which may arise regarding the rights and obligations which are created by the contract itself” and those which “show an intention to refer some wider class or classes of disputes.” In *Premium Nafta Products Ltd. & Others v. Fili Shipping Ltd. & Others* [2007] EWCA Civ 20, the House of Lords held that the former ‘may be said to arise “under” the contract while the latter would arise “in relation to” or “in connection with” the contract.’ (*per* Lord Hoffmann, at para. 11). In *Fillite (Runcorn) Ltd. v. Aqua-Lift* (1989) 26 Con LR 66, 76, Slade LJ and Nourse LJ held that the phrase “under a contract” was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract.

¹⁶ Idornigie, P.O., ‘*The Implication of Poorly Drafted Arbitration Clause in a Contract*,’ a paper presented at the capacity building session for the Directorate of Legal Services of the National Assembly on Bill Drafting and Dispute Resolution, held in Abuja, Nigeria, on 29-31 March 2021; available at <https://paulidornigie.org/wp-content/uploads/2021/03/The-Implication-of-Poorly-Drafted-Arbitration-Clause-in-a-Contract-Final.1.pdf> (accessed 21 February 2023).

where the agreement to arbitrate is set out in a standalone agreement entered into between the parties after the dispute has arisen.¹⁷

A leading authority that has defined an arbitration agreement in recent times is *Fiona v. Privalov*, [“**Fiona**”]¹⁸ where the English House of Lords (now the Supreme Court) held that:

“[5] Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader’s understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.”¹⁹

As such, the House of Lords in the *Fiona* case held that construction of an arbitration clause ‘should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption, unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.’²⁰ Otherwise, ‘if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.’²¹

III. THE PURPOSE AND SCOPE OF THE ARBITRATION AGREEMENT

As the court held in *Euromec v. Shandong Taikai*,²² the primary purpose of an arbitration clause is to provide ‘a specialized tribunal to hear the dispute falling within the ambit of the matters

¹⁷ According to Section 6(1) of the English Arbitration Act, Cap. 23 (1996), an “arbitration agreement” means ‘an agreement to submit to arbitration present or future disputes (whether they are contractual or not).’ See also LexisNexis, op. cit.

¹⁸ *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40 (‘*Fiona v. Privalov*’).

¹⁹ *Ibid*, para. 5.

²⁰ *Ibid*, para. 13.

²¹ *Ibid*, para. 17 (per Longmore LJ).

²² *Euromec International Ltd. v. Shandong Taikai Power Engineering Co. Ltd.* (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) (‘*Euromec v. Shandong Taikai*’).

governed by the agreement.’ Elaborating the purpose of an arbitration agreement or clause, in the *Fiona* case, the House of Lords was of the view that:

“[6] *The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.*”²³

As such, the construction of an arbitration agreement ‘must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts.’²⁴ Therefore, parties are at liberty to contract and allow to vest arbitrability determinations in the arbitrator, but only if the agreement contains clear language to that effect.²⁵

In terms of scope, the arbitration agreement is governed by several underlying principles: foremost is the doctrine of party freedom and autonomy, which posits that parties to a contract are *free* to agree and decide *on a forum*²⁶ and *choice of law* for the determination of a contractual dispute.²⁷ In addition, parties are *free to agree* on how their disputes should be resolved. In this regard, subject only to such safeguards as are necessary in the *public interest* or as provided by law,²⁸ the

²³ *Ibid*, para. 6.

²⁴ *Ibid*, para. 7.

²⁵ *Ibid*, p. 5.

²⁶ *Sunshine Furniture v. Maersk*, op. cit.

²⁷ *Luganuzza v. Orthodox Church*, op. cit.

²⁸ Under Section 10 of the Kenya Arbitration Act, two possibilities are permitted where the court can intervene in arbitration. Firstly, where the Act expressly provides for or permits the intervention of the court; and, secondly, in public interest, where substantial injustice is likely to be occasioned even though a matter is not provided for in the Act. See especially *Euromec v. Shandong Taikai*, op. cit.

court is excluded from resolving a dispute where the parties have consensually agreed to arbitrate.²⁹

Because of the doctrine of party autonomy underlying an arbitration agreement, such agreement is held to be sacrosanct. As the court held in *Shamji v. Treasury Registrar*,³⁰ the doctrine of the sanctity of contract / *Pacta Sunt Servanda* requires that where parties have agreed to resolve their dispute through an arbitrator, they must do so³¹ instead of going to court, in which case the court's duty is to refer them to arbitration.³² As such, when there is an agreement between the parties to refer a dispute to arbitration regardless of the nature of the complaint, the parties must go before the arbitral tribunal and not the court.³³ Therefore, as case law posits, under the doctrine of sanctity of the contract, the terms and conditions set out in the arbitration clause are to be interpreted to give effect to the agreement of the parties.³⁴

Another principle underlying the arbitration agreement is that arbitration clauses are independent and separate from the contract in which they are contained.³⁵ This principle was enunciated in

²⁹ Section 5 of the Indian Arbitration and Conciliation Act (1996) provides that: "*Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*"; See *Euromec v. Shandong Taikai*, op. cit; where it was held that Section 10 of the Kenya Arbitration Act enunciates the necessity to curb the court's role in arbitration so as to give effect to that policy. The principle of party autonomy is recognized as a critical precept for guaranteeing that parties are satisfied with results of arbitration. It also helps to achieve the key object of arbitration, that is, to deliver fair resolution of disputes between parties without unnecessary delay and expense. The Act is enacted with the key purpose of increasing party autonomy and minimizing court intervention.

³⁰ Op. cit.

³¹ See *Telkom Kenya Ltd. & Another v. Kamconsult Ltd. Nairobi* (Milimani) HCCC NOS. 262 & 267 of 2001 [2001] KLR 683; [2001] 2 EA 574 ('*Telkom v. Kamconsult*'); and *Elite Earthmovers Ltd. v. Machakos County Government & Another* [2020] eKLR ('*Elite Earthmovers v. Machakos County Government*').

³² See also *Cable and Wireless v. IBN United Kingdom Ltd* [2002] EWHC 2059 ('*Cable and Wireless v. IBN*'); and *Euromec v. Shandong Taikai*, op. cit.

³³ *Travelport International Ltd. v. Precise Systems Ltd.*, High Court of Tanzania (Commercial Division), Misc. Commercial Application No. 359/2011 (Unreported) ('*Travelport v. Precise Systems*').

³⁴ *Luganuzi v. Orthodox Church*, op. cit.

³⁵ The principles of independence and separability of an arbitration agreement are enshrined in Section 12 of the Tanzania Arbitration Act and Section 7 of the English Arbitration Act, 1996. See also *Plinth Technical Works Ltd. v. Fort Portal Municipal Local Government Council* (CAD/ARB/ 62 of 2017) [2018] UGCADER 3 (16 March 2018) ('*Plinth v. Fort Portal*'). In *Fiona Trust*, op. cit, para. 17, it was held that:

'The principle of separability enacted in section 7 [of the English Arbitration Act, which is in *pari materia* with Section 12 of the Tanzania Arbitration Act] means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course, there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct

Travelport v. Precise Systems,³⁶ where the court held that an arbitration agreement must be treated as an independent agreement. Accordingly, when parties have willingly submitted to arbitration as a dispute resolution mechanism, the arbitration clause remains operative even if the subject matter of the dispute differs from the main contract or the contract itself has been terminated.

IV. ESSENTIAL INGREDIENTS OF AN ARBITRATION AGREEMENT

As previously stated, an agreement to arbitrate can take the form of a standalone ‘arbitration agreement’ or, more frequently, of a clause within a dispute resolution section of a contract.³⁷ Although there is no specific form for an arbitration agreement,³⁸ it must contain several fundamental ingredients. Indeed, the drafter of an arbitration agreement must exercise care to ensure that such clause is ‘appropriate for the particular circumstances of the case’³⁹ and to avoid rendering it ambiguous and unenforceable.

Universally, an arbitration agreement must be in writing.⁴⁰ Additionally, an arbitration agreement is founded in the underlying principle of contract law that requires the parties to possess legal capacity to contract, i.e., the parties must be legally competent to enter into contract in which an arbitration clause is contained.⁴¹ Because arbitration agreements are binding contracts,⁴² the lack of capacity on the part of the parties can vitiate the agreement. In addition, the arbitration agreement must be valid as a separate contract from the main contract in which it is contained.⁴³

agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.’

³⁶ *Travelport v. Precise Systems*, op. cit.

³⁷ Burges Salmon, ‘*Arbitration Basics: Key Ingredients for the Arbitration Agreement*’, 16 August 2022; available at <https://www.burges-salmon.com/news-and-insight/legal-updates/disputes/burges-salmon-arbitration-basics-key-ingredients-for-the-arbitration-agreement> (accessed 11 February 2023).

³⁸ Mishra, V., ‘*Essential Elements of an Arbitration Agreement*’, Lex-Warrier, 1 July 2013; available at <http://www.journal.lex-warrier.in/2013/07/01/essential-elements-of-an-arbitration-agreement/> (accessed 11 February 2023).

³⁹ See Sutton, D.S.J., et al., *Russell on Arbitration* (24th edn.) (London: Sweet & Maxwell, 2015), p. 61.

⁴⁰ See e.g. Section 7(3) of the Indian Arbitration and Conciliation Act (1996), Section 10(1) and (3) of the Tanzania Arbitration Act (2020), Section 5(1) and (2) of the English Arbitration Act (Cap. 23 of 1996), Section 4(2) of the Kenya Arbitration Act (Cap. 49), and Section 3(2) of the Uganda Arbitration and Conciliation Act (Cap. 4).

⁴¹ Kumar, op. cit.

⁴² *Luganuzza v. Orthodox Church*, op. cit.

⁴³ See Section 7 of the English Arbitration Act; and Section 12 of the Tanzania Arbitration Act. In *Travelport International Ltd. v. Precise Systems Ltd.*, High Court of Tanzania (Commercial Division), Misc. Commercial Application No. 359/2011 (Unreported) (‘*Travelport v. Precise Systems*’), it was held that an arbitration agreement in a contract must be taken to be an independent and separate agreement such that it survives the main contract even where it is vitiated by various reasons.

