
Contractual Disclaimer and Limitation of Liability under Nigerian Law



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Abstract

Our July 2011 newsletter¹ reviewed important provisions of the Consumer Contracts (Regulation of Unfair Terms) Bill, 2010 of Nigeria² (the "Bill" or "Proposed Legislation") and consequently generated several useful comments from readers who argued the need to examine the proposed legislation alongside current laws applicable to consumer contracts in Nigeria. These readers also argued the need to examine the practical impact of the legislation on existing contracts such as those relating to carriage of goods by air and oil services contracts. This newsletter is in response to some of the issues raised by the various comments.

Background

The applicable legislation for contracts relating to sale of goods in Nigeria remains the Sale of Goods Act 1893, which was received as a statute of General Application. For states created from the old Western Region, such contracts are governed by the Sale of Goods Law 1958, which has similar provisions as the Sale of Goods Act

¹ Available at [http://www.ainabblankson.com/pdftemp/July%202011-%20An%20Overview%20of%20the%20Consumer%20Contracts%20\(Unfair%20Terms\)%20Bill.%202010.pdf](http://www.ainabblankson.com/pdftemp/July%202011-%20An%20Overview%20of%20the%20Consumer%20Contracts%20(Unfair%20Terms)%20Bill.%202010.pdf), last assessed 27 April 2012.

²This Bill is currently still pending before the Nigerian legislature.

1893. Apart from these, the principles of common law as developed by English courts also constitute the applicable law on sale of goods contracts in Nigeria.

Proposed due to the absence of a comprehensive legislation, the Bill seeks to regulate the extent to which clauses excluding or limiting liability of a party to a contract are accepted by the parties. As we shall see below, the Bill only applies to contracts between a seller or supplier of goods and services and a "consumer". It excludes from its scope contracts relating to employment, succession rights, rights under family law, incorporation and organization of companies or partnerships, as well as any term incorporated in a contract in order to comply with statutory or regulatory provisions in Nigeria or with the provisions or principles of international conventions to which Nigeria is a party.³

Who is a Consumer?

Section 2 of the Bill defines a "consumer" as *a natural person who, in making a contract to which this Act applies, is acting for purposes which are outside his business.*⁴ On first glance, this definition appears quite uncomplicated and straightforward,

requiring no further examination. However, a careful perusal would reveal otherwise.

The definition could be analyzed in two aspects, beginning with the term "natural person". In legal parlance, a natural person is taken to mean a *human being* as opposed to a *fictional person* such as a corporation or other legal person. This then means that only contracts initiated by real human beings would be recognized once the Bill is implemented. The Consumer Protection Council Act of Nigeria 1992⁵ uses a different term to define a consumer. It defines a consumer as *an individual who purchases, uses, maintains or disposes of product or services*. From the wordings of that statute, it would appear that the intention of the draftsman was to use the term *individual* only in relation to natural persons. It is doubtful whether the term extends to corporations.

The second aspect of the definition of a "consumer" in section 2 of the Bill, however, poses more difficulty. That section defines a consumer as *a natural person who ... is acting for purposes which are outside of his business*. In the first instance, the phrase *"acting for purposes which are outside of his business"* seems to suggest that a commercial buyer may be classified as a consumer so long as he acts outside of his own business. In the second

³ First Schedule to the Bill.

⁴ This definition is similar to that contained in section 3(1) of the Unfair Terms in Consumer Contracts Regulations 1999 of the UK.

⁵ Cap C25 Laws of the Federation of Nigeria 2004; section 32.

instance, however, the natural person must *act for purposes which are outside his business* to invoke the provisions of the Bill. Does this mean that a commercial buyer who regularly deals in the type of goods or services could invoke the provisions of the Bill if in the particular instance he acts for purposes outside his business? If a car dealer goes to another to purchase a type of car he regularly deals in for his own personal use, for instance, can a clause in the standard contract which irrevocably binds the car dealer to the terms of the contract be set aside under the Bill where the dealer claims that he had no real opportunity to become acquainted with the terms before signing the contract? A careful review of the definition would suggest an answer in the affirmative. Thus, an individual can fully invoke the provisions of the Bill where he enters into a contract to which the Bill applies, so long as the contract was for purposes other than his business.

The definition of a "consumer" in section 32 of the Consumer Protection Council Act 1992 seems broader. The Act protects not only those who purchase, but also those who use, maintain or dispose of products or services. Thus, the Act would protect a commercial buyer who used a product even though he originally purchased the product for resale. Until the Bill becomes law, however, the definition in section 32 of the 1992 Act remains the current position of law in Nigeria.

