Contemporary Issues In Arbitration

17. Pathological Arbitration Clauses in Ad Hoc Arbitrations[1]

1.0 Introduction

This article reflects how Kenyan courts treat pathological arbitration clauses in ad hoc arbitrations. Further emphasis is on appointing authorities and how the arbitrators behave, or should behave when faced with such clauses. The writer makes some radical proposals on curing the pathological clauses from the Kenyan Arbitration Act, CIArb (K) Arbitration Rules as well as from the law of tort.

Much has been written on how arbitral institutions treat pathological clauses in administered arbitrations. The "Gang of Four" consists of the German Institute of Arbitration (DIS), the Milan Chamber of Arbitration, the Arbitration Institution of the Stockholm Chamber of Commerce, and the Vienna International Arbitration Centre. The Secretary Generals hold seminars to compare notes on various issues on arbitration, including pathological arbitration clauses in administered arbitrations. The writer hopes to attend one of the seminars in due course and has meanwhile decided to write about pathological clauses in ad hoc arbitrations.

1 Conference which was held at Whitesand Beach Hotel in Mombasa Kenya on 7th - 8th August 2014. Audio Visual are available on www.ngotho.co.ke and on YouTube. It was then published in the Chartered Institute of Arbitrators (Kenya) journal, Alternative Dispute Resolution Volume 2 No 1, (2014) Pages 106 -125.

Arbitration clauses were first referred to as "pathological" in 1974 by Frederick Eisemann, who served at the time as the Secretary General of ICC International Court of Arbitration. Pathology "is the science of causes and effects of diseases, especially the branch of medicine that deals with laboratory examination of samples of body tissue for diagnostic or forensic purposes."

Pathological arbitration clauses can be defined as those drafted in such a way that they may lead to disputes over the interpretation of the arbitration agreement, may result in the failure of the arbitral clause or may result in the unenforceability of an award. All pathological clauses are sick or ill. The illness could be minor, like running nose, coughing, migraines, limping, headache, gout, cancer etc. Some of the flaws are curable. Others are fatal or inherently suicidal, killing the arbitration agreement completely.

Examples of pathological arbitration clauses include; naming a specific person as arbitrator who is deceased or who refuses to act, naming an institution to administer the arbitration proceedings or to appoint the arbitrators if the institution never existed, is misnamed in the clause or refuses to act.

The occurrence of such clauses is a reflection of the parties' and advisors' optimism at the stage of signing the contract. The mood then is such that neither party takes, or wants to be seen to be taking, undue interest in the possibility of disputes arising. The arbitration clause is not called the "mid-night" clause for nothing.

Arbitration institutions play an important role in weeding out baseless requests for the appointment of arbitrators. In ad hoc arbitrations the arbitrator, once appointed, is left to his own devices.

Pathological arbitration clauses waste court time and much more time and money for the parties. They delay the resolution of disputes by engaging parties in non-issues and side-shows, which could have been avoided by more diligent drafting.

2.0 The Kenyan Arbitration Act

The standard or thermometer for testing pathological clauses is specified in section 6(1) of the Act;

> "A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds-
>
> a) That the arbitration agreement is null and void, inoperative or incapable of being performed" (Emphases added)

Section 5, which is titled "Waiver of Right to Object", states that,

> A party who knows that any provisions of this Act from which parties may derogate or any requirement that under the arbitration agreement has not been

complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.

Invalidity of an arbitration agreement could jeopardise the recognition and enforcement of the award under section 37(1) (a) (ii) but that dimension will not be explored in this paper.

3.0 Other Jurisdictions

3.1 General Examples

A UK court held recently that the following clause did not amount to an arbitration agreement:

> "In the event of any dispute between the parties pursuant to this Agreement, the parties will endeavour to first resolve the matter through Swiss arbitration. Should a resolution not be forthcoming the courts of England shall have non-exclusive jurisdiction". *(Christian Kruppa v Alessandro Benedetti & Anr[2])*

At least 4 clauses in that arbitration agreement are pathological:

i. "the parties <u>will</u> endeavour to first resolve the matter through Swiss arbitration". An arbitration clause should put an obligation on parties to refer disputes to arbitration. The language of "endeavouring" or

2 [2014] EWHC 1887)