This means that its object must be lawful and capable of being carried into effect.⁴⁴ To achieve this, the arbitration agreement should be carefully drafted to provide clear and unequivocal terms.

Another essential ingredient of an arbitration agreement is that the parties must have the *intention* to refer any disputes arising out of or under the contract in which the arbitration agreement is contained to arbitration.⁴⁵ As it is the case with the consent inherent in a contract, the consent of the parties to an arbitration agreement must not be influenced by fraud.⁴⁶ The intention of the parties to refer disputes to arbitration is framed in the underlying principle that a binding contract requires parties to be at consensus *ad idem*.⁴⁷ Viewed in this sense, an arbitration agreement should indicate the parties' consensual agreement on a number of basic elements: the appointment of arbitrators (including the number and manner of their appointment), the juridical seat of arbitration and the place of arbitration, choice of forum⁴⁸ and language of arbitration, choice and determination of the law governing the contract and the rules of procedure governing the arbitration (*lex arbitri*) and other procedural aspects.⁴⁹

In addition, the arbitration agreement should set out the jurisdiction and powers of the arbitral tribunal.⁵⁰ In arbitral proceedings, the arbitrator derives his or her jurisdiction from the arbitration clause, and they cannot act outside it as doing so will render the decision a nullity.⁵¹ This power also entails the parties' freedom and autonomy to agree in what circumstances the authority of an arbitrator may be revoked,⁵² as well as the termination of the mandate.⁵³

⁴⁴ Kumar, op. cit.

⁴⁵ *Ibid.*

⁴⁶ Kumar, op. cit.

⁴⁷ *Ibid.*

⁴⁸ *Luganuzo v. Orthodox Church*, op. cit.

⁴⁹ *Sushila Seth v. State of MP*, AIR 1980 Del 244.

⁵⁰ See Section 38(1) of the English Arbitration Act; *Luganuzo v. Orthodox Church*, op. cit; and *Medical Store Department v. Cool Care Services*, High Court of Tanzania (Commercial Division), Consolidated Misc. Commercial Causes Nos. 13 & 32/2020 (Unreported) ('*MSD v. Cool Care*').

⁵¹ *MSD v. Cool Care*, *ibid.* See also *Mvita Construction Co. Ltd. v. Tanzania Harbour Authority*, Court of Appeal of Tanzania, Civil Appeal No. 94/2001 (Unreported) ('*Mvita v. THA*'); and *M/S Marine Services Co. Ltd. v. M/S Gas Entec Company Ltd.*, High Court of Tanzania (Commercial Division), Consolidated Misc. Commercial Cause Nos.25 & 11/2021: (Unreported) ('*Marine Services v. Gas Entec*').

⁵² Section 23 of the English Arbitration Act, and Section 27 of the Tanzania Arbitration Act.

⁵³ Section 16 of the Kenya Arbitration Act and Section 15 of the Uganda Arbitration and Conciliation Act.

In addition to the foregoing essential ingredients, the Indian Supreme Court has outlined several attributes of an arbitration agreement. In *KK. Modi v. K.N. Modi*,⁵⁴ the Supreme Court listed the following elements as attributes of a contemporary arbitration agreement:

- (i) The arbitration agreement must contemplate that the decision of the arbitrator(s) will be binding on the parties to the agreement;
- (ii) The arbitration agreement must indicate that the jurisdiction of the arbitrator(s) to determine the rights of the parties must derive from either the parties' consent, the order of the court, or a statute;⁵⁵
- (iii) The arbitration agreement must contemplate that the substantive rights of the parties will be determined by the arbitrator(s);
- (iv) The arbitration agreement must indicate that the arbitrator(s) will determine the rights of the parties in an impartial and judicial manner with the arbitral tribunal owing an equal obligation of fairness towards both sides; and
- (v) The arbitration agreement must contemplate that the arbitral tribunal will make a decision upon a dispute which is already formulated at the time when a reference to the tribunal is made.

To sum, an effective arbitration agreement is supposed to contain the following fundamental elements: (i) the existence of a valid commercial or investment contract; (ii) the arbitration agreement must be valid and binding in nature (*i.e.*, it must have all the essentials of a valid contract, including the arbitrability of its subject matter, proper identification of the parties, and a clear reference of the dispute to arbitration – is it some or all disputes that are referable to arbitration?);⁵⁶ (iii) the governing law of the contract and the arbitration agreement; (iv) the *lex arbitri*; (v) the number of arbitrators and the procedure as well as the manner of their appointment (is there any appointing authority? Any qualification for members of the tribunal?); (vi) the juridical seat and venue of arbitration; (vii) the language and costs of arbitration; (viii) whether an

⁵⁴ *KK. Modi v. K.N. Modi*, AIR, 1998, SCC 1297 ('*Modi v. Modi*').

⁵⁵ See, for instance, Section 33 of *Sheria ya Uwekezaji Tanzania, Na. 10 ya Mwaka 2022* (*i.e.*, Tanzania Investment Act, No. 10 of 2022).

⁵⁶ Sutton, *et al.*, *op. cit.*

ad hoc or institutional arbitration; (ix) mutuality; (x) confidentiality of arbitral proceedings; and (xi) acceptance of arbitral award.

V. DEFECTIVE ARBITRATION AGREEMENTS

Despite the foregoing essential ingredients of an arbitration agreement, some lawyers have been drawing defective arbitration agreements to the detriment of their clients' future dispute resolution through arbitration, as considered below.

A. Pathological Arbitration Clauses

The term “pathological clauses” (in French: or “*clauses pathologiques*”) was coined, for the first time, by Frédéric Eisemann in 1974.⁵⁷ In his considered view, this term ‘denotes arbitration agreements, and particularly arbitration clauses, which contain a defect or defects liable to disrupt the smooth progress of the arbitration.’⁵⁸ As such, the term “pathological clauses” is widely used to describe an ambiguously drafted arbitration agreement or one laden ‘with apparent defect(s) liable to disrupt the smooth progress of the arbitration.’⁵⁹ Such clauses may be ‘a source of strife for the whole duration of the dispute, from jurisdictional battles to challenges at the enforcement stage.’

Additionally, a pathological arbitration clause is an arbitration clause, or more generally an arbitration agreement, whose defective drafting ‘does not allow the constitution of an arbitral tribunal or the appointment of a sole arbitrator without the intervention, not anticipated by the parties, of the “supporting” judge, or even renders it impossible to establish arbitral jurisdiction.’⁶⁰

⁵⁷ Eisemann, F., ‘La clause d’arbitrage pathologique,’ in COMMERCIAL ARBITRATION- ESSAYS IN MEMORIAM EUGENIO MINOLI (Torino: Unione Tipografico-editrice Torinese, 1974), p. 129. See also Idornigie, op. cit; Davis, B., ‘*Pathological Clauses: Frederic Eisemann’s Still Vital Criteria*,’ ARBITRATION INTL., Vol. 7, Issue 4, 1 December 1991, p. 365; and Molfa, M., ‘*Pathological Arbitration Clauses and the Conflict of Laws*,’ HONG KONG L. J., Vol. 37, 2007, pp. 161-184.

⁵⁸ Idornigie, *Ibid*; and Madumere, op. cit, p. 17.

⁵⁹ Suh, J.H., ‘*Interpretation of Pathological Clauses: A Cautionary Tale?*’; Thomson Reuters Practical Law Arbitration Blog, 13 January 2019; available at <http://arbitrationblog.practicallaw.com/interpretation-of-pathological-clauses-a-cautionary-tale/> (accessed 11 February 2023).

⁶⁰ Paris Arbitration Association, ‘*Pathological Clause*,’ available at <http://parisarbitration.com/en/glossaire/pathological-clause/> (accessed 11 February 2023).

In this last situation, the arbitration agreement is null and void or cannot be applied and courts regain jurisdiction to settle the dispute.⁶¹

According to Eisemann, an arbitration clause is pathological when it deviates from any of the essential elements of an arbitration clause.⁶² How defective the clause is, it depends on the extent of the deviation from those elements.⁶³ Nevertheless, when it comes to its implementation, a pathological clause ‘may lead to a clash between its effective interpretation and the parties’ intent to refer their disputes to an arbitral tribunal.’⁶⁴ As such, the interpretation of such a pathological clause ‘creates problems for the parties, the arbitral tribunal and the courts.’⁶⁵

In sum, the core of the pathology concept is that the arbitration agreement ‘is *born* (agreed on) with an inherent disease (defect).’⁶⁶ This means that the agreement is drafted in a way that ‘from the time of entering into the agreement raises questions concerning its own interpretation, and hence is liable to disrupt the smooth progress of the arbitration.’⁶⁷

B. Instances of Defective Arbitration Clauses

There are several instances in which pathological clauses are manifested. In this article we consider a few of them, including manifest inconsistency, uncertainty and inoperability of such clauses; referring to non-existent arbitration institutions or arbitral rules; referring to arbitrators who are

⁶¹ *Ibid.*

⁶² In fact, Eisemann summarized four essential elements of an arbitration clause: firstly (and more common to all agreements), an arbitration clause produces mandatory consequences for the parties to arbitrate; secondly, it excludes the intervention of state courts in the settlement of the disputes, at least before the issuance of the arbitral award; thirdly, it vests powers in the arbitrators to resolve the disputes likely to arise between the parties; and, fourthly, it permits 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 of judicial enforcement.

⁶³ See especially Lee, S., ‘Pathological Arbitration Clauses,’ Singapore International Arbitration Blog, 8 March 2013; available at <https://singaporeinternationalarbitration.com/2013/03/08/pathological-arbitration-clauses/> (accessed 11 February 2023).

⁶⁴ Idornigie, op. cit. See also Pirozzi, R. and R. Ioia, ‘Defective Arbitration Clauses,’ 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 21 February 2023).

⁶⁵ Idornigie, *Ibid.*

⁶⁶ Frank, M., ‘*Interpretation of Pathological Arbitration Agreements: Non-existing and Inaccessible Elements*,’ PEPPERDINE DISPUTE RESOLUTION L. J., Vol. 20 Issue 3, 2020, pp. 298-343, at p. 304. Available at: <https://digitalcommons.pepperdine.edu/drlj/vol20/iss3/5> (accessed 11 March 2023). See also Auchie, D.P., ‘*The Liberal Interpretation of Defective Arbitration Clauses in International Commercial Contracts: A Sensible Approach?*’, INTERNATIONAL ARBITRATION L. REP., Vol. 10 No. 6, 2007, pp. 206-229.

