# J-K GADZAMA LLP

LEGAL PRACTITIONERS * ARBITRATORS * MEDIATORS * REGULATORY CONSULTANTS

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CHIEF JOE-KYARI GADZAMA, SAN (MIDDLE) WITH THE 2017 SET OF EXTERNS POSTED TO THE FIRM FROM THE NIGERIAN LAW SCHOOL

# EDITORIAL

We are delighted to present you with this edition of our newsletter.

The centerpiece of this edition is an incisive analysis of the statutory regulations on campaign spending by political parties in Nigeria, presented by our principal partner, Chief Joe-Kyari Gadzama, SAN.

With the present administration long past the halfway mark, both public and scholarly interest have turned towards the next elections which will be held in 2019. We hope that the piece will help stimulate thought on the subject.

We also bring you a penetrating review of the decision of the Court of Appeal in Imoukhuede v. Mekwunye. In the paper, Mr. Tunde Onamusi, our Head of Chambers, Abuja, examines the judicial attitude towards pathological arbitration clauses and suggests possible alternatives to the Court of Appeal's approach.

This edition also features exciting sights from the mock trial exercise conducted for the externs posted to the firm from the Nigerian Law School. As usual, there are also segments featuring legal humour and curious legal trivia.

We hope that you find this edition illuminating and entertaining.

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# LEGALITY AND LEGITIMACY OF ELECTION THAT BREACHES THE LIMITS OF POLITICAL CAMPAIGN EXPENDITURES

BEING A PAPER PRESENTED
On Thursday, 27th day of April, 2017
At the convened round table conversation, by the law firm of Azinge & Azinge
*By*

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Chief Joe-Kyari Gadzama, SAN

## PROTOCOL

### 1.0 INTRODUCTION

It gives me great pleasure to be invited to speak at this round table conversation. I thank the management and the organisers for finding me worthy to undertake this task and I thank you for doing me the honour.

Before I proceed, I must commend the Principal Partner of the law firm of Azinge & Azinge and the convener of this programme, my learned brother silk, **Prof Epiphany Azinge SAN, OON.**

I also want to commend your wisdom for the choice of this very important topic at this point in time, aptly titled, **'LEGALITY AND LEGITIMACY OF ELECTION THAT BREACHES THE LIMITS OF POLITICAL CAMPAIGN EXPENDITURES,** as Nigeria prepares for 2019 general election. While legality means the quality, state or condition of being allowed by the law, legitimacy means lawfulness.

1.1 The jurisprudential pedigree for the regulation of political parties' funding and campaign expenditures in Nigeria is traceable to the First and Second Republics where it was an issue that was hotly debated in the Parliament. It was the fear of allowing the so called 'moneybags' to put political parties in their pockets that led the regime of General Ibrahim Badamasi Babangida (IBB) to make government partly responsible for political parties' funding.

1.2 Nigerian political system today is quite appalling. It is regrettable that most political parties lack ideologies as most of its members are virtually political jaywalkers. Political parties are merely created by individuals and their allies of notables who will be in control and, often enough, manipulate party structures, candidacies and even the general electoral process itself.

### 2.0 CONSTITUTIONAL AND STATUTORY REGULATIONS ON CAMPAIGN/POLITICAL FINANCING IN NIGERIA

The legal regime as it relates to Elections in Nigeria viz: the 1999 Constitution of Nigeria, (as amended); the Electoral Act 2010, (as amended); the Constitutions of the political

parties, the Political Finance Manual and Handbook, as well as the Companies and Allied Matters Act (section 38) all contain provisions aimed at regulating political finance in Nigeria.

2.1 The previous Constitutions of the Federal Republic of Nigeria including that of 1999 (before its amendment) were clearly silent on the issue of political funding. The amendment to the 1999 Nigerian Constitution by the National Assembly innovatively made provisions for funding of political parties which thereafter enabled INEC to regulate and supervise both the funding and election expenses of political parties.

2.2 These laws provide copious provisions on the extent and limitation of political parties with respect to campaign/political financing. Thus, the provisions of sections 222-229 of the 1999 Constitution (as amended) are very apt. Worthy of note here are the limitations placed on political parties especially with respect to their funding activities by the 1999 Constitution.

2.3 For instance, section 225(2) of the 1999 Constitution (as amended) is unambiguous on the finances of political parties. It states that:

> *"Every political party shall submit to the Independent National Electoral Commission a detailed annual statement and analysis of its sources of funds and other assets together with a similar statement of its expenditure in such form as the commission may require."*

2.4 Sub sections 3, 4, 5 and 6 of section 225 of the 1999 Constitution (as amended) are even more detailed on the roles of INEC in checking the financial dealings and status of political parties. For instance, subsection 3 states that no political party shall –

> *(a) Hold or possess any funds or other assets outside Nigeria; or (b) Be entitled to retain any funds or assets remitted or sent to it from outside Nigeria.*

> **Sub-section 4 states that:**
> *Any funds or other assets remitted or sent to a political party from outside Nigeria shall be paid over or transferred to the commission within twenty-one days of its receipt with such information as the commission may require.*

> **Sub-section 5 further states that:** *The Commission shall have power to give directions to political parties regarding the books or records of financial transactions which they shall keep and to examine all such books and records.*

2.5 Significantly, section 226 (1)CFRN requires INEC to mandatorily prepare and submit annually to the National Assembly a report of the accounts and balance sheet of every political party. In preparing its report, sub-section 2 of the same provision empowers INEC to:

> *"Carry out investigations as will enable it form an opinion as to whether proper books of account and proper records have been kept by any political party, and if the Commission is of the opinion that proper books and accounts have not been kept by a political party, the Commission shall so report."*

2.6 It is also important to examine the provisions of section 228 of the 1999 Constitution, especially as it deals with public funding of political parties and punishment for those that contravene sections 221, 225 (3) and 227 of the Constitution. The Constitution goes further at section 228 and states, *inter-alia:*

> *The National Assembly may by law provide- (a) for the punishment of any person involved in the management or control of any political party found after due inquiry to have contravened any of the provisions of sections 221, 225 (3) and 227; (b) for the disqualification of any person from holding public office on the ground that he knowingly aids or abets a political party in contravening section 225 (3) of this constitution; (c) for an annual grant to the Independent National Electoral Commission for disbursement to political parties on a fair and equitable basis to assist them in the discharge of their functions; and (d) for the conferment on the Commission of other powers as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the Commission more effectively ensure that political parties observe the provisions of this part of the chapter.*

## 3.0 LIMITATION ON POLITICAL EXPENDITURES UNDER THE ELECTORAL ACT, 2010 AMENDED

3.1 The Electoral Act (as amended) in 2010 doubled the campaign spending limits in the 2006 Act. Someone running for the Presidency can spend up to N1 billion, a Governor can spend up to N200 million, N40 million for Senate, N20 million for House of Representatives, N10 million for State House of Assembly and local government, and N1 million for ward Councilor. See section 91(1-7) Electoral Act 2010 as amended.

3.2 It is very worrisome as the Act at section 91(8) (a) - (c) provides that in determining the total expenditure incurred in relation to the candidature of any person at any election, no account shall be taken of any deposit made by the candidate on his nomination in compliance with the law; any expenditure incurred before notification of the date fixed for the election with respect to services rendered or materials supplied before such notification or political party expenses in respect of the candidate standing for a particular election. It is disheartening though laudable as the Senate makes provision for the financial benchmark for the nomination forms of political aspirants come 2019 as contained in the Electoral Act No.6 (Amendment) Bill 2017 which has been passed by the National Assembly. In the amendment bill, presidential aspirants are required to pay a maximum of N10 million for the nomination form while governorship aspirants are to pay a maximum of N5 million, senate to pay not more than N2 million, House of Representatives aspirants to pay not more than N1 million etc. This is partly laudable in the sense that if the said amendment is passed, it will no longer be left to the arbitrariness of political parties to determine what is payable by the aspirants as witnessed in 2015 wherein presidential aspirants paid up to N20 million for the nomination form and N2 million for the expression of interest.

3.3 Even with these limits and criminalisation of non-compliance pursuant to section 91 (10 & 11) of the Act as amended, there has been no enforcement of the said provisions from the INEC, which has powers to monitor campaign finance, audit the accounts of political parties, and make that information available to the public, as enshrined in Section 153 of the Constitution, as well as section 15(c), (d) and (f) Part 1 of the Third Schedule.

3.4 By virtue of section 228 of 1999 Constitution, it is clear as crystal that the framers of the 1999 Constitution gave the National Assembly the requisite powers to make laws to provide for the type of punishment that should be imposed on politicians and political parties that contravene the aforementioned provisions. The National Assembly, in consonance with the above mandates, makes the relevant provisions in the amendment of 2010 Electoral Act penalising contravention of the limit of expenditures pursuant to the provisions of section 91 (10) of the Act but it has been difficult for either INEC or janitors of our criminal justice system to enforce this law which has been flagrantly violated by both the political parties and the politicians in the recent times.

3.5 Be that as it may, there are inherent problems with the laws, hence the need for further reform of the legislations. Sadly, Nigeria's National Assembly failed to look at some of the lapses inherent in the Act during the course of Electoral Act No.6 (Amendment) Bill 2017 which has been passed. Aside the weaknesses in the law, there are challenges in enforcement.

## 4.0 FUNDAMENTAL LAPSES IN THE ELECTORAL ACT AS IT RELATES TO ENFORCEMENT

4.1 These constitutional and statutory provisions are aimed at closely monitoring and supervising campaign expenditures of political parties and individual aspirants. There are, however, some gaps, especially in the implementation of these provisions.

4.2 A cursory look at the provisions of the Electoral Act 2010 (as amended) as it relates to the offences and penalties in respect of the limit of both political parties and candidates' expenditures reveals that law itself hamstrung both the INEC and law enforcement agencies. There is no mechanism for the determination of candidates' election expenses as candidates for the election make no returns or reports to the Commission. The Act at section 91(10) only penalises a candidate who knowingly acts in contravention of limit of expenditure and on conviction liable to the fine or imprisonment as provided therein. Moreover, section 92 (2 & 3) of Electoral Act 2010 (as amended) provides as follow:

> *(2) Election expenses incurred by a political party for the management or conduct of an election shall be determined by the Commission in consultation with the political parties.*
> *(3) Election expenses of a political party shall be submitted to the commission in a separate audited return within 6 months after an election....*

4.3 And the contravention of above provision viz failure of the party to file the audited return, without more attracts only but a maximum fine of N1 million upon conviction and should the party file inaccurate report, the court may impose a maximum penalty of N200,000 per a day for the period after the return was due until it is submitted to the Commission. While section 92 (7) of the Act

provides that a political party that incurs election expenses beyond the limit stipulated in the Act commits an offence is liable on conviction to a maximum fine of N1 million and forfeiture to the Commission of the amount by which the expenses exceed the limit set by the Commission. The power of INEC only ends in publishing what the Act requires it to publish.