"attempting" is generally reserved to the negotiation, mediation and the other procedures which do not guarantee an outcome.

ii. Ideally, an arbitration agreement is couched in mandatory terms like "shall", not "will" but whether or not that alone would invalidate the agreement is debatable.

iii. How/why would a "resolution not be forthcoming" if a dispute is referred to arbitration? A cheeky or particularly pro-arbitration court could have ordered the parties to refer the dispute to arbitration and leave issues unresolved by arbitration, if any, to be dealt with by the court.

iv. "Should a resolution not be forthcoming the courts of England shall have non- exclusive jurisdiction" There are several ways to skin this cat. The clause completely negates any intentions of arbitrating disputes arising from the contract.

The whole clause, read in its entirety, shows that the parties did not understand what arbitration was all about. Therefore, they could not possibly have intended to refer disputes to arbitration.

In the case of *Tritonia Shipping Inc v South Nelson Forest Products Corporation, [1966] 1 Lloyd's Rep. 114*[3] a charter-party provided merely 'arbitration to be settled in London.' The Court of Appeal held that disputes under the charter-party should be arbitrated in London in accordance with the agreement of the parties.

3 [1966] Lloyd's Rep. 114.

In the case of *London-Goldstar International (HK) Ltd v Ng Moo Kee Engineering Ltd: High Court of Hong Kong (Kaplan J.) Hong Kong Law Reports (HKLR), 73*[4] the arbitration clause provided that arbitration would be 'in a third country...in accordance with the rules of procedure of the International Commercial Arbitration Association'. No third country was nominated and no such association existed. The Supreme Court of Hong Kong held that the parties had nevertheless agreed to go to arbitration: the term 'third country' meant any country other than those of which the parties were nationals and the reference to a non-existence association could be deleted as meaningless.

3.2 Over Specification

"Sometimes a drafter of an arbitration clause may be too over-zealous and thus come up with an arbitration clause with either too many terms or one that may be difficult to implement. For example a clause may provide as follows:

> "the arbitration shall be conducted by three arbitrators, each of whom shall be fluent in Hungarian and shall have twenty or more years of experience in the design of computer chips and one of whom shall act as chairman, shall be an expert on the law of Hapsburg empire."

When an arbitration clause is over-detailed, those layers of details could make it difficult or impossible to apply when a dispute arises.

4 [1993] 2 Hong Kong Law Reports (HKLR), 73

3.3 The Unconscionable

A party may seek to avoid an arbitration agreement on the ground that it is unconscionable. In the United States of America there have been recent cases in which parties have attacked the selection of the ICC Arbitration Rules in contracts on the ground that the ICC's administrative costs are excessive and thus that the arbitration clause is unconscionable.

This was the case in *Brower v Gateway 2000 Inc*[5] in which a computer manufacturer's standard terms and conditions agreement included in the box of the computer, provided for arbitration of any dispute in accordance with the ICC Arbitration Rules. The agreement also stated that by keeping the computer for more than thirty days, the consumer accepted the terms and conditions. The New York court noted that the ICC advance fee of $ 4000 (for a claim of less than $ 50,000) is more than the cost of most of the defendant's products. The court held that the excessive cost of the ICC fees would effectively deter and bar consumers from arbitration, leaving them no forum for their disputes. The ICC fees were held unreasonable and the arbitration clause unconscionable and unenforceable."

3.4 Derogation from Institutional Rules

In drafting the arbitration clause, the parties should consider whether they can modify the institutional rules

5 246 A.D.2d 246, 676 N.Y.S.2d 569 (N.Y.A.D. 1 Dept. 1998).

adopted. Most of the institutional rules allow parties to modify them.

However in some cases the ICC has on its part refused to administer arbitration because of alterations made by the parties' agreement to particular rules where deemed by the ICC to be fundamental to its arbitral procedure.[6] It is not advisable to amend the arbitration clauses in standard forms of contract. It is more prudent to leave ICC, FIDIC etc. as they are without trying to "improve" them. Do not try to improve them. They have been tried and tested.

3.5 The Pathological Arbitrator

In *ACC Limited v Global Cements SLP (C) No. 17689 of 2012*[7], the Supreme Court of India considered the issue as to whether the arbitration clause would remain valid if the arbitrator named in the arbitration clause was dead.