⁶⁷ Frank, *ibid.* See also Henriques, D.G., ‘*Pathological Arbitration Clauses, Good Faith and the Protection of Legitimate Expectations*,’ ARBITRATION INTL., Vol. 31, June 2015, at p. 354 (noting that a pathological arbitration agreement ‘contains a defect or defects liable to disrupt the smooth progress of the arbitration’).

not alive at the time of arbitration; hybrid institutional arbitration clauses; referring to two *ex facie* competing dispute resolution clauses; and incomplete and ambiguous arbitration clauses.

i. Manifest Inconsistency, Uncertainty and Inoperability of Arbitration Clauses

In many jurisdictions and in most arbitral tribunals' jurisprudence, the principal defects found in arbitration clauses are those that are manifestly inconsistent, uncertain and inoperable.⁶⁸ This offends Article II.3 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Award, which provides that:

“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.”

This provision is akin to Article 8(1) of the UNCITRAL Model Law.⁶⁹ Arbitration agreements that are ambiguous, inoperable, or incomplete may lack essential requirements, such as those for the appointment of arbitrators or the procedure in general, and may also include conditions that complicate their interaction with international institutional arbitration rules.⁷⁰ Where courts find an arbitration clause to be ambiguous, inoperable, or incomplete they tend to render such pathological clauses to vitiate parties' agreement to arbitrate. For instance, in *SIA v. Rahul*,⁷¹ the parties agreed to arbitration under the “by-laws of Indian Company's Act 1956” or “as per International Trade Laws.” The Supreme Court of India held that there was no arbitration clause since the same was vague and ambiguous.

ii. Referring the Dispute to Non-Existent Arbitration Institutions and Rules

⁶⁸ Blackaby, N., *et al.*, *Redfern and Hunter on International Commercial Arbitration* (6th edn.) (Oxford: Oxford University Press, 2015), p. 72. *See also* Idornigie, *op. cit.*

⁶⁹ U.N. Commission on International Trade Law, Model Law on International Commercial Arbitration, Art. 8(1), U.N. Doc A/40/17, Annex I (June 21, 1985) (henceforth, ‘the UNCITRAL Model Law’).

⁷⁰ Eisemann, F., ‘*La Clause d'arbitrage pathologique*,’ in COMMERCIAL ARBITRATION: ESSAYS IN MEMORIAM EUGENIO MINOLI 129–61 (1974).

⁷¹ *System for International Agencies v. Rahul Coach Builders Pvt. Ltd.*, MANU/SC/0145/2015 (‘*SIA v. Rahul*’).

Another manifestation of a pathological arbitration clause is its reference to non-existent arbitral institutions, where the parties agree in their arbitration clause to refer their disputes to an arbitral institution that does not exist.⁷² For instance, in *Pricol v. Johnson*,⁷³ the parties agreed to refer their disputes to the Singapore Chamber of Commerce. However, the court found that there was no institution administering arbitration under such name and accordingly, rendered the arbitration clause as invalid.⁷⁴

Other pathological arbitration clauses tend to refer to non-existent arbitral rules. In this incidence, parties tend to agree to refer their disputes to arbitration, but under non-existent arbitration rules.

iii. Referring to Arbitrators Who Are Not Alive at the Time of the Dispute

Another instance in which pathological arbitration clauses are manifested involves references to arbitrators who are not alive at the time of dispute.⁷⁵ In this case, an arbitration clause tends to refer a dispute to an arbitrator; but when a dispute arises, the arbitrator may not be alive, as was the case in *ACC v. Global Cements*.⁷⁶ In that case, the arbitration clause provided for arbitration by one of the two persons who were both dead when disputes arose. Similarly, there are instances where parties have agreed to refer disputes to certain institutions which ceased to exist when disputes surfaced.⁷⁷

iv. Hybrid Institutional Arbitration Clauses

Although hybrid institutional clauses are valid and hence workable, they may be constructed in such a way that may result in defect. The pathological nature of an arbitration clause may be manifested in unworkable terms.⁷⁸ In this type of defect, although the arbitration clause tends to provide for arbitration under an arbitral institution, it decrees that the arbitral proceedings have to be conducted under arbitration rules of some other arbitral institution or arbitration rules inconsistent with the rules of the nominated arbitral institution. These are technically referred to

⁷² Srinivasan, op. cit.

⁷³ *Pricol Ltd. v. Johnson Controls Enterprises Ltd.* (2015) 4 SCC 177; MANU/SC/1165/2014 (*'Pricol v. Johnson'*);

⁷⁴ See also *Lucky-Goldstar International (HK) Ltd. v. Ng Moo Kee Engineering Ltd.* [1993] 1 HKC 404 (Hong Kong High Court) (*'Lucky-Goldstar v. Ng Moo Kee'*); and *In Re: Arbitration between C.M. Karanji & Co. (India) v. Indo-China Trading Co., Ltd.* CWN 763; MANU/WB/0403/1951 (*'Karanji v. Indo-China'*).

⁷⁵ Srinivasan, op. cit.

⁷⁶ *ACC Ltd. v. Global Cements Ltd.*, AIR 2013 SC 3824; MANU/SC/0489/2012 (*'ACC v. Global Cements'*).

⁷⁷ See Born, G.B., *International Commercial Arbitration* (The Hague: Wolters Kluwer, 2009), p. 683.

⁷⁸ Srinivasan, op. cit.

as “hybrid institutional arbitration clauses.” Both in principle and practice, hybrid institutional arbitration clauses are manifested in situations where parties choose one arbitral institution to administer a case but under the rules of another arbitral institution. As a consequence, this situation compels arbitral institutions to adapt their organs to the chosen set of rules, ‘making procedures more cumbersome and increasing litigiousness.’⁷⁹ Consequently, hybrid arbitration clauses are ‘a prime example of something parties may choose to do under the principle of party autonomy, yet shouldn’t do in the interest of safeguarding the principle of efficiency of arbitral procedure.’⁸⁰

A good example of this type of pathological clauses is exhibited in *Alstom v. Insigma (II)*.⁸¹ In those proceedings, it was apparent that the parties entered into a licensing agreement, which contained an arbitration clause stating that disputes were to be resolved by arbitration at the Singapore International Arbitration Centre [“SIAC”] pursuant to the Rules of Arbitration of the International Chamber of Commerce [“ICC”] in effect at the time of arbitration. A dispute arose between the parties regarding royalty payments. Alstom first initiated arbitration at the ICC. Insigma objected, arguing that the parties agreed to arbitrate at the SIAC under ICC rules. The SIAC created a tribunal to administer the arbitration pursuant to the ICC rules, including establishing functional bodies corresponding with the bodies required to carry out ICC procedures. The SIAC tribunal held that it had jurisdiction to hear the dispute, consequent to which Insigma appealed to the Singapore High Court, which affirmed the tribunal.⁸² Furthermore, Insigma appealed to the Singapore Court of Appeal, arguing that the arbitration agreement was unclear because it was not possible for a non-ICC institution to administer the ICC rules. Insigma also argued that SIAC arbitration did not carry the reputation of quality associated with ICC arbitration for which Insigma had bargained, and that the tribunal effectively rewrote the parties’ agreement by substituting SIAC bodies for the corresponding ICC bodies.

In this appeal, the novel and important legal issue was whether an arbitration agreement may validly provide for one arbitral institution to administer an arbitration under the rules of another arbitral institution. In a judgment dated 2 June 2009, the Singapore Court of Appeal upheld the

⁷⁹ Esteban, C.M., ‘Hybrid (Institutional) Arbitration Clauses: Party Autonomy Gone Wild,’ ARBITRATION INTL., Vol. 36, Issue 4, December 2020, pp. 475–489 (<https://doi.org/10.1093/arbint/aiaa027>).

⁸⁰ *Ibid.*

⁸¹ *Alstom Technology Ltd. v. Insigma Technology Co. Ltd. (II)*, SIAC Case No. 087 of 2006 (Judgment of the Court of Appeal of Singapore) [2009] SGCA 24 (‘*Alstom v. Insigma (II)*’).

⁸² *Insigma Technology Co. Ltd. v. Alstom Technology Ltd.* [2009] 1 SLR 23 (‘*Insigma v. Alstom*’).

decision of the Singapore High Court. Both courts upheld a “hybrid” arbitration clause, which provided that all disputes should be resolved ‘by arbitration before the SIAC in accordance with the Rules of Arbitration of the ICC.’⁸³ In fact, the Singapore Court of Appeal set out a number of general principles to be applied in such cases,⁸⁴ most significant ones being:

- (i) where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to that intention even if certain aspects of the agreement are ambiguous, inconsistent or incomplete;
- (ii) where a clause can be interpreted in two different ways, the interpretation enabling the clause to be effective should be adopted in preference to that which prevents the clause from being effective; as far as possible, a commercially logical and sensible construction is to be preferred over another that is commercially illogical;
- (iii) there was no reason why a clause providing for the rules of one arbitral institution to be applied by a similar institution should be too uncertain to be given effect to;
- (iv) a defect in an arbitration clause does not necessarily render it unworkable, since it may often be cured by the assistance of state courts, arbitral institutions and arbitrators, and in this case the clause was rendered workable by the SIAC agreeing to administer the arbitration in accordance with the ICC Rules; and
- (v) no policy considerations would bar SIAC from agreeing to administer an arbitration under the ICC Rules.

Although the Singapore Court of Appeal upheld that the said hybrid institutional arbitration clause “was rendered certain and workable in the present case by the SIAC agreeing to administer the arbitration in accordance with the ICC Rules”, the potential controversy inherent in that decision is whether or not the SIAC can truly administer an arbitration “under the ICC Rules”. This is principally because the ICC Rules specify steps to be taken by the Court in such a situation, i.e., a reference to the ICC’s International Court of Arbitration. In fact, the Court’s role under the ICC Rules includes scrutiny of the draft award under Article 27. However, in this case, the role of the International Court of Arbitration was performed by the SIAC Board of Directors.