4.4 The unresolved question that usually comes to mind is the fate of an election or return of a person who contravenes or exceeds the statutory limit on election or campaign expenditures. What if the elected or returned person falls in the category that enjoys immunity under section 308 of the 1999 Constitution (as amended)?

4.5 The Electoral Act 2010 (as amended) would have narrowly resolved the issue above on one hand but on the other hand, left it to the determination of the Court pursuant to the provisions of section 138(1)(b) and section 138 (1) of the Electoral Act, 2010 (as amended). It provides that;

*An election may be questioned on any of the following ground: that is to say-*

*(b) That the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act.*

*s. 139 (1) An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or Court that the election was conducted substantially in accordance with the principles of this Act and that noncompliance did not affect substantially the result of the election (emphasis mine)*

4.6 It is at the subjective view of the Court to determine if an election complied substantially with the provisions of the Act. Non-compliance with the provisions of the Act cannot invalidate an election except if same affected the result. The law as it is today is equally silent on issue of third party campaign expenditures.

## 5.0 COMPARATIVE SUMMARY OF OTHER JURISDICTIONS' CEILINGS ON CAMPAIGNS EXPENDITURES

5.1 France, Israel and the United Kingdom impose ceilings on expenditures permitted in elections. Australia and Germany have no such ceilings. The ceilings are either set amounts or based on a formula that takes into consideration the number of eligible voters or constituencies.

In United States, the Federal Election Campaign Act of 1971 (Act), as amended in 1974 made provisions for ceiling on campaign expenditures but was voided by the Supreme Court in the case of **Buckley v. Valeo** to the effect that the Act's contribution provisions are constitutional, but the expenditure provisions violate the First Amendment to the U.S. Constitution which guarantees freedoms concerning religion, expression, assembly, and the right to petition. The First Amendment guarantees freedoms concerning religion, expression, assembly, and the right to petition. It forbids Congress from both promoting one religion over others and also restricting an individual's religious practices. It guarantees freedom of expression by prohibiting Congress from restricting the press or the rights of individuals to speak freely. It also guarantees the right of citizens to assemble peaceably and to petition their government.

However, as one of the conditions for receiving public funding, Presidential candidates or publicly

funded candidates must agree to abide by certain spending limitations.

## 6.0 CONCLUSION AND RECOMMENDATIONS

6.1 In conclusion, it is beyond doubt that there is a legal limit on campaign expenditure on both political parties and her candidates but to what extent is this practicable? What is the mechanism for the enforceability of these limitations on election expenses? In general, INEC only barks within the euphoria of the innovations embedded in both the Constitution and the Electoral Act provisions as reflected above but definitely cannot bite due to lapses in such legislations. The politicians who make the laws only shielded themselves from probable prosecution by ensuring the existence of those shortcomings in the Act. In the 2017 amendment, the politicians went further to protect themselves from the arbitrariness of their political parties determining what is payable as nomination fees. The law in this regards seems to breed the powerful individuals in society who are more powerful than an institution.

6.2 Be that as it may, it is my humble opinion that both the candidates and political parties should be saddled with the obligations of submitting election expenses reports to the Independent National Electoral Commission (INEC) in the case of general elections and State Independent Electoral Commissions (SIECs)in the case of Local Government elections for more accountability. The rationale behind this is that candidates spend more on their campaigns than their political parties who are charged under the current Electoral Act with the duty of making the reports to INEC. More so, the electoral law limits election expenses candidates can incur (See Section 91 of Electoral Act 2010, as amended), they should therefore be made answerable for any breach of campaign ceiling as enshrined in the Act.

6.3 More so, there is an urgent need for further amendment of the Act to include excess expenditures of candidates or political parties as a ground for challenge of an election or return of candidates in Nigeria.

I have no doubt we will all return enlightened. I thank you for your attention and God bless.

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# PHOTO SPEAK

## MOCK TRIAL EXERCISE CONDUCTED FOR THE 2017 SET OF EXTERNS FROM THE NIGERIAN LAW SCHOOL IN THE FIRM'S HON. JUSTICE NIKI TOBI, JSC MOOT COURT

Chief Joe-Kyari Gadzama, SAN (middle) with the externs before the trial

L-R: Jemimah C. Daniel, Chukwu C. Justice and Kukoyi Olugbenga as counsel for the defendants during the mock trial

L-R: Ozoemenam U. Chinelo, Hon Christian Sesugh and Ahmad A. Yahaya as counsel for the claimant during the mock trial

D. I. Onyekwere, Esq. (counsel in chambers) presiding over the mock trial

L-R: Rosaline E. Anang and Nancy C. Oyinbo as registrars of the court during the exercise

Anonaba I. Deborah and Ohai Franklyn as witnesses during the exercise

Chukwu C. Justice (middle) addressing the court on a point of law

L-R: Chief Joe-Kyari Gadzama, SAN and Manni Ochugboju, Esq. observing the proceedings

L-R: Tunde Onamusi, Esq. (Head of Chambers); Keffas Gadzama, CP (Rtd) (Partner) and Dimson Dimas (counsel in chambers)

A cross section of the gallery engrossed in the proceedings

# LAW ON MARBLE

It is my considered view, which I cherishingly uphold, that the judiciary must at all times strive to weather the storm, so to say, and be seen to have risen up to daunting challenges before it; otherwise it will one day wake up from the slumber thereof only to realise that it has lost its prestige, formidable authority and legitimacy. And I dare reiterate that the alternative to a virile, courageous, fearless, incorruptible and visionary judiciary is anarchy.