The arbitration clause in question stated:

> "21. If any question or difference or dispute shall arise between the parties hereto or their representatives at any time in relation to or with respect to the meaning or effect of these presents or with respect to the rights and liabilities of the parties hereto then such question or dispute shall be referred either to

6 Thuo Caroline Wambui, 'Pitfalls in the Drafting of Arbitration Agreements' (University of Nairobi School of Law, 2011),

http://erepository.uonbi.ac.ke/bitstream/handle/11295/14914/%2 Pitfalls%20In%20The%20Drafting%20Of%20Arbitration%2 Agreements?sequence=3.

7 MANU/SC/0489/2012.

> Mr. N.A. Palkhivala or Mr. D.S. Seth, whose decision in the matter shall be final and binding on both the parties."

The agreement containing the arbitration clause was entered into in 1989. Arbitration was invoked in 2011. By that time, the arbitrators named in the arbitration clause had died. One of the parties had approached the High Court under Section 11. The High Court held that there was no indication that parties intended that arbitration clause would cease to be in existence. The court held that it was the policy of law to promote the efficacy of arbitration and therefore the efficacy of commercial arbitration must be preserved when dealings are based on agreement providing for recourse to arbitration when disputes arise. Consequently, the court appointed a retired Supreme Court judge as arbitrator."[8]

4.0 Kenyan Examples

4.1 Imaginary Appointing Authority

In Mugoya Construction & Engineering Ltd (Plaintiff) v National Social Security Fund and another Milimani Commercial Courts Civil Case 59 of 2005[9], the arbitration agreement stated the arbitrator would be appointed "by the Chairman or Vice Chairman of the East African Institute of Architects who

8 Jasmine Joseph, 'Arbitration Clause Survives Death of the Named Arbitrator: SCI Rules' http://practicalacademic.blogspot.com/2012/06/arbitration-clause-survives-death-of.html.

9 High Court (Milimani Commercial Courts), Civil Case 59 of 2005.

will, when appropriate, delegate such appointment to be made by the Chairman or Vice Chairman of the local (National) society of Architects".

The East African Institute of Architects does not exist, and probably never existed. The court could not believe that the organisation did not exist, and noted that if it by any chance did not, then the parties "have freedom to resort to the relevant provisions of the Arbitration Act 1995" (emphasis added). The court did not specify which those provisions were but it referred the dispute to arbitration all the same.

4.2 The Charitable Judge

In *Motik Telecoms Ltd v Telkom Kenya Ltd* the plaintiff[10], a debt collector entered into an agreement with the defendant for debt collection. A dispute arose, prompting the plaintiff to make an application for the court to compel the parties to refer the dispute to arbitration.

The arbitration mechanism was in two clauses of the contract. The first one stated "if a dispute is not resolved in an amicable and formal manner within 2 days, then either party may refer the dispute to arbitration." The second clause stated that the dispute would be referred to the arbitration of two persons, "one to be appointed by the Company and one by one Arbitrator". The statement providing for the appointment of the second arbitrator did not make sense.

10 High Court (Milimani Commercial Courts), Civil Case 59 of 2005.

An earlier draft of the second clause stated above provided that the second arbitrator would be appointed by the other party. Unfortunately, that draft was not signed and had been, more importantly, superseded by the final signed copy, which had the defective clause.

The court found that there was clear intent of the parties to refer disputes to arbitration in spite of the defective clause. It invoked section 3A of the Civil Procedure Rules which states, "nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice" and ordered the parties to refer the dispute to arbitration. Thus CPR saved the Arbitration Clause.

4.3 Arbitration versus Expert Determination

In *Agricultural Finance Corporation and another v Lustman & Co (1990) Ltd*[11] , the plaintiffs owned a building and had contracted the defendant as the managing and letting agent. They terminated the contract and filed a court suit for the recovery of money allegedly collected on their behalf and not remitted to them. The defendant applied for stay pending arbitration. It cited a clause in the contract that any disputes regarding any amounts due or payable by one party to the other would be "calculated by any reputable firm of independent public accountants agreed by the parties" and that the calculation would be conclusive and binding.