⁸³ Hill, R., ‘Hybrid ICC/SIAC Arbitration Clause Upheld in Singapore,’ Kluwer Arbitration Blog, 10 June 2009; available at <https://arbitrationblog.kluwerarbitration.com/2009/06/10/hybrid-iccsi-ac-arbitration-clause-upheld-in-singapore/> (accessed 9 March 2023).

⁸⁴ *Ibid.*

As Richard Hill correctly posits, while in this case the Singapore Court focused on the question of whether an arbitral institution could administer arbitrations under the rules of another institution, arbitral institutions ‘are likely to consider whether they should do so, and what this may lead to.’⁸⁵ The SIAC’s agreement to administer the arbitration in accordance with ICC Rules potentially raises issues of comity as between arbitral institutions: a possible concern is that the Singapore Court of Appeal’s decision has ‘endorsed this practice, which could conceivably prompt parties to write in such clauses in order to obtain “cut price” ICC (or London Court of International Arbitration) arbitration administered by various other institutions around the world.’⁸⁶ However, parties would be ill-advised to do this. It should be noted that, although in this case the arbitration clause, and the resulting award, were ultimately upheld, the complexity of this hybrid clause ‘caused the parties to incur costs in appearing before the ICC, the SIAC, the Singapore High Court and the Singapore Court of Appeal.’⁸⁷ As other courts or arbitral institutions would likely follow the SIAC’s approach in this case, it is advisable that hybrid institutional arbitration clauses should be avoided as it may lead to the unnecessary invocation of court’s intervention and costs associated with such court litigation. This practice also compromises the overriding objective of arbitration – to resolve disputes through arbitration expediently and with less costs, without resorting to conventional courts.

v. *Referring to Two ex facie Competing Dispute Resolution Clauses*

Another incidence in which pathological arbitration clauses are manifested is through parties’ reference of disputes to both arbitration and courts of law at the same time. In certain arbitration agreements, parties have been agreeing to refer disputes to arbitration under valid clauses but, at the same time, they agree contradictorily that courts of a certain country or city would have the exclusive jurisdiction over disputes.⁸⁸ For example, in *Paul Smith v. H&S*,⁸⁹ the disputes resolution clauses provided that any dispute or difference – ‘shall be adjudicated upon under the Rules of Arbitration of the International Chamber of Commerce’ (clause 13 of the agreement) as well as ‘Courts of England shall have exclusive jurisdiction over it to, which jurisdiction the parties hereby

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Srinivasan, *op. cit.*

⁸⁹ *Paul Smith Ltd. v. H & S International Holding Co. Inc.* [1991] 2 Lloyd’s L. Rep., 127 (*‘Paul Smith v. H&S’*). See also *AEZ Infratech Pvt. Ltd. v. SNG Developers Ltd.* 2014 (143) DRJ 616: MANU/DE/1383/2014.

submit’ (clause 14 of the agreement). In this case, the plaintiffs argued that ‘this is not one of those cases where there is an option to resort to arbitration or legal proceedings.’ Steyn, J., held this to be ‘a drastic and very unattractive result. It involves the total failure of the agreed method of dispute resolution in an international commercial contract.’ According to Justice Steyn,

“[...] Clause 13 is a self-contained agreement providing for the resolution of disputes by arbitration. Clause 14 specifies the lex arbitri the curial law or the law governing the arbitration, which will apply to this particular arbitration. The law governing the arbitration is not to be confused with (1) the proper law of the contract, (2) the proper law of the arbitration agreement, or (3) the procedural rules which will apply in the arbitration. These three regimes depend on the choice, express or presumed, of the parties. In this case it is common ground that both the contract and the arbitration agreement are governed by English law. The procedural rules applicable to the arbitration are not rules derived from English law. On the contrary, the procedural regime is the comprehensive and sophisticated ICC rules which apply by virtue of the parties’ agreement.”

As such, Justice Steyn held that, if clause 14 is read as specifying the law governing the arbitration; there was no inconsistency between clauses 13 and 14. According to him, the language was ‘not felicitous.’ It provided for the ‘exclusive jurisdiction of the English Courts “over it”, i.e., the agreement. In his view, therefore, there was no inconsistency between clauses 13 and 14, and both clauses were held to be valid and binding.

Similarly, in *Intra Asia Airlines v. Norse Air*,⁹⁰ an agreement contained two dispute resolution clauses: one requiring disputes to be submitted to arbitration ‘pursuant to the Rules of Conciliation and Arbitration of the ICC in effect as of the date any dispute arose’ (clause 15), and the other providing that:

“22.1 This Agreement shall be governed and construed in accordance with the laws of The Republic of Singapore.”

⁹⁰ P. T. Tri-M.G. *Intra Asia Airlines v. Norse Air Charter Limited*, [2009] SGHC 13 (*Intra Asia Airlines v. Norse Air*).

22.2 *Each of the parties to this Agreement agrees for the exclusive benefit of the others (sic) that the courts of The Republic of Singapore shall have jurisdiction to hear and determine any suit, action or proceedings and to settle any disputes which may arise out of or in connection with any Governing Document (respectively “Proceedings” and ‘Disputes’) and, for such purposes irrevocably submits to the jurisdiction of such courts.”*

Dispute arose between the parties and the defendant made an application to the Singapore High Court seeking a stay of proceedings pursuant to Section 6 of the Singapore International Arbitration Act⁹¹ [“IAA”]. The defendant submitted that the dispute in this case ought to be referred to arbitration because: (i) there was an inconsistency in a contract in relation to the dispute resolution mechanism; and, as a matter of policy, the courts would give priority to the obligation to arbitrate; (ii) relying on *Paul Smith v. H&S*, the jurisdiction clause (*i.e.*, clause 22) ought to be interpreted as a reference to the law governing the arbitration (*i.e.*, the curial law or the *lex arbitri*);⁹² (iii) clauses 15 and 22.2 of the agreement in this case should not be construed as giving the parties an option to elect between arbitration and litigation; and (iv) basing on the rule of construction to the effect that where there are two inconsistent clauses in a contract, the later clause is to be rejected as repugnant and the earlier clause prevailed. However, if the court could read the later clause as qualifying rather than destroying the effect of the earlier clause, then the two were to be read together and effect given to both.⁹³

On its part, the plaintiff persuaded the court that, on a proper construction of the agreement in question, clauses 15 and 22.2 gave parties an option to proceed with either arbitration or litigation. In the process, the plaintiff distinguished *Paul Smith v. H&S* on two grounds: firstly, the wording of the jurisdiction clause in *Paul Smith v. H&S* was different from clause 22.2 of the said agreement in *Intra Asia Airlines v. Norse Air* and that the phraseology employed in clause 22.2 would be inconsistent with a finding that that clause referred to the Singapore courts having mere supervisory jurisdiction over the arbitration. Secondly, *Paul Smith v. H&S* was decided before the enactment of the English Arbitration Act (1996), when the ‘judicial climate’ in England was more

⁹¹ Cap. 143A, 2002 Rev. Ed.

⁹² *Shell International Petroleum Co. Ltd. v. Coral Oil Co. Ltd.* [1999] 1 Lloyd’s Rep 72 (*‘Shell v. Coral Oil’*).

⁹³ See Lewison, K., *The Interpretation of Contracts* (London: Sweet & Maxwell, 2007), at 9.08; and *AL Stainless Industries Pte Ltd. v. Wei Sin Construction Pte. Ltd.* [2001] SGHC 243.

interventionist. Accordingly, the Singapore court's jurisdiction was merely allowing the courts supervisory jurisdiction over the arbitration, which is contrary to the doctrine of party autonomy. In principle, this doctrine recognises that parties are at liberty to choose for themselves the procedures and legal rules applicable to their contractual relationship.⁹⁴

After reviewing several English,⁹⁵ US, French⁹⁶ and Singapore's⁹⁷ courts' decisions, in *Intra Asia Airlines v. Norse Air*, the Singapore court held that, upon a proper construction of clause 22.2 of the agreement in question, parties had, in effect, stipulated Singapore 'to be the seat of arbitration by submitting to the Singapore court's supervisory jurisdiction over the arbitration.'⁹⁸ According to the court, this 'is not incongruous with the rest of the Agreement since parties expressly chose Singapore law as the proper law of the contract (in cl 22.1 of the Agreement); the arbitral tribunal is not placed in an unenviable situation of having to manage various systems of laws.'⁹⁹ For the avoidance of doubt, the court held, the stipulation of Singapore as the seat of arbitration 'does not pre-determine the ultimate venue of the arbitral hearings.'¹⁰⁰

Relying on *Law Debenture v. Elektrim*,¹⁰¹ David St John Sutton, Judith Gill and Matthew Gearing have espoused the principle that where a dispute resolution provision contains an arbitration

⁹⁴ See Redfern, A. and M. Hunter, *Law and Practice of International Commercial Arbitration* (4th edn.) (London: Sweet & Maxwell, 2004), at 2-34. For judicial pronouncements on the party autonomy principle, see *Sunshine Furniture v. Maersk*, op. cit; *Luganuzza v. Orthodox Church*, op. cit; *Shamji v. Treasury Registrar*, op. cit; *Telkom v. Kamconsult*, op. cit; *Elite Earthmovers v. Machakos County Government*, op. cit; *Euromec v. Shandong Taikai*, op. cit; *Travelport v. Precise Systems*, op. cit; and *Cable and Wireless v. IBN*, op. cit.

⁹⁵ See *Paul Smith v. H&S*, op. cit; *The Nerano* [1994] 2 Lloyd's Rep 50 [approved by the House of Lords in *The Nerano* [1996] 1 Lloyd's Rep 1 at 4]; *Axa Re v. Ace Global Markets Limited* [2006] EWHC 216 (Comm) ('*Axa v. Ace*'); *McConnell Dowell Constructors (Aust) Pty. Ltd. v. National Grid Gas Plc.* [2006] EWHC 2551 (TCC) ('*McConnell v. National Grid Gas*'); *Ace Capital Ltd. v. CMS Energy Corporation* [2008] EWHC 1843 (Comm) ('*Ace Capital v. CMS Energy*'); *Fiona v. Privalov*, op. cit; and *Shell v. Coral Oil*, op. cit. In all these cases where there were two clauses (one referring to arbitration, and the other to courts), the English courts held that the two clauses (*i.e.*, two *ex facie* competing dispute resolution clauses) were reconcilable and the reference to English jurisdiction was not inconsistent with a submission to arbitration. It simply meant that the English courts were to retain supervisory jurisdiction over the arbitration since under the arbitration clauses, the arbitration was to take place in England.