**– Saulawa, JCA in Gadi V. Male (2010) 7 NWLR (Pt. 1193) 225.**

It is all very well to paint Justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour and prejudice, but clear to see which way lies the truth; and the less dust there is about, the better.

**– Lord Alfred Denning**

It is the duty of the judge to pursue the truth, but it is permitted of an advocate to urge what has only the semblance of it.

**– Cicero**

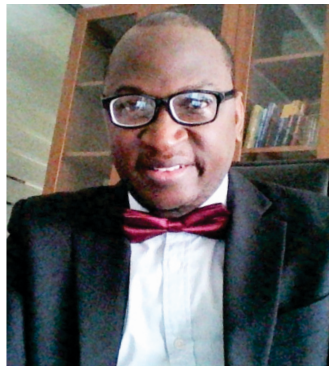
The courts exist to do substantial justice not formal and technical justice. Rules of Court dealing with the technical modes of procedure should be subservient to the dictates of justice. If therefore the observance of any rule will produce an obvious injustice, a court of justice will naturally prefer justice to the technicalities the rule imposes.

**– Oputa, JSC in Nneji V. Chukwu (1998) 3 NWLR (pt. 81) 184**

# "PHYSICIAN, HEAL THY PATIENT:"

## The Pathological Arbitration Clause in Imoukhuede v. Mekwunye

– Tunde Onamusi, LL.M (Lond.), MCIArb. (UK)



### INTRODUCTION

Imagine with me for a brief moment a young wife, pregnant with her first child. A few days to her EDD she is diagnosed with a disease, life threatening for herself and the unborn.

What would we think of a physician who does not bother with getting a cure, or whose main concern is showing that the illness may have been self inflicted?

This appears to have been the attitude of the Court of Appeal in the recent case of Imoukhuede v. Mekwunye[1] ("the Mekwunye Case"). The Court succeeded remarkably in concealing any concerns it may have had about saving an arbitration clause which suffered from a defect that, as this paper shows, is both common and curable. With troubling tenacity, the learned justices strained against a liberal interpretation and comfortably conjectured that the parties intended their own predicament. This paper decries that approach and draws attention to possible alternatives.

If we accept that the pathological[2] arbitration clause is simply sick or diseased, then perhaps we may also expect that someone act as physician. This is necessarily the judge, who, by adopting a liberal approach, may birth or preserve the arbitration process by saving the defective clause.

In arguing for this liberal approach, this paper will focus on the actual defect in the Mekwunye case – non-existent or improperly identified institutions or appointing authorities. In reviewing the Mekwunye Case, the paper will also highlight[3] some potentially "pathological symptoms" of the judgment itself.

Finally, the paper will offer a glimpse of how similarly defective clauses have been treated in other jurisdictions and suggest some tests for determining when they may be viewed as curable.

### THE PATHOLOGICAL CLAUSE

The phrase "pathological arbitration clause" was first coined by Frederic Eismann[4] in a seminal article published in 1974. The phrase refers to clauses which suffer defects that either disrupt or altogether prevent the arbitration process.

Examples of such defects abound and range from clauses which render arbitration optional rather than mandatory, to clauses which are unclear in the number of arbitrators; clauses which inconsistently refer to both arbitration and litigation; and clauses referring to an institution or appointing authority that is non-existent or incorrectly named. While there are no doubt others, the last example given is the focus of this essay and was the defect which afflicted the Mekwunye Case.

### IMOUKHUEDE V. MEKWUNYE & 2 ORS (2015) 1 CLRN 30

This was a decision of the Court of Appeal (Lagos Division), where the Court unanimously allowed an appeal against a ruling of the High Court. The ruling had essentially upheld an arbitration clause which incorrectly named the Chartered Institute of Arbitrators (UK).

The appellant and 1st respondent were parties to a tenancy agreement which contained an arbitration clause. The 2nd respondent was the sole arbitrator appointed by the 3rd respondent – the Chartered Institute of Arbitrators (UK) Nigeria Branch.

The arbitration clause embedded in the tenancy agreement provided that in the event of a conflict or disagreement, an arbitrator would be appointed by:

> *"the President of the Chartered Institute of Arbitration (London) Nigeria Chapter."*

Pursuant to the clause, the 1st respondent, had requested the appointment of an arbitrator. In response, the 3rd respondent nominated the 2nd respondent as sole arbitrator. The 2nd respondent at the end of proceedings delivered an award.

Rejecting a challenge to the award on the grounds that the 3rd respondent was not the proper appointing authority, the trial court reasoned that the error was simply one of semantics and did not erode the validity of the appointment.

Dissatisfied with this decision the appellant appealed.

In the Court of Appeal, the relevant issue for determination was whether the appointment of a sole arbitrator was effected via the proper means and by the proper person or body.