11 High Court (Milimani Commercial Courts), Civil Suit 134 of 2004

The plaintiff argued that there was no arbitration agreement and that if there had been one, stay should not be granted anyway because the defendant had already filed its pleadings, in addition to four advocates having entered appearance at different times.

The court found that the alleged arbitration clause fell short of Black's Law Dictionary's definition of arbitration as "a process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard" (emphasis by the court).

The plaintiff would probably have achieved the objective of the private resolution of the dispute if it had asked the court to order expert determination instead of arbitration.

4.4 Don't Shoot Yourself in the Foot

In *Pacific Insurance Brokers (EA) Ltd v Housing Finance Co. of Kenya Ltd Civil Case 227 of 2009*[12] an arbitration clause provided;

> "In the event of a dispute arising from the interpretation and/or meaning of the agreement, both HFCK and K & M agree to go for arbitration to be presided over by the then Chairman of the Law Society of Kenya with each party nominating their own arbitrator. The decision will be binding to both HFCK and K & M. Otherwise, either party

12 High Court (Milimani Commercial Courts) Civil Case 227 of 2009

> can determine to take the case before the High Court, should it find that the decision is inequitable. However, HFCK and K & M pledge to resolve all issues amicably and in any event no Court action will be instituted before three (3) months of arbitration's ruling to allow time for negotiation to resolve the difference."(Emphases added)

Suffice to say that the interpretation of the clause gave the parties much grief because of being ambiguous and too prescriptive[13].

4.5 Don't Throw That Laundry Receipt Away

A dry cleaning firm in Nairobi has the following in font size No. 7 at the rear of the receipt,

> "Conditions of Acceptance
>
> All disputes arising out of this contract shall be referred to the decision of one arbitrator who shall be appointed by the Kenya National Chamber of Commerce and Industry within one calendar month after having been required in writing to do so by either of the parties and only after a deposit of Kshs.500/=[14] is made by each party to cover arbitration cost. The making of an award shall be

13 High Court (Milimani Commercial Courts) Civil Case 227 of 2009 Consider King Solomon's advice in Proverbs 10:19 "When there are many words, transgression is unavoidable but he who restrains his lips is wise" (New American Standard Bible"

14 About USD 5

> condition precedent to any liability to the customer for any claim hereunder and if such claim shall not be within 6 months from the date a disclaimer have been referred to a arbitration under the provision herein contained, then the claim shall not for a purpose be deemed to have been abandoned and waived and shall not thereafter be recoverable.

The costumer is required to put a signature against the following declaration at the front of the receipt:

> "I declare that I have seen the Conditions of Acceptance displayed on the Notice Board and the Reverse of the receipt and agree to be bound by them. Signature....."

4.6 The Pathological Appointing Authority

In *Donwoods Company Ltd v Samura Engineering Ltd*[15], there was nothing wrong with the arbitration agreement itself. The problem was that a party, which had taken part in the proceedings by attending the preliminary meeting, paying the arbitrator's fee deposit and serving pleadings, chose to challenge the arbitrator's jurisdiction on the day of the hearing. The reason was that the arbitrator had been appointed by the Chartered Institute of Arbitrators (Kenya Branch) and not by the Architectural Association of Kenya as stipulated in the arbitration agreement.

The judge dismissed the application with costs, having considered section 6 (1)(a) of the Act in view of the 6 month

15 High Court (Commercial & Admiralty Division at Milimani Law Courts) Civil Suit Misc No 714 of 2012.

delay from the arbitrator's appointment to the date of the challenge as well as the fact that the applicant had not shown that it would suffer any prejudice if the arbitration proceeded.

4.7 The Venue versus Seat of Arbitration

A Fuel Purchase Agreement cited in *Kenya Oil Company Ltd v Westmount Power (Kenya) Ltd*[16], provided among other things, that "it is hereby agreed that the site of the Arbitration shall be London, England". Both parties were Kenyan. The contract was performed in Kenya. The witnesses were likely to be in Kenya.

The word "site" in the arbitration agreement could present several challenges because it is capable of two interpretations. One is that the place or venue of arbitration shall be London. The alternative interpretation or possibility is that the parties meant that the seat (not site) of arbitration would be London. Of course it is possible for the site/venue to be Kenya while the seat remains United Kingdom.