⁹⁶ The French courts' decisions on this issue are canvassed in Gaillard, E. and J. Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) (pointing out that: 'when faced with an apparent contradiction between an arbitration clause and a clause providing for the jurisdiction of courts, the French courts have systematically attempted to ensure that the former prevails over the latter.').

⁹⁷ See *Arta Properties Ltd. v. Li Fu Yat Tso & Others* [1998] HKCU 721 ('*Arta v. Li Fu*'); *William Co. v. Chu Kong Agency Co. Ltd & Another* [1993] 2 HKC 377 ('*William v. Chu Kong*'); and *Yien Yieh Commercial Bank Ltd. v. Kwai Chung Cold Storage Co. Ltd.* [1989] 2 HKLR 639 (PC) at 645 ('*Yien Yieh v. Kwai Chung*').

⁹⁸ *Intra Asia Airlines v. Norse Air*, op. cit, para. 50.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* See also *P.T. Garuda Indonesia v. Birgen Air* [2002] 1 SLR 393 at [23] – [24] ('*Garuda v. Birgen*').

¹⁰¹ *Law Debenture Trust Corp. Plc. v. Elektrim Finance BV* [2005] EWHC 1412 ('*Law Debenture v. Elektrim*').

agreement but also provides one party with an option to litigate, the provision for arbitration will be upheld provided it is clear and unequivocal.¹⁰² The above-cited case law is in consensus with the notion that where there are two *ex facie* competing dispute resolution clauses (*i.e.*, one referring to arbitration, and the other to litigation), parties must refer disputes to arbitration under the supervisory jurisdiction of the court from the stated country. In other words, courts will retain supervisory jurisdiction over the arbitration since, under the arbitration clauses, the arbitration is to take place in the country where such courts are situated.

Although it has been pointed out that where an arbitration agreement could give either party a choice between arbitration and litigation,¹⁰³ and courts would just retain a supervisory jurisdiction over arbitration, such confusion defeats the very purpose of arbitration. In all the above-cited cases, parties were at issue as to whether to resolve their disputes through arbitration or litigation, until they sought the court's indulgence over the matter. While resorting to the court's indulgence, the disputes remained unresolved and by the time the superior courts in the given countries made their final decision, time had lapsed and parties had incurred unnecessary costs in shouldering such interpretative litigation instead of going straight to arbitration. Therefore, in order to avoid going through this unnecessary route in resolving commercial disputes, experts involved in assisting parties to draft arbitration clauses in international commercial contracts should make sure that such clauses do not contain two *ex facie* competing dispute resolution clauses.

vi. Incomplete and Ambiguous Arbitration Clauses

In certain international commercial contracts, drafters draw incomplete arbitration and ambiguous clauses. It should be noted that, when such arbitration clauses land in court, courts generally look for an unequivocal intent to arbitrate,¹⁰⁴ which requires the arbitration clause to employ unambiguous and mandatory language to arbitrate (such as "shall" or "will" to convey parties' intent to refer disputes to arbitration). Unclear and ambiguous terms such as "may"¹⁰⁵ or "can" are generally held not to indicate a "firm" intention to arbitrate. As such, clauses containing these

¹⁰² David St John Sutton, D.S.J, *et al.*, *Russell on Arbitration* (23rd ed.) (London: Sweet & Maxwell, 2007), at 2-018.

¹⁰³ Seng, G.J., 'The *Dai Yun Shan*,' SINGAPORE LAW REVIEW, Vol. 2, 1992, p. 508.

¹⁰⁴ Srinivasan, *op. cit.*

¹⁰⁵ In *Messy v. Council of the Municipality of Yass* (1922) 222 SRNSW 494 per Cullen, C.J at pp 497, 498 ('*Messy v. Yass*') 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; and *Chief J.O. Edewor v. Chief M. Uwegba & Others* (1987) NWLR Part 50, at p. 313 ('*Edewor v. Uwegba*').

terms are typically not considered “mandatory” arbitration clauses. Where an arbitration clause fails to employ unambiguous and mandatory language to arbitrate, such arbitration clause would be rendered defective.

A number of judicial decisions have held that unclear and ambiguous arbitration clauses do not represent the parties’ consensual agreement to arbitrate. For example, in *Wellington v. Kirit*,¹⁰⁶ the agreement contained an exclusive jurisdiction clause¹⁰⁷ and also provided that any dispute “may” be referred to arbitration.¹⁰⁸ Holding that said arbitration clause did not constitute a “firm” or “mandatory” arbitration clause, the Indian Supreme Court held, *inter alia*, that:

“21. Does clause 5 amount to an arbitration clause [...]? I may here state that in most arbitration clauses, the words normally used are that “disputes shall be referred to arbitration”. But, in this case before me, the words used are “may be referred.”

22. [...] The parties, in my view, used the words “may” not without reason. If one looks at the fact that clause 4 precedes clause 5, one can see that under clause 4 parties desired that in case of disputes, the Civil Courts at Bombay are to be approached by way of a suit. The follows clause 5 with the words “it is also agreed” that the dispute “may” be referred to arbitration implying that parties need not necessarily go to the Civil Court by way of suit but can also go before an arbitrator. [...] Thus, reading clause 4 and clause 5 together, I am of the view that [it] is not the intention of the parties that arbitration is to be the sole remedy. It appears that parties agreed that they can “also” go to arbitration also in case the aggrieved party does not wish to go to a Civil Court by way of a suit.”

Having held so, the Indian Supreme Court found that clause 5 was not a “firm” or “mandatory” arbitration clause in that it required ‘a fresh agreement between the parties that they will go to

¹⁰⁶ *Wellington Associates Ltd. v. Kirit Mehta*, MANU/SC/0232/2000: (2000) 4 SCC 272 (*Wellington v. Kirit*).

¹⁰⁷ In fact, the exclusive jurisdiction clause provided explicitly that:

‘4. It is hereby agreed that, if any dispute arises in connection with these presents, only courts in Bombay would have jurisdiction to try and determine the suit and the parties hereto submit themselves to the exclusive jurisdiction of courts in Bombay.’

¹⁰⁸ Notably, the optional arbitration clause provided categorically that:

‘5. It is *also* agreed by and between the parties that any difference or differences arising in connection with the presents *may* be referred to arbitration in pursuance of the Arbitration Act, 1947, by each party appointing one arbitrator and the arbitrators so appointed selecting an umpire. The venue of arbitration shall be at Bombay.’ [Emphasis supplied].

arbitration' in the future. To that extent, the Indian Supreme Court held that 'fresh consent' of the parties was necessary in covenanting such fresh arbitration clause.¹⁰⁹ Similarly, in *Gopal v. Kota*,¹¹⁰ an arbitration clause provided that: '*in case of any dispute arising between the parties, the matter may be referred to [an] arbitrator mutually agreed upon and acceptable to you and us.*' It was held that 'fresh consent for arbitration was necessary.'

In addition to the use of the optional words "may" and "parties also agree to" refer disputes to arbitration, the use of the words "parties can refer disputes to arbitration" also renders a purported arbitration clause invalid. For instance, in *Jyoti v. Shree Durga*,¹¹¹ the purported arbitration clause provided that: '*In the event of any dispute arising out of this contract, the same can be settled by Arbitration held by a Chamber of Commerce at Madras. [Arbitrators'] decision shall be binding to the Buyers and Sellers.*' Holding that the foregoing clause was not a binding arbitration agreement, the Indian High Court held, *inter alia*, that:

"I know of no reported decision whereby any Arbitration Clause used the word 'can' as in this case. The Arbitration Clause in this case can at best mean that the dispute 'can' be settled by Arbitration. But that does not mean that the dispute shall be settled by Arbitration. It only means that after the dispute has occurred, the parties may go to Arbitration as an alternative method of settling the dispute instead of going to the Courts. But that means that after the dispute has arisen, the parties will have to come to a further agreement that they shall go to Arbitration."¹¹²

According to the court, the purported arbitration agreement meant, at best, 'a contract to enter into a contract' in that it denoted 'the possibility of arbitration in the event of a future dispute.' As such, the court held that a contract to enter into a contract cannot be considered to be a valid contract in law, thus, it is not a valid submission to arbitration. According to the court,

"The word 'can' by the most liberal interpretation only indicates a possibility. A legal contract is more than a mere possibility. It is a possibility added to obligation.

¹⁰⁹ See also *Lobb Partnership Ltd. v. Aintree Racecourse Co. Ltd.* [2000] BLR 65 ('*Lobb v. Aintree*').

¹¹⁰ *B. Gopal Das v. Kota Straw Board Pvt. Ltd.* AIR 1971 Raj. 258 ('*Gopal v. Kota*').

¹¹¹ *Jyoti Brothers v. Shree Durga Mining Co.*, AIR 1956 Calcutta 280 ('*Jyoti v. Shree Durga*').

¹¹² *Ibid*, para. 4.

*[...] An arbitration agreement has to be couched not in precatory but obligatory words. No particular form can be laid down as universal for framing an arbitration agreement [...] but words used for the purpose must be words of choice and determination to go to arbitration and not problematic words of mere possibility.”*¹¹³

The word “can” was also used in a pathological arbitration clause that was the subject of *Sapna v. Ajay*.¹¹⁴ In this matter, the pathological arbitration clause governing the parties was drafted in an *ex facie* ambiguous form; whereas its first part provided for dispute resolution by mutual discussions amongst the partners, the last part referred to ‘arbitration’ in the following phraseology: ‘however the dispute can also be decided under the provisions of Indian Arbitration Act.’ In between these references, there was a provision for the applicability of the Indian Partnership Act (1932), which had actually ‘no correlation to the preceding or succeeding parts.’¹¹⁵ The court held that, even if this was a case of inartistic drafting,¹¹⁶ a plain reading of the phrase “can also be decided” manifested the requirement of a fresh consent for arbitration, i.e., that the parties may wish to agree to refer the disputes to arbitration in the future. As such, the court held that this clause merely indicates a desire or hope to have the disputes settled through arbitration, or at best, a tentative arrangement to explore arbitration as a mode of resolution. Therefore, it is only an agreement to enter into an arbitration agreement in the future.¹¹⁷

It should be noted that *Wellington v. Kirit*¹¹⁸ was affirmed in *Chopra v. CLB*,¹¹⁹ where a dispute resolution clause stated, *inter alia*, that in case of failure of conciliation, a party “may refer the claim, dispute or difference to arbitration.” The court held that there was no valid arbitration agreement between the parties. Similarly, in *Jagdish v. Ramesh*,¹²⁰ a purported arbitration agreement (clause 16 of the contract in question) stated, in part, that, in case a dispute arose

¹¹³ *Ibid.*

¹¹⁴ *Sapna Gupta v. Ajay Kumar Gupta & Others*, O.M.P.(I) (COMM.) 281/2021 (decided on 7 December 2021) (*‘Sapna v. Ajay’*).