Predictably, the appellant argued that since the *"Chartered Institute of Arbitration (London) Nigeria Chapter"* did not

[1] 2015 1 CLRN 30
[2] The word 'Pathology' is borrowed from two Greek words: *Pathos* meaning suffering and *Logia* meaning study. So really it is about the study of disease or the suffering caused by disease.
[3] With deep respect, of course, for elders and betters.
[4] Secretary General of the International Court of Arbitration of the ICC from 1947 – 1973.

exist, the clause was fatally defective as there could be no reference to a non-existent institution.

He also argued that the appointment made pursuant to such an unenforceable clause was for that reason of no effect.

For his part, the 1st respondent argued that the Court's main duty is to interpret a contract to give effect to the words used. He maintained that the court should avoid interpretations that lead to absurdity or conflict, noting the parties' mutual understanding that the words in the clause referred to the Chartered Institute of Arbitrators (UK) Nigeria Branch.

**PATHOLOGICAL SYMPTOMS OF THE JUDGMENT**

Unanimously allowing the appeal, the Court of Appeal rejected the trial court's view that simple semantics were at stake.

It found no "evidence" in the record for the trial judge's view that the Chairman of the Chartered Institute of Arbitrators (UK) Nigeria Branch is the same person as the "President" of the Chartered Institute of Arbitration (London) Nigeria Chapter.

It is mystifying that the Court of Appeal expected to find such evidence, considering its own conclusion that the latter did not exist at all. Did the Court of Appeal really expect that there should be evidence that a person who exists is the same as a person who does not? One wonders what such evidence would look like.

The Court of Appeal also stated that the words in the clause were clear and unambiguous, which seems to suggest that error cannot be clear. The statement "The Deputy President of Nigeria is a man" is very clear. But it is also very wrong. Yet can there be serious doubt about who the speaker has in mind?

Could it have been so unclear what Institute the parties in the Mekwunye Case had in mind when they mentioned "Chartered Institute of Arbitration (London) Nigeria Chapter"? Does a court not have a duty to try to ascertain and give effect to what parties have in mind – i.e. their intention?

In essence, the Court of Appeal went on, quite curiously, to insist that the parties were determined that only a non-existent body should be the appointing authority. The Court referred to the Notice of Arbitration sent by the 1st respondent, which also made reference to the *"President of the Chartered Institute of Arbitration (London) Nigeria Chapter"*. This strongly implies that in the Court's view, the parties used an arbitration agreement to agree to avoid arbitration.

Not done, the Court went on to hold that if the parties had intended any other appointing authority they would have said so explicitly. This not only oddly and even unfairly rules out the possibility that humans err; it is no different from saying wrong solutions, even to important problems, are given deliberately, by persons directly affected.

Did the Court of Appeal pause to wonder why the parties would be so determined to resort to a non-existent institution? If the Court had pondered the question, it would perhaps have realised the obvious fact which the trial court had seen and dealt with – the parties made a mistake. The clause was defective not because the parties wanted it to be, but because the draftsmen did not know better – a global phenomenon, as the next section of this paper demonstrates.

The Court eventually arrived at the unsurprising conclusion that the clause was unenforceable since the Institution referred to was non-existent. Which begs the question why parties who did not really intend to arbitrate, having selected a non-existent appointing authority, would have bothered to even include an arbitration clause at all.

Does this decision represent the law? Perhaps, to the extent that a common mistake is a vitiating element. But does it bother with business efficacy or make commercial sense of the contract? You may draw your own conclusions. Does it accord with international practice in this area? Perhaps not, and this brings us to our next point.

**ERRORS FROM ABROAD**

Although leading arbitration institutions have over the years published model clauses, mistakes are very common. As indicated at the outset, this paper will focus only on those defects regarding the identity of arbitration institutions.

One, now famous example, came before the High Court of Hong Kong in 1993. The arbitration clause stated that the dispute shall be arbitrated:

> *"in the 3rd Country, under the rule of the 3rd country and in accordance with the rules of procedure of the International Commercial Arbitration Association"*

The defendant sought to stay proceedings on the basis of the arbitration clause. It was argued for the plaintiff that there was no binding arbitration agreement on grounds of common mistake, since the International Commercial Arbitration Association did not exist.

Rejecting the plaintiff's position, Kaplan J. held that the fact that the institution was non-existent was not enough to vitiate the clause. In his view, it simply meant that the arbitration would be conducted in a 3rd country (not South Korea or Hong Kong where the parties were from) – a neutral country, to be chosen by the plaintiff, and under the law of that neutral country.

He also decided, quite sensibly, to simply ignore the reference to the non-existent institution and failed to see *"how it could be argued that the parties placed any importance on non-existent rules"*.[5]

In another well-known example, a French case,[6] the arbitration clause stated as follows:

[5] Lucky Goldstar (Hong Kong) Ltd V. Nag Moo Kee Eng. Ltd (1993) 2 HKLR 73 @ 77
[6] Societe Asland v. Societe European Energy Corporation (Rev Arb 521 1990)

*"In the event any disputes fail to be settled amicably, both parties agree to arbitrate their difference before the Official Chamber of Commerce in Paris, France and to apply Arkansas law USA"*

There is no *"Official Chamber of Commerce"* in Paris. Clearly it was a mistaken reference to the International Chamber of Commerce in Paris.

Aware of his predicament, the claimant quickly sought clarification of the French Courts on the matter prior to even requesting arbitration. The French Judge, like Kaplan J, recognized the presence of the clause as evidence of parties' intention to arbitrate their dispute. He noted that although the designated "Official Chamber" did not exist, the ICC itself was a widely recognized arbitration centre in Paris with organized procedure for dealing with international arbitration. He decided that the parties' designation of the Official Chamber actually signalled a common intention to refer the dispute to the ICC. The Clause was upheld.