Whether the arbitration was held physically in Kenya or in London has a huge effect on costs. The cost of flights, hotel accommodation, visa applications (and granting of visas is not guaranteed) for counsel, parties and witnesses, etc. could be prohibitive. Not to mention that a foreign- based arbitrator is likely to charge more than a Kenyan one.

16 Civil Suit No. 106 of 2002 in High Court of Kenya, Commercial and Admiralty Division).

Another pathological clause reads, "The place and seat of arbitration shall be Nairobi and the language of arbitration shall be English". The fact that the arbitrator is sitting in Nairobi does not make Nairobi the seat of arbitration. Indeed, Nairobi is not legally capable of being a seat of arbitration.

The seat is the juridical seat, and not the venue of the arbitration or the place where the hearings are held. It is the jurisdiction/nation whose arbitration law would govern the procedure and whose courts would have jurisdiction on issues like stay of proceedings, removal of arbitrator, etc.

It is advisable for drafters to avoid the phrase seat in an arbitration agreement like the plague unless they are double sure they know what a seat of arbitration is. The omission of the seat in the agreement does not make arbitration pathological. An arbitrator can determine the seat of arbitration after hearing the parties, if need be. Sins of omission may be easier to deal with than those of commission as far as the seat is concerned.

4.8 "Shall" Vs "May"

In *Kenya Ports Authority v Amarco (Kenya) Ltd*[17] the arbitration clause stated that disputes "may be submitted by either party to arbitration..." Justice P. Waki observed that the use of the word "may" instead of shall" did not compel

17 High Court Mombasa, Civil Suit No. 23 of 2000

the parties to refer the dispute to arbitration and that, therefore, the arbitration agreement was "inoperable".

4.9 Did they mean that? Really?

In *Naizons (K) Ltd v China Road & Bridge Corporation (Kenya) Civil Appeal No. 187 of 1999*[18], the arbitration clause provided that the arbitration shall be "conducted by the Institute of Engineers of Kenya... The appointed of Arbitration shall be the Chairman of the Institute of Engineers of Kenya".

This case was in court for reasons different from the obviously pathological arbitration clause. The parties probably missed the fact that IEK was incapable of carrying out an arbitration, and so the arbitration agreement was inoperable.

4.10 The In arbitrable: Taking Jokes too Far

In *Emily Susanne Dyk Wissanja v Zahid Asafali Wissanja*[19], the court observed that,

"It is possible for parties to have an arbitration agreement in respect of a number of matters in relation to their marriage including property but such matters may not extend to those over which the law has placed exclusive jurisdiction in the courts. In such situations, once in court the parties may invoke mediation or other permissible mode of alternative dispute resolution as provided for

18 Court of Appeal, Civil Appeal No. 157 of 2000.

19 (HCT-00- FD-MC-0008-2009) [2009] UGHC 34 (23 July 2009) High Court of Uganda.

by the law to settle some or all of the questions before the court as the court may direct. In the result I find that the proceedings before the arbitrator chosen by the parties were void. Partites cannot confer jurisdiction on any private or public tribunal over a matter in which jurisdiction is reserved to the courts only."

4.11 Pathological Draftsmanship

In *Trattoria Ltd v Joaninah Wanjiku Maina Civil Case 126 of 2008 [2007] eKLR*[20], an arbitration clause stated,

"Save as may hereinbefore be otherwise specifically provided all questions hereafter in dispute between the parties hereto and all claims for compensation or otherwise not mutually settled or agreed between the parties hereto shall be referred to arbitration by a single arbitrator (assisted by assessors or professional advisors as the arbitrator shall deem necessary to appoint) in like manner as provided in by paragraphs 1 and 2 of the 2nd Schedule hereto for a valuer and every award made under this Clause shall be expressed to be made under the Arbitration Act (Cap 49) or other Act or Acts for the time being in force in Kenya in relation to arbitration".

Considerable time and effort would be required to unpack the above sentence.

20 HCC Civil Case No. 126 of 2008.

4.12 Personal Experience: The Insured vs the Insurer

The author has contended with an arbitration agreement which was not inherently pathological, but the circumstances made it impractical and probably unconscionable. It was in the insurance policy.

One party's default saved the situation. It required a 3-person arbitral tribunal. The claim was for about Ksh.500,000/=[21] . The fees for a 3- person tribunal and the legal costs would have exceeded that sum by far.