¹¹⁵ Juris Corp, *‘To Be or Not to Be: An Assessment of a Pathological Arbitration Clause,’* Juris Corp (Litigation & Dispute Resolution), 2 February 2022 available at <https://www.legal500.com/developments/thought-leadership/to-be-or-not-to-be-an-assessment-of-a-pathological-arbitration-clause/> (accessed 12 March 2023).

¹¹⁶ *Visa International Ltd. v. Continental Resources (USA) Ltd.*, (2009) 2 SCC 55 (*‘Visa v. Continental Resources’*).

¹¹⁷ Juris Corp, *op. cit.*

¹¹⁸ *Op. cit.*

¹¹⁹ *Sudarshan Chopra v. Company Law Board* 2004 (2) Arb. LR 24 (*‘Chopra v. CLB’*).

¹²⁰ *Jagdish Chander v. Ramesh Chander* (2007) 5 SCC 719 (*‘Jagdish v. Ramesh’*).

between the parties, it “shall be referred to arbitration *if the parties so determined.*” The court held that this clause did not ‘indicate a firm determination of the parties and binding obligation on their part to resolve their disputes through arbitration.’ According to the court, this clause merely gave ‘an option to either of [the parties] to seek arbitration and on such option being exercised, it would be for the other party to accept it or not.’

In sum, the consensus of the foregoing authorities on arbitration agreements that do not contain a firm or mandatory reference to arbitration – quite often reflected in the words “may”, “can” or “if parties so determined” – is that such purported arbitration clauses are invalid in that they constitute mere contracts to enter into a future arbitration agreement, or, in other words, “agreements to agree.” They only indicate a possibility of arbitration in the event of future disputes. Therefore, courts agree that where an arbitration agreement requires or contemplates a further or fresh consent to refer the dispute to arbitration, it cannot constitute a valid arbitration agreement.

VI. COURT’S APPROACHES TO PATHOLOGICAL ARBITRATION AGREEMENTS

Not all ‘defects’ may render an arbitration clause devoid of any effect.¹²¹ This means that labelling an arbitration agreement ‘pathological’ does not change its legal character or substance, i.e., a defect in an arbitration clause ‘does not necessarily negate the agreement thereby constituted.’¹²² It depends on the nature, the extent or the substance of the defect, or whether the defect is curable or incurable. Therefore, labelling or describing a clause as ‘pathological,’ in essence, “*does not automatically invalidate it as an agreement.*”¹²³ As it was held in *HKL v. Rizq*,¹²⁴ whether that clause may or may not be upheld “*depends on the nature and extent of its pathology.*”

Therefore, as can be gleaned from the authorities cited above, some of the defects are curable and some are incurable even upon approaching the courts. The incurability of a pathological defect makes it unenforceable, which usually renders the entire arbitration agreement fatal.¹²⁵ On their part, curable defects in pathological arbitration clauses may be remedied through the tool of interpretation employed by courts of law in different jurisdictions around the world. In effect,

¹²¹ Suh, op. cit.

¹²² Frank, op. cit, p. 305.

¹²³ *Ibid*; See also *Insignia Technology Co Ltd. v. Alstom Technology Ltd.* [2009] SGCA 24, ¶ 37–38 (*Insignia v. Alstom*).

¹²⁴ *HKL Group Co. Ltd. v. Rizq Int’l Holding Pte. Ltd.* [2013] SGHCR 5, ¶ 12 (*HKL v. Rizq*’).

¹²⁵ Frank, op. cit, p. 305.

where the pathological element is “curable” (and is therefore not “infectious”), the arbitration agreement may also be considered as “cured” (or “rescued”).¹²⁶

Notwithstanding the severe defects of many pathological clauses, parties in different jurisdictions around the world have sought the assistance of courts to obtain judicial interpretation and directive to make the pathological arbitration clauses work.¹²⁷ As such, where disputes arise under agreements containing pathological arbitration clauses, the party invoking arbitration usually has ‘no other choice but to approach courts in getting the matter referred to arbitration.’¹²⁸ This is because such party ‘lacks the inherent ability to force the other side to proceed with the arbitration’¹²⁹ on grounds of lack of consensus *ad idem* on the parties to *firmly* or *mandatorily* refer the dispute to arbitration by reason of a defective arbitration clause.¹³⁰ In practice, such issue may be determined by the courts when (i) reviewing a decision of an arbitral tribunal in respect of its own jurisdiction,¹³¹ (ii) deciding on the defendant’s motion for dismissal,¹³² or (iii) considering setting aside or enforcing an arbitral award.¹³³ Alternatively, such issue may be determined by the arbitral tribunal’s ruling on its own jurisdiction.

Universally, when encountering pathological arbitration clauses, courts generally adopt one of several approaches enumerated below. Firstly, where courts find a pathological arbitration clause to be invalid, inoperative or unenforceable for imprecision, they tend to hold the view that there is

¹²⁶ *Ibid*, p. 307.

¹²⁷ *Insignia v. Alstom*, op. cit (quoting Professor Benjamin G. Davis, who once noted that notwithstanding ‘the severe defects of many of the clauses, the fortuitous – but unpredictable – assistance of state courts, able institutions and imaginative arbitrators, could still make them work.’).

¹²⁸ Srinivasan, op. cit.

¹²⁹ *Ibid*.

¹³⁰ See *Alstom v. Insignia (II)*, op. cit; *Paul Smith v. H&S*, op. cit; *Intra Asia Airlines v. Norse Air*, op. cit; *Wellington v. Kirit*, op. cit; *Gopal v. Kota*, op. cit; *Jyoti v. Shree Durga*, op. cit; *Lobb v. Aintree*, op. cit; and *Jagdish v. Ramesh*, op. cit.

¹³¹ See Article 16(3) of the UNCITRAL Model Law, Section 30(2) of the English Arbitration Act, Section 17(6) of the Kenya Arbitration Act, Section 34(2) of the Tanzania Arbitration Act, and Section 16(6) of the Uganda Arbitration and Conciliation Act.

¹³² See especially Article 8(1) of the UNCITRAL Model Law, which provides categorically that:

‘(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration *unless it finds that the agreement is null and void, inoperative or incapable of being performed.*’ [Emphasis supplied].

See also Section 32 of the English Arbitration Act, and Section 36 of the Tanzania Arbitration Act.

¹³³ See Articles 34 and 36 of the UNCITRAL Model Law of the UNCITRAL Model Law, Section 67(1)(a) of the English Arbitration Act, Section 37(1)(a)(ii) of the Kenya Arbitration Act, Sections 74(1)(a) and 83(2)(a)(ii) of the Tanzania Arbitration Act, and Section 34(2)(a)(ii) of the Uganda Arbitration and Conciliation Act.

no arbitration clause since the same is vague, ambiguous and inoperative.¹³⁴ Secondly, in case of pathological arbitration agreements that tend to refer to non-existing arbitrators, many state courts tend to invoke the default mechanism under Article 11(4) of the UNCITRAL Model Law and relevant domestic laws providing similarly¹³⁵ by allowing any party to request the court or other authority specified in Article 6 to take the “necessary measure” to ensure arbitrators are duly appointed.¹³⁶

Thirdly, where the parties have agreed to arbitrate under the auspices of non-existing arbitral institutions or non-existing arbitration rules, courts have tended to remedy the defect by looking at the intent of the parties to arbitrate.¹³⁷ It should be noted that the intention of parties factored in by the courts in considering the validity of an arbitration agreement may be express or implied, that is, by conduct. For the purpose of ascertaining the intention of the parties, courts also factor in the terms of the contract, the conduct of the parties, and the circumstances of the case.¹³⁸ For instance, in *Imoukhuede v. Mokwuenye*,¹³⁹ a pathological clause (*i.e.*, 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 [...]. (Emphasis supplied).”

¹³⁴ *SIA v. Rahul*, op. cit.

¹³⁵ See *e.g.* Sections 17(2)-(4), 18 and 19 of the English Arbitration Act; Section 12(3)-(9) of the Kenya Arbitration Act; Section 5 of the US Federal Arbitration Act; Section 22 of the Tanzania Arbitration Act; and Section 11(3)(b), (4)-(6) of the Uganda Arbitration and Conciliation Act. Referring the import of Section 5 of the US Federal Arbitration Act, the court in *Astra v. Harwyn* held that:

‘The Court finds that [FAA] § 5 was drafted to provide a solution to the problem caused when the arbitrator selected by the parties cannot or will not perform. In view of the federal policy to construe liberally arbitration clauses and to resolve doubts in favor of arbitration [...], the Court concludes that it cannot ignore the plain language of [FAA] § 5, nor do the equities of the case warrant doing so. The Court thus agrees to appoint an arbitrator pursuant to [FAA] § 5.’ *Astra Footwear Industries v. Harwyn International Inc.*, 442 F. Supp. 907, 910–11 (S.D.N.Y. Jan. 11, 1978).

¹³⁶ *Infinity Communications Ltd. v. MIC Tanzania Ltd.*, High Court of Tanzania (Commercial Division) at Dar es Salaam, Misc. Commercial cause No. 233/2015 (Unreported) (*‘Infinity v. MIC’*). See also *Kunti Yusuph Majala v. Avic Coast Land Development (T) Ltd.*, High Court of Tanzania at Dar es Salaam, Misc. Civil Application No. 805/2018 (Unreported) (*‘Kunti v. Avic’*).