Similarly a clause that indicated the *"Arbitration Court at the Swiss Chamber for Foreign Trade in Geneva"* (a non-existent institution) was taken to mean, the Chamber of Commerce and Industry in Geneva, Switzerland.[7]

Another Clause mentioned the *"International Trade Arbitration Organization in Zurich"*, also non-existent. Yet this was accepted as a reference to the Zurich Chamber of Commerce.[8]

More recently in 2013, a court in Singapore,[9] also a recognised arbitration-friendly jurisdiction, upheld a pathological arbitration clause which provided as follows:

*"...In case both parties fail to reach amicable agreement, all dispute out of in connection (sic) with the contract shall be settled by the Arbitration Committee at Singapore under the Rules of the International Chamber of Commerce of which awards (sic) shall be final and binding both parties (sic)".*

It was accepted that there was no entity in Singapore called "Arbitration Committee".

The plaintiff (HKL) brought proceedings before the national court. The defendant (Rizq), relying on the arbitration clause, sought to stay the proceedings. Rizq argued that despite the defect, parties could still arbitrate in Singapore before the Singapore International Arbitration Centre and could apply the ICC Rules.

In a well-reasoned ruling, the judge (referred to as "Assistant Registrar" or "AR") upheld the clause and made a number of important observations in the process.

First, he upheld the clause on the condition that parties seek the consent of the Singapore International Arbitration Centre or any other arbitral institution in Singapore to conduct the arbitration applying the ICC Rules.

Secondly, the AR recognized that there is such a thing as a defective arbitration clause (a point which the Court would not concede in the Mekwunye Case). He accepted that such defects were sometimes curable and sometimes not, but that Singapore Courts would lean in favour of upholding the clause.

Thirdly, the AR made reference to Frederic Eismann's enduring formulation[10] of the 4 elements of a functional arbitration clause:

These elements are that the clause:

a. *has mandatory consequences for the parties (like all agreements)*
b. *excludes the intervention of national courts (at least before award)*
c. *empowers arbitrators to actually resolve the dispute*
d. *facilitates a procedure that under best conditions of efficiency and speed leads to an enforceable award.*

The AR then went on to quite properly examine how Courts in other jurisdictions, faced with similar problems, resolved them in favour of upholding the defective clause.

The AR even went ahead to cite a leading text on International Arbitration and to endorse the scholarly views expressed on the very subject of clauses which reference non-existent institutions.

Although, somewhat confusingly, the AR rejected the view that the clause envisaged either an ICC or even SIAC arbitration, hence the condition he gave, it is for our purposes still quite helpful to note his reasoning and the direction of his research in addressing the defective clause.

One may surmise that if the Court of Appeal in the Mekwunye case had adopted a similar approach, its conclusion may have been different. Perhaps the Court could have been helped by paying some attention to certain tests which emerge from some of the decisions discussed above. And this brings us to a brief examination of some tests which courts of some jurisdictions seem to find useful in determining whether a defective clause is curable.

**MANIFEST INTENTION TEST**

This test requires the court to determine whether the manifest intention of the parties was to arbitrate their dispute.

The test was alluded to in 1990 by a French court in Societe Asland v. European Energy Corp, a case cited earlier in this paper, where the parties agreed to arbitrate "*before the Official Chamber of Commerce in Paris*". In accepting that this

[7] Interlocutory Award in Case No. 117, 29 November 1996 cited in Lew et al Comparative International Commercial Arbitration p. 156
[8] Preliminary Award, 25th November 1994 XXII YBCA 211cited in Lew et al Ibid at page 156
[9] HKL Group Co. Ltd V. Rizq International (2013) SGHCR 5.
[10] Although formulated in 1974, an excellent article on pathological arbitration clauses published in 1991 positively appraises Eismann's criteria: Benjamin Davis, "Pathological Clauses: Frederic Eismann's Still Vital Criteria", 7 Arbitration International 365 1991.

was a mistaken reference to the ICC in Paris, the French Court recognized that the parties by the clause had "*unequivocally manifested their will"* to resort to arbitration.

The test, it seems, was also applied by a Court of Appeal in Ontario, Canada to a clause that stated that "*parties may refer any dispute to arbitration*".[11] It held that this clause *manifested* an intention to arbitrate. This was in spite of the permissive rather than mandatory language.

*Comparative International Commercial Arbitration*,[12] a leading text in arbitration practice, after citing examples of some pathological clauses that referred to non- existent institutions, reflects this test in the following words at page 156:

> *"While these clauses refer to non-existent institutions, they show clearly that the parties intended to submit their disputes to arbitration. For this reason Courts and tribunals are reluctant to consider these clauses void for uncertainty"*. (Underlined for emphasis)

**DOMINANT PURPOSE TEST**

The Dominant Purpose test is closely related to the first. It refers to the dominant purpose of the parties' arbitration agreement, which after all is a separate contract. Whether the dominant purpose of the agreement is to resolve their dispute by arbitration or rather to provide the instrumentality through which arbitration will be effected. Where it is clear that the former is the case the court should endeavour to uphold the clause.

This test emerges from a decision of the Supreme Court of New York (Lab Grossman v. Forest Labs)[13] where the parties' clause referred to the rules of a non-existent organization.