The author was appointed by the Insured in what was expected to be a 3-person tribunal. He accepted appointment and immediately offered to resign on condition that the parties must appoint someone else as a sole arbitrator to save time and especially costs. He also offered to waive the fees for the time he had spent on the matter so far. The Insurer did not respond.

The Insured served notice under s. 12(3) of the Arbitration Act of Kenya to have the arbitrator it had appointed become the sole arbitrator. The insurer did not respond. Thus the party appointed arbitrator became the sole arbitrator as provided under s. 12(4). The parties eventually settled and agreed that the Insurer would pay the arbitrator's fees. There was additional drama. The arbitrator sent a fee note to the Insurer, who did not respond. He then issued an award in which the only issue for determination was the quantum of his fees. The Insured eventually paid up when threatened with enforcement proceedings.

21 About USD 5,900 at the time

5.0 Proposed Solutions

5.1 Simply Do It Right! - Age Quod Bene Agis[22]

> "The leading rule for the lawyer, as for the man of every other calling, is diligence." (Abraham Lincoln)

George Washington, the first President of the United States, borrowing from his experience as an arbitrator of private disputes in the 1770s, left nothing to chance in his last will and testament:

> "I hope and trust, that no disputes will arise concerning them; but if, contrary to expectations, of the usual technical terms, or because too much or too little has been said on any of the devices to be consonant with law, my will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and understanding; two to be chosen by the disputants - each having a choice of one - and the third by those two. Which three men thus chosen, shall, unfettered by law, or legal constructions, declare their sense of the testators' intention; and such decision is, to all intents and purposes to be as binding on the parties as if it had been given in the Supreme Court of the United States."

5.2 Authorities: Do not read someone else's letter.

An organization should not spend time and money making

22 Latin for "Whatever you do, do it well"

an appointment if it is not mandated to do so. It should simply decline to make the appointment and advise the person applying for the appointment to direct the request to the right organization.

5.3 Arbitrators Should Stop Playing Hide and Seek!

In the absence of an administering institution, which would look at the arbitration agreement critically prior to making an appointment, arbitrators in ad hoc arbitrations should on appointment or at the earliest opportunity interrogate the arbitration clauses and address pathological issues squarely.

They should ask themselves if they have been appointed prematurely or properly and ask the parties to comment. If they find that they have not been properly appointed, they should promptly do the honourable thing: resign. Raising the issue upfront gives the parties an opportunity to amend the pathological clause or enter into a new arbitration agreement altogether.

5.4 Party Agreement

As suggested above, party autonomy allows the parties to amend an existing arbitration agreement or to replace the pathological one with a new one.

5.5 Behold The Heart Surgeon!

The arbitration agreement is the heart of arbitration. Any problem with it could jeorpadise the whole process. Enter the heart surgeon. The Chartered Institute of Arbitrators,

Arbitration Rules of 2012 give the arbitrator powers to correct or amend pathological arbitration clauses. Rule 16B (2) stipulates that,

"The Arbitral Tribunal has jurisdiction to order on application by a party, the correction or amendment of any such agreement, and of the arbitration agreement, submission or reference, but only to the extent required to rectify any manifest error, mistake or omission which it decides to be common to all the parties."

The English Act of 1996 is less explicit but creative arbitrators and parties could navigate their way around section 48 (5) (c), which is in the context of remedies available to parties. It states that,

> "The tribunal has the same powers as the court … to order the rectification, setting aside or cancellation of a deed or other document"[23].

5.6 Malpractice suits - Let the negligent advisors pay!

Professional advisors owe their clients (and potentially third parties under the law of tort) a duty of care to ensure that the contracts, including the arbitration clauses, are

23 Bernstein, Wood, Tackerberry and Marriot have not commented at all on this section in their excellent contribution to the Handbook of Arbitration Practice.

The writer is not aware of any use of the above section to cure pathological clauses. It could be argued that such was beyond the contemplation of the legislators. To be fair, no one in the whole world had heard of or even imagined that human heart transplants were possible until Dr Christeaan Barnard performed one in 1967.

prepared to a professional standard. If the advisors clients breach and the clients suffer loss, then the clients could sue successfully for professional negligence.