¹³⁷ See *e.g.* *In re HZI Research Centre v. Sun Instruments Japan Co.*, 1995 WL 562181 (S.D.N.Y. Sept. 20, 1995) (*‘HZI v. Sun’*); and *Lucky Goldstar International (H.K.) Ltd. v. Ng Moo Kee Engineering Ltd.*, [1993] 1 H.K.C. 404, 404 (H.K.) (*‘Lucky v. Ng Moo’*).

¹³⁸ Idornigie, op. cit.

¹³⁹ *Imoukhuede v. Mokwuenye* (2019) LPELR-48996 (SC).

Before the court, 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. While the trial court refused to set aside the arbitral award, the Court of Appeal of Nigeria did set it aside on the ground, *inter alia*, that the arbitration institution referenced in the arbitration agreement was non-existent. However, the Supreme Court of Nigeria quashed that decision instead it held that where such terms or expression will not be absurd or is unambiguous, the intention of the parties is read into the contract.¹⁴⁰

Similarly, in *Visa v. Continental Resources*,¹⁴¹ the arbitration clause was ambiguous as it stipulated that disputes arising out of the agreement could be settled amicably. In that case, the court held that no party can be allowed to take advantage of inartistic drafting of arbitration clause and instead the intent of the parties can be gathered from the surrounding circumstances, including their conduct and the correspondences exchanged between them. Additionally, in *Powertech v. Delvin*,¹⁴² on the basis of correspondence between the parties on record, it was held that parties had an arbitration agreement in writing and were *ad idem* in their intention to refer disputes to arbitration.¹⁴³

In a celebrated US case of *Laboratorios v. Forest Labs.*,¹⁴⁴ the parties agreed on arbitration ‘in accordance with the rules and procedures of the Pan-American Arbitration Association,’ which did not exist. Whereas respondent claimed that the parties’ real intention was to refer the dispute to “the Inter-American Commercial Arbitration Commission” – an organization set up by the Pan-American Union, the appellant contested this argument, pointing out that: “*The appellant denies that such was the agreement, and states further that the agreement to arbitrate was conditioned upon arbitration being conducted in Mexico.*”¹⁴⁵ Although the court did not settle the specific interpretation dispute,¹⁴⁶ it held that:

¹⁴⁰ A similar reasoning was held by the Nigerian Supreme Court in *Agbule v. Warri Refinery & Petrochemical Co Ltd.* (2012) LPELR-20625(SC) (*‘Agbule v. Warri’*); and *Afolabi & 2 Others v. Adekunle & Another* (1983) 8 SC 98.

¹⁴¹ *Visa International Ltd. v. Continental Resources (USA) Ltd.* (2009) 2 SCC 55 (*‘Visa v. Continental Resources’*).

¹⁴² *Powertech World-Wide Ltd. v. Delvin International General Trading LLC* (2012) 1 SCC 361 (*‘Powertech v. Delvin’*).

¹⁴³ *Juris Corp*, op. cit.

¹⁴⁴ *Laboratorios Grossman, S.A. v. Forest Labs., Inc.*, 295 N.Y.S.2d 756, 757 (N.Y. App. Div. 1968) (*‘Laboratorios v. Forest Labs.’*).

¹⁴⁵ *Ibid*, at 575.

¹⁴⁶ *Ibid* (The court merely concludes that: ‘in the light of these conflicting positions a hearing should be had to determine the true intent of the parties.’). For a discussion on this point, see Frank, op. cit, pp. 309-310.

“If it should be found that the parties really intended to arbitrate pursuant to the rules of the Inter-American Commercial Arbitration Commission [(as stated by the American party)], then arbitration before that tribunal should be directed, and nothing further need be determined. If, however, it should be determined that the parties did not so agree, the issue to be decided is whether the dominant purpose of the agreement was to settle disputes by arbitration, rather than the instrumentality through which arbitration should be effected. [...] In such event, there being no viable organization named in the agreement, through which arbitration may be had, the court may direct arbitration before such tribunal as it may determine would be the most appropriate in the circumstances.”

As stated in *Russell on Arbitration*¹⁴⁷ (with reference to *Lucky v. Ng Moo* and *HKL v. Rizq*):

“The arbitration agreement will not be inoperative or incapable of being performed just because reference is made to the rules of a non-existent arbitration institution, provided the underlying intention to arbitrate is clear.”

Indeed, the essence of factoring in the parties’ intention to arbitrate, according to *Laboratorios v. Forest Labs.*, is to assess ‘whether the agreement’s dominant purpose was (i) the jurisdictional allocation (“to settle disputes by arbitration”) rather than (ii) the procedural rule (“the instrumentality”).’¹⁴⁸ In the former situation, the jurisdictional allocation ‘is enforced, and the procedural rule is supplemented in the “most appropriate” way by the courts, while in the latter situation the arbitration agreement lapses.’¹⁴⁹ Nevertheless, this does not apply if it can be established that ‘the parties’ real intention was to refer to an existing element, because the arbitration agreement will in such case be construed accordingly.’¹⁵⁰

In *HZI v. Sun*,¹⁵¹ an American developer of medical equipment and a Japanese distributor agreed on the following in terms of dispute resolution: ‘each party shall select an arbitrator and the two arbitrators shall select a third arbitrator, all of whom shall be Members of the American or Japanese Arbitrator Society, who will resolve the dispute.’ As opposed to the American Arbitration

¹⁴⁷ Sutton, *et al.*, *op. cit.*

¹⁴⁸ Frank, *op. cit.*, p. 309.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, pp. 309-310. See also *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 295 (N.Y. 1929).

¹⁵¹ *Op. cit.*

Association [“AAA”] and the Japan Commercial Arbitration Association [“JCAA”], the two named societies did not exist.¹⁵² The American party claimed institutional arbitration under the AAA, which the Japanese party contested, arguing that “*its Agreement with HZI did not state that any arbitration would be conducted by the AAA, nor that the arbitration would take place in New York.*”¹⁵³ The court, which initially referred to the American federal pro-arbitration policy,¹⁵⁴ held that the reference to non-existing institutions:

“[] furnishes no impediment to enforcement of the arbitration agreement. *The dominant purpose of the parties, clearly expressed in their contract, was to resolve disputes by arbitration.* If the parties imperfectly or incorrectly designate the instrumentality through which arbitration should be effected, *the court will enforce the contract by making an appropriate designation.*”

Subsequently, the court referred the parties to the AAA for arbitration. Moreover, in *Travelport B.V. v. Bellview*,¹⁵⁵ a distribution agreement between Dutch and Nigerian parties indicated that, in the event of any dispute arising under that agreement, arbitration would be conducted ‘in the United States in accordance with the UNCITRAL Arbitration Rules in force at the date of reference. The Appointing Authority shall be *the United States Council of Arbitration* and such appointment will be in accordance with its “Procedures for Arbitration.”’ (Emphasis supplied).¹⁵⁶ Although the latter “Appointing Authority” did not exist, the court remedied this defect in the following regard:

“*The parties clearly expressed their intention to resolve this dispute through arbitration in the Distribution Agreement. This was the parties’ primary intention; the agreement as to the particular forum was secondary. The Court may therefore designate a proper arbitral body.*”¹⁵⁷

¹⁵² Frank, op. cit, p. 310.

¹⁵³ *HZI v. Sun*, op. cit.

¹⁵⁴ *Ibid*, at 3 (pointing out that: ‘Arbitration agreements, favored by public policy, are construed broadly and in accordance with common sense.’).

¹⁵⁵ *Travelport Global Distribution System B.V. v. Bellview Airlines Ltd.*, 2012 WL 3925856, at *1 (S.D.N.Y. Sept. 12, 2012) (‘*Travelport B.V. v. Bellview*’).

¹⁵⁶ *Ibid*.

¹⁵⁷ *Ibid*, at *5 (referring to *HZI v. Sun*, op, cit).

Similarly, in *Warnes v. Harvic*,¹⁵⁸ a sales contract between an Argentinian and an American business stated that disputes “shall be finally settled by arbitration in New York in accordance with the Commercial Arbitration Rules of the New York Commercial Arbitration Association.” Nevertheless, the “Association” in question did not exist, prompting the Argentinian party to demand an “AAA arbitration,” while its counterparty claimed that the arbitration clause was not binding, thus, ‘the parties are not bound to arbitrate’ under it.¹⁵⁹ The court referred initially to the federal pro-arbitration policy (*i.e.*, ‘a liberal federal policy favouring arbitration’)¹⁶⁰ and held that: ‘an agreement on a non-existent arbitration forum is the equivalent of an agreement to arbitrate that does not specify a forum, because the parties had the intent to arbitrate, even in the absence of a properly designated forum.’ Subsequently, the court referred the parties to the AAA for arbitration.¹⁶¹

Furthermore, courts tend to split the defective part from the part that provides for resolution of disputes through arbitration and enforce the valid part of the arbitration clause.¹⁶² For example, in *Lucky v. Ng Moo Kee*,¹⁶³ the parties agreed to refer their disputes to arbitration under the rules of “procedure of the International Commercial Arbitration Association.” However, there was no such association. Therefore, Hong Kong High Court detached the defective part and referred the parties to arbitration under the laws of the seat of arbitration chosen by the parties in the arbitration clause.

Fourthly, in certain circumstances, courts do tend to re-write the defective part of the arbitration clause by supplying meaning that is most reasonable in the context of the arbitration clause.¹⁶⁴ For instance, in *Pricol v. Johnson*,¹⁶⁵ 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

¹⁵⁸ *Warnes S.A. v. Harvic International Ltd.*, 1993 WL 228028 (S.D.N.Y. June 22, 1993) (*Warnes v. Harvic*).

¹⁵⁹ *Ibid*, at *2.

¹⁶⁰ See also *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24–25 (1983) (*Moses v. Mercury*) (holding that: ‘Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.’).

¹⁶¹ *Warnes v. Harvic*, *op. cit.*, at *3.

¹⁶² Srinivasan, *op. cit.*

¹⁶³ *Op. cit.*

¹⁶⁴ Srinivasan, *op. cit.*

¹⁶⁵ *Pricol Ltd. v. Johnson Controls Enterprises Ltd. & Others* (2015) 4 SCC 177: MANU/SC/1165/2014 (*Pricol v. Johnson*).