**The same approach which was adopted by Kaplan J. sitting in Hong Kong High Court in the case of Lucky Gold Star cited earlier (he made reference in fact to the New York decision), and held that** *"the parties dominant intention (for entering the agreement) was to settle disputes by arbitration rather than the instrumentality through which arbitration should be effected".*

**SUFFICIENT IDENTITY TEST**

Another test, put simply, is for the Court to determine whether the institution parties may have had in mind has been sufficiently identified.
The learned authors Lew *et al* express the point as follows:

> *"In general the reference to a particular city, the type of dispute or industry sector involved have allowed the Courts to identify the chosen institution."*[14]

This was the clear approach of the Singapore Court in the Rizq case.

**BORROWED PRECEDENTS**

While precedents from other jurisdictions are of course not binding, they are often quite helpful. In other words, how judges in other jurisdictions have approached similar defects may offer a useful test of whether or not a particular defect is curable.

**PREVENTION BETTER THAN CURE**

There is no point in reinventing the wheel. The safest way to avoid the time and trouble, as well as the energy and expense frequently occasioned by defective clauses is to simply avoid drafting them. One good way to do this is for parties and practitioners to pay close attention to the model clauses already offered by various institutions.

Another way is to take the trouble to research the intended institution and to ascertain its precise appellation from its own publications or online presence.

**CONCLUSION**

This paper has reviewed the Court of Appeal decision in Mekwunye's Case.

It has shown that the reasoning of the Court could have shown more interest in saving the defective arbitration clause, and that such a liberal approach would have been more consistent with the judicial attitude in other arbitration-friendly jurisdictions.

It has also discussed a few cases where similar defects have arisen, and highlighted the approach of the courts.

The paper has also noted some tests, drawn from a few decided cases that may be useful to courts faced with pathological arbitration clauses, especially clauses that refer to non-existent or improperly identified arbitration institutions.

It is respectfully suggested that judges in Nigeria may quite properly adopt or indeed maintain a liberal approach to pathological arbitration clauses. After all, a court which merely gives effect to the obvious intention to arbitrate can hardly be regarded as writing a contract for parties. It should in fact be praised for curing a disease, and bringing to life an arbitration process.

[11]Canadian National Railway Co. Lovat Tunnel Equipment Inc, 3 Int ALR N-5 (2000)
[12]Comparative International Commercial Arbitration, Ed, Lew
[13]Laboratories Grossman v. Forest Laboratories, 295, New York Supp. 2$^{nd}$ Series 756 cited with approval by Kaplan J in Lucky Goldstar.
[14]Lew et al, ibid p. 156

# PHOTO SPEAK

Chief Joe-Kyari Gadzama, SAN (5th left), Prof. Tahir Mamman, OON, SAN (4th right, front row) celebrating with July-born counsel in chambers

Chief Joe-Kyari Gadzama, SAN (2nd left), Mr. Tunde Onamusi (right) and Keffas Gadzama CP Rtd (left) celebrating with August-born counsel in chambers

Chief Joe-Kyari Gadzama, SAN (right), Prof. Tahir Mamman (2nd left), Keffas Gadzama CP Rtd (left) and Mr. Mohammed Monguno (2nd right) celebrating with September-born counsel in chambers

Chief Joe-Kyari Gadzama, SAN (3rd left) with counsel in chambers at the 2017/2018 Legal Year Ceremony of the Federal High Court on Tuesday, 12th September, 2017

L-R: Kaydian Sawyers, Madu Joe Gadzama, Esq. and Haroon Khattak at the Honourable Society of Lincoln's Inn Introductory Weekend in Old Hall, Lincoln's Inn, Holborn, London (UK) on the 6th of October, 2017

# LEGAL HUMOUR

- **Judge:** Silence in Court. The next person who laughs again will be thrown out of Court.
  **Accused:** Ha ha ha ha ha ha ha ha ha!
  **Judge:** I wasn't talking to you.

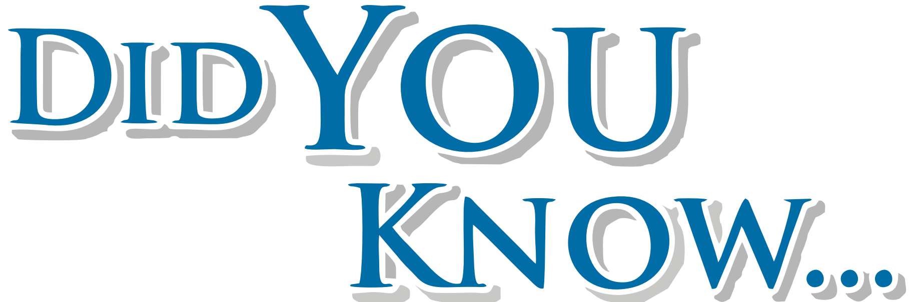
- A defendant isn't happy with how things are going in court, so he gives the judge a hard time.
  **Judge:** Where do you work?
  **Defendant:** Here and there.
  **Judge:** What do you do for a living?
  **Defendant:** This and that.
  **Judge:** Take him away.
  **Defendant:** Wait; when will I get out?
  **Judge:** Sooner or later.

## WACKY CROSS EXAMNATION

- **Lawyer:** Now sir, I'm sure you are an intelligent and honest man...
  **Witness:** Thank you. If I weren't under oath, I'd return the compliment.

- **Lawyer:** When he went, had you gone and had she, if she wanted to and were able, for the time being excluding all the restraints on her not to go, gone also, would he have brought you, meaning you and she, with him to the station?