Pathological clauses deny parties an opportunity to resolve a dispute privately and probably inexpensively. The parties also spend money they would have put to other use if the arbitration agreement had been drawn correctly. It is time somebody got sued for crafting silly arbitration clauses. A well publicised malpractice suit would do wonders, especially if the firm sued its one of the leading worldwide consultancy or legal names.

5.7 Advocacy

Following the personal experience narrated above, the writer influenced the adoption of a practical arbitration clause in motor and various other classes of insurance by all the insurance companies in Kenya.

There are probably other industries in Kenya which are stuck with pathological arbitration clauses in their standard forms. The maritime contracts used in Kenya are suspect.

5.8 Drafting Arbitration Agreements from Scratch

Some of the critical components are:

Provision that disputes shall be resolved by arbitration Designate the body which would appoint an arbitrator if cannot agree on one person.

Conditions precedent (like notice of dispute, mediation as a contractual pre- condition to mediation, the time limits, etc.) could frustrate the arbitration process. The interplay among the various ADR procedures and time limits must be calibrated thoughtfully. Specify the qualifications of the arbitrator if that is considered important.

5.9 Just Copy and Paste!

Some contracts come with in-built arbitration clauses while most arbitral institutions have recommended standard wording, which invaluably names the subject institution as the appointing authority and specifies that its rules shall apply.

The choice of the arbitration agreement depends on the Sums of the contract (which acts as a pointer to the sums likely to be disputed about), technical nature of the industry, complexity of the issues in the underlying

5.9.1 Sample Clauses

- Disputes arising from this agreement shall be resolved by an arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch)[24]
- Any dispute arising from or related to this agreement shall be resolved by an arbitrator. Who shall be

24 The other main arbitrator appointing authorities in Kenya are the Law Society of Kenya, Architectural Association of Kenya, Association of Engineers of Kenya and The Institution of Surveyors of Kenya. Nairobi Centre for International Arbitration will join them once it is fully operational

appointed jointly by the parties or in default by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) at the request of either party.

- Disputes arising from this agreement shall be resolved by a non-Kenya arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) on request by either party.
- The parties shall first attempt amicable settlement of disputes through negotiation but either party shall be free to at any time refer unresolved issues to an arbitrator, who shall be appointed by the Chairman of The Institute of Surveyors of Kenya.
- Disputes arising from this agreement shall be resolved by an arbitrator appointed by the parties or in default by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) at the request of either party. The arbitrator shall be at least a Member (MCIArb) of the Chartered Institute of Arbitrators.
- Disputes arising from this agreement shall be resolved by an arbitrator appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch). The arbitrator shall be a Fellow of the Chartered Institute of Arbitrators.

5.9.2 Mediation & Arbitration

- The parties shall attempt mediation of any disputes arising from this contract under a mediator appointed jointly by the parties. If the parties do not agree on the mediator to appoint within 14 days of one party

requesting the other in writing that the dispute be referred to mediation or if the dispute is not resolved fully within 30 days after the appointment of a mediator, then the unresolved issues shall be referred to an arbitrator appointed by the parties or in default by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) at the request of either party.

5.9.3 Mediation & 3-Person Arbitration Tribunal

Any dispute arising from or related to this agreement shall be referred to a mediator, who shall be appointed jointly by the parties. Any issue or aspect of the dispute which is unresolved within 30 days of either the dispute arising or of one party inviting the other one for mediation in writing shall be resolved by a tribunal of 3 arbitrators. Each party shall appoint one arbitrator. The third arbitrator, who shall be the Chairman of the Tribunal, shall be appointed jointly by the two party-appointed arbitrators or in default by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch) on request by either of them. All the 3 arbitrators shall be independent and impartial, and shall be at least Fellows of the Chartered Institute of Arbitrators (FCIArb). At least one of them shall be a Chartered Surveyor (MRICS or FRICS), so the Chairman shall be a Chartered Surveyor if none of the party-appointed arbitrators is one. The English Arbitration Act of 1996 shall apply in the Arbitration.[25]

25 The other main arbitrator appointing authorities in Kenya are the Law Society of Kenya, Architectural Association of Kenya, Association of Engineers of Kenya and The Institution of Surveyors of Kenya. Nairobi Centre for International Arbitration will join them once it is fully operational