Commerce. Although there was no such arbitral institution, the Supreme Court construed the reference in the arbitration clause to mean the SIAC.

VII. CONSEQUENCES OF PATHOLOGICAL ARBITRATION AGREEMENTS

From the case laws considered above, there are mainly two consequences of pathological arbitration clauses. Firstly, a pathological arbitration clause renders an arbitration clause null and void, inoperative or incapable of being performed. This is reflected in Article II.3 of the New York Convention, which allows the court of a Contracting State to refuse to refer a matter to arbitration when seized of an action in a matter in respect of which the parties have made an agreement to refer the parties to arbitration, for reason that the said agreement ‘is null and void, inoperative or incapable of being performed.’

Secondly, although a pathological arbitration clause may be defective, the court may sustain, cure and reconcile it with the implied intention of the parties to refer a dispute to arbitration, rather than resorting to litigation in court. Although courts in many jurisdictions these days are in favour of enforceability of arbitration clauses and adopt an interpretation that is in favour of giving effect to arbitration clauses, as noted in most of the cases considered in this article, it is possible that courts “*may adopt a diametrically opposite stand.*”¹⁶⁶ In the latter state of affairs, pathological clauses “*could potentially have serious adverse effects. The party which is at the receiving end of the notice invoking arbitration often takes advantage of these defects to defeat the salutary objectives of arbitration of efficiency and finality.*”¹⁶⁷

As a consequence, in such cases, there is considerable wastage of time and effort in litigating in courts on whether the arbitration clause is valid or not, which dispute often goes up on appeal to the highest court in the relevant jurisdiction.¹⁶⁸ In addition, the invoking party has “*to expend substantial expenses in litigating the matter in court.*”¹⁶⁹ Apart from considerable wastage of time, effort and expenses, it is also possible that the party at the receiving end of the arbitration notice “*may initiate proceedings in a country other than the one chosen by the parties in the agreement. This may lead to multiple proceedings in different jurisdictions. A corollary of this is that multiple*

¹⁶⁶ Srinivasan, op. cit.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

proceedings on the subject may lead to inconsistent decisions on the enforceability of the arbitration clause."¹⁷⁰

VIII. SOME WAY FORWARD AND RECOMMENDATIONS

The above discussion naturally places the arbitration agreement at the very centre of the arbitration process. This is so principally because the arbitration agreement lays down the foundation of arbitration by setting out: (i) the parties' *ad idem* and consensual agreement to arbitrate, (ii) the law governing the contract and the arbitration, (iii) the *lex arbitri*, (iv) the seat, place and language of arbitration, and (v) the constitution of the tribunal, to name but a few. Therefore, a carefully drafted arbitration agreement in a contract is integral to facilitating a smooth, expedient and time-serving dispute resolution between the parties. However, a poorly or pathologically drafted arbitration agreement frequently traps parties in a less than optimal dispute resolution process.¹⁷¹

As considered above, pathological arbitration clauses compel parties to waste time, effort and expenses in pursuing court litigation concerning whether such clauses are valid or operative so as to allow the parties to initiate arbitral proceedings. In certain cases, parties are also forced to participate in multiple litigation proceedings in different jurisdictions as a result of the poorly drafted arbitration clauses. As consequence, multiple proceedings on the subject have led to inconsistent decisions on the enforceability of the arbitration clause.

Therefore, it is pertinent that experts involved in commercial negotiations leading up to the drafting of contracts that contain arbitration clauses are well-versed with the essentials of drafting effective arbitration clauses. As Frédéric Eisemann – the former Secretary-General of what is today the ICC International Court of Arbitration – once counselled, a properly drafted arbitration clause must fulfil four essential functions, *i.e.*, it must: (i) produce mandatory consequences for the parties; (ii) exclude the intervention of courts in the settlement of the disputes, at least before the issuance of the award; (iii) give powers to the arbitrators to resolve the disputes likely to arise between the parties; and (iv) implement a procedure which fosters the best conditions of efficiency and speed resulting in a final award that is susceptible to judicial enforcement.¹⁷² Notably, these essential

¹⁷⁰ *Ibid.*

¹⁷¹ Samra and Ramachanderan, *op. cit.*, p. 1111.

¹⁷² Eisemann, "La Clause D'arbitrage Pathologique," *op. cit.*

functions of an arbitration agreement still live today¹⁷³ and they should be used as ‘the guiding principles for users and counsel advising or drafting arbitration clauses.’¹⁷⁴

During the negotiation stage of an international commercial transaction, lawyers from both sides negotiate the contract terms in a manner consistent with the interests of their respective clients.¹⁷⁵ However, the prevalence of arbitration cases decided against a company due to poorly drafted clauses suggests that the lawyers ‘do not want to perturb the bliss of the moment of agreement by talking about how to proceed in case of a dispute.’¹⁷⁶ Although carefully drafted dispute resolution clauses in a commercial contract are integral to facilitating smooth commercial and investment transactions (including the resolution of disputes) between parties, they are often ‘neglected in the negotiation process.’¹⁷⁷

It is at the negotiation stage where parties and their counsel invest significant time and resources in defining their commercial relationship in their agreements. However, parties and their counsel sometimes fail to give the same care — or seek expert advice — when crafting a mechanism for resolving disputes.¹⁷⁸ But it should be noted that, whether impelled by exhaustion (*i.e.*, “midnight clauses”) or other influences (*i.e.*, “champagne clauses”)¹⁷⁹ or by rush or lack of both expertise and experience of the parties,¹⁸⁰ poorly drafted arbitration clauses frequently trick parties into ‘a less than optimal dispute resolution process.’¹⁸¹ As considered above, in some cases, the clauses are so pathologically drafted that they are internally inconsistent, or otherwise suffer from defects that ‘may make them cumbersome or even, in the worst of scenarios, unenforceable.’¹⁸²

¹⁷³ See Davis, “Pathological Clauses: Frédéric Eisemann’s Still Vital Criteria,” *op. cit.*

¹⁷⁴ Samra and Ramachanderan, *op. cit.*, p. 1112.

¹⁷⁵ Domínguez, L.A.G., ‘*Causes and Consequences of Faulty Arbitration Clauses*,’ ESTUD. SOCIO-JURÍD., Bogotá (Colombia), Vol. 9 No. 2, 2007, pp. 111-141, at p. 118.

¹⁷⁶ *Ibid.*

¹⁷⁷ Samra and Ramachanderan, *op. cit.*, p. 1111.

¹⁷⁸ *Ibid.* See also Holtz, N., ‘*Beware the Midnight Clause: Hold the Champagne?*’, 19 February 2016, *JAMS*; available at <https://www.jamsadr.com/files/uploads/documents/articles/holtz-insidecounsel.com-beware-the-midnight-clause.pdf>. (accessed 12 March 2023).

¹⁷⁹ *Ibid.*

¹⁸⁰ Domínguez, *op. cit.*, p. 119.

¹⁸¹ Samra and Ramachanderan, *op. cit.*

¹⁸² *Ibid.* See also Stone, A., and K. Pickett, ‘*When Less Is More: The Dangers of Multiple Inconsistent Arbitration Agreements*,’ American Bar Association, 8 October 2018; available at https://www.americanbar.org/groups/construction_industry/publications/under_construction/2018/fall/arbitration-agreements/ (accessed 12 March 2023).

In order to avoid incorporating defective arbitration clauses in commercial and investment contracts, negotiators should be more aware that it is precisely at this stage that business lawyers are meant to participate.¹⁸³ It has been counselled time and again that, it is at the negotiation stage that the parties would do well ‘in avoiding considering business lawyers as omen of controversy’ rather they should embrace them.¹⁸⁴ In fact, the role of business lawyers at the negotiation stage includes selecting the most suitable templates of arbitration clauses currently incorporated in many institutional arbitration rules, or, in the case of an *ad hoc* arbitration, drafting the clause ‘in the most satisfactory way, including all essential and necessary elements to make it enforceable, according to foreseeable source of conflict, and, “if possible”, suppress any deficiency.’¹⁸⁵

Both in principle and practice, a more careful selection of an appropriate and effective method to settle disputes between international players is very important at the negotiation state; and lawyers and their respective clients should understand this importance so as to avoid unnecessary subsequent legal costs that may be associated with first referring disputes to courts to remedy poorly drafted arbitration clauses.¹⁸⁶ At the end of the day, inadequately handled conflicts affect, eventually, the financial statements of companies, and, therefore, the trust and patience of the stakeholders.¹⁸⁷

IX. CONCLUSION

In order to maintain the integrity, independence, and reputation of the arbitration process, arbitration agreements should be drafted in a manner that will effectively and correctly convey the parties’ consensual agreement to resolve their disputes through arbitration. As considered in this article, a carefully and duly drafted arbitration clause normally yields into a smooth, expedient, and cost-serving dispute resolution process. However, a poorly drafted or pathological arbitration clause results in a usually prolonged litigation process where the parties will need to first obtain judicial interpretation and a directive on the validity, operativity, curability, legality or otherwise of the poorly drafted clause. This prolonged litigation process compels the parties to spend more

¹⁸³ Domínguez, op. cit.

¹⁸⁴ *Ibid*, p. 119.

¹⁸⁵ *Ibid*.

¹⁸⁶ Glynn, J., *et al.*, *Accounting for Managers* (3rd edn.) (Thomson Learning. Surrey. 2003), p. 325 (arguing that this is ‘because legal costs vary in a considerable amount depending on this matter).

¹⁸⁷ Domínguez, op. cit.

time, efforts and resources in pursuing the prolonged court process, which would otherwise not be the case if the arbitration clauses were crafted carefully, duly and effectively.

To prevent parties from being placed in the latter position, it is strongly recommended that transactional lawyers and corporate executives involved in negotiating and drafting international commercial and investment contracts ensure that arbitration clauses contained in such contracts include all the essential ingredients of a valid and proper arbitration agreement. To achieve this, it is urged further that corporate executives involved in these types of negotiations engage legal counsel with the requisite expertise and experience in negotiating and drafting such clauses, as well as those with a deep understanding of international commercial arbitration practices.