  **Other Lawyer:** Objection. That question should be taken out and shot.




**Women can kill adulterous husbands**

In Hong Kong a betrayed wife is legally allowed to kill her adulterous husband, although she may only do this with her bare hands.

**Toad licking banned**

In California it is illegal to lick toads in order to get high.

**Beer making formula**

In Texas the Encyclopaedia Britannica was banned because it gave people the formula for making beer.

**Children under 12 banned from phoning**

In Blue Earth, Minnesota, it is illegal for children under 12 years of age to speak on the telephone unless accompanied by one of their parents.

**Illegal to marry the same man 4 times**

In Kentucky it is against the law for a woman to remarry the same man four times.

**Kill 6 blackbirds before you marry me**

In Truro, Mississippi, before a man can get married, he must prove himself worthy by killing either 3 cows or 6 blackbirds.

**Children need a licence to play games**

In Tennessee it is illegal for children to play games on a Sunday without a valid license.

**Soap stealers forced to use it**

In Mohave County, Arizona, a person caught stealing soap from a shop must wash himself with it until the soap is gone.

# NEWS
## FROM THE FIRM

- The firm is pleased to announce that Mohammed Monguno, Esq., a distinguished legal practitioner of the famed class of '86, has joined the firm as a partner.

- Ubani Princewill Obinna (400L, Law, University of Nigeria, Nsukka), Abubakar Mohammed (100L, Law, University of West England), Deborah F. Tatama (500L, Law, Bowen University, Iwo, Osun State), Enokela Anita (500L, Law, Afe Babalola University, Ado-Ekiti, Ekiti State) and Oluwabiyi Emmanuel Olasunkanmi (500L, Law, Bowen university, Iwo, Osun State) Saifullah Ishaq Bello (LL.B, Coventry University, United Kingdom, 2017) joined the firm as interns.

- Miss Maryanne Azumi Madaki, Mrs. Amina Kabiru Turaki, Miss Ijeoma Onyejiaka and Miss Chioma Iheagwara have completed their internship. The firm wishes them the best in their future endeavours.

- Madu Joe Gadzama, Esq., counsel in chambers, has left the firm for further studies in the United Kingdom. The firm wishes him success in his academic pursuit.

- Mr. Yamta Yusuf Ali, erstwhile Head of Chambers, Lagos, has left the firm. The firm wishes him the best in his future endeavours.

# UPCOMING EVENTS & CONFERENCES

International Bar Association Annual Conference 2017,
International Convention Centre, Sydney, Australia
8th - 13th October 2017

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Annual General Conference & Gala of the
Chartered Institute of Arbitrators, Balmoral Convention Centre,
Federal Palace Hotel, Victoria Island, Lagos
2nd - 3rd November, 2017

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J-K Gadzama LLP 10th Annual Lecture,
J-K Gadzama Court, Abuja
Tuesday, 28th November, 2017

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Staff End of Year Party and Christmas Carol
J-K Gadzama Court, Abuja
Tuesday, 19 th December, 2017

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1. UBANI PRINCEWILL OBINNA
2. SAIFULLAH ISHAQ BELLO

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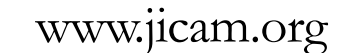
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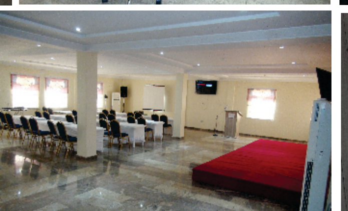

## Who are we?

The Vox Populi Foundation for Leadership was founded in the year 2010 and was incorporated in the year 2012 by its founder Chief J-K Gadzama OFR, MFR, SAN, FNIALS, FCIArb. (UK) (of Lincolns Inn, Barrister/Life Bencher/CEDR Accredited Mediator). The Foundation is a Non-Profit making institution formed to deepen the understanding of democracy by carrying out structured programmes that promote positive leadership qualities and ideals in the society. This is because we believe that a society can only evolve when the people have the opportunity to contribute to the process of governance and have a voice in the creation of policies and laws that affect them as a people.

## How do we do this?

We sincerely believe the best way to achieve this goal is to pursue initiatives that look at proffering solutions to the issues that interfere with governance. We look at utilizing the immense manpower of youths and able bodied people who are hungry to bring about a change in their society through direct engagement with society in a volunteer signup process, which is one of the mechanisms we intend to employ to secure citizens participation. This process of inclusion we believe will foster and build a common front that will enable people to improve on their understanding of what leadership connotes in their everyday lives and reinforce their commitment towards creating a better society.

## Governance

Created with gifts by its founder Chief J-K Gadzama, the foundation is an independent, non-profit, non-governmental organization, with its own Board. The trustees of the foundation set policies and delegate authority to the Director General and senior staff for the foundation's operations. Zonal volunteer Heads in the 6 geo-political zones explore opportunities to pursue the foundation's goals and formulate strategies for action.

## Location

The Foundation is headquartered in Abuja. It conducts its activities through an increasing pool of volunteers from across the country.

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## Our Vision

*to promote, protect and safeguard the tenets and ideals of democracy leadership & good governance in our society.*

## What is Our Goal?!

***to encourage citizens to participate in governance & support a platform that will inspire proactive leadership that will drive the free flow of democratic ideals and social justice.***

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articles and news from the firm are accessible online on the office website

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