Consumer rights under current laws in Nigeria

The rights applicable to consumers in sale of goods contracts are mostly found in the Sale of Goods Act 1893 and the Sale of Goods Laws of some states in Nigeria. Under the Sale of Goods Act, a consumer is entitled to expect that he will obtain title to the goods sold by the seller and enjoy quiet possession.⁶ Where the sale is by description, the consumer has a right to expect that the goods will correspond with the description, and if sale by sample, the bulk will correspond with the sample in quality.⁷ Where the seller had reason to know the purpose for which the goods are required, the goods must be fit for the particular purpose for which they were supplied, and the goods must be free from defects.⁸

A buyer is entitled to a reasonable opportunity of examining delivered goods for conformity with the contract prior to acceptance and would not be deemed to have accepted the goods until he has had the opportunity.⁹ However, parties may by their agreement, course of dealing or usage vary the rights, duties or liabilities which would otherwise have arisen

⁶ Section 12 of the Sale of Goods Act 1893.

⁷ Sections 13 and 15 of the Sale of Goods Act 1893. The consumer must be given a reasonable opportunity of comparing the bulk with the sample.

⁸ Section 14 of the Sale of Goods Act 1893.

⁹ Section 34 of the Sale of Goods Act 1893.

under the contract.¹⁰ What we find with some contracts, especially consumer contracts, is that the sellers sometimes limit or exclude the duties or liabilities which accrue to the buyer under a contract for sale of goods. Thus, notwithstanding the right conferred on buyers to seek remedy from courts under the Sale of Goods Act 1893,¹¹ most of these sellers go as far as excluding the buyer's ability to take legal action or seek remedy from courts in the event of a breach.

Our July 2011 newsletter revealed that a number of jurisdictions including the United Kingdom through the Unfair Contract Terms Act 1977 ("UCTA") and the Unfair Terms in Consumer Contracts Regulations 1999 ("UTCCR"), and Australia through Australian Consumer Law which commenced in January 2011, limit the ability of parties to include unfair terms in standard contracts. No such comprehensive legislation currently exists in Nigeria. The only consumer legislation, the Consumer Protection Council Act 1992, merely establishes the body responsible for resolving consumer complaints and regulating the market for consumer products in Nigeria. The proposed Nigerian legislation would therefore provide necessary reforms in this area. It would appear from the wordings of the Bill that it is expected to apply alongside the Consumer

Protection Council Act 1992. Section 9 of the Bill confers on the Director of Fair Trading in the Consumer Protection Council the duty to consider complaints of unfair terms in contracts.

Unfair Terms in Contracts

As noted above, parties sometimes try to limit or exclude liabilities for breach of contracts. Most often, they rely on boilerplate clauses which sometimes appear in small prints to exclude rights which a party would otherwise have been entitled to, or reduce the remedies available to party.¹² These terms are mostly considered unfair by modern statutes.¹³ Even before these statutes were codified, English judges adopted several approaches to limit the application of exemption clauses. Applying the common law rules, the judges gave strict interpretation to the clauses as we shall see below.

The common law approach to interpretation of exclusion clauses consists of two main rules, *contra proferentem* rule and *the doctrine of fundamental breach*:

¹⁰ See sections 34 and 55 of the Sale of Goods Act 1893.

¹¹ See section 57.

¹² The Fourth Schedule to the Bill contains an illustrative list of terms which parties use in standard contracts to exclude or exempt themselves from liability or reduce the remedies available to a party whose rights have been breached.

¹³ See UCTA, UTCCR and the Australian Consumer Law.

a. *Contra proferentem* rule

This is also called the rule of construction.¹⁴ Under this rule, an exclusion clause will always be construed narrowly, against the party who puts it forward.¹⁵ An example of a case applying the general *contra proferentem* rule is ***Andres Bros (Bournemouth) Ltd v Singer & Co Ltd***.¹⁶ In that case, a clause in the plaintiff's contract to buy a number of cars under an agreement which provided, *inter alia*, that 'all conditions, warranties and liabilities implied by statute, common law or otherwise are excluded' was held ineffective to exclude liability for breach of an express term of the contract which was

effectively to deliver a new car.¹⁷

b. *Doctrine of fundamental breach*

The doctrine of fundamental breach which was expounded by the House of Lords in ***Suisse Atlantique Société d' Armement SA v Rotterdamsche Kolen Centrale NV***¹⁸ was based on the view taken by some courts that some breaches of contract are so serious that no exclusion can cover them.¹⁹ Applied more generally to the law of contract, the doctrine took two forms. The first was to the effect that there are certain terms within a contract which are so fundamental that there cannot be exclusion for breach of them. The second form of the doctrine ignored the particular term which had been broken, but considered the overall effects of the breach which had occurred, such that if the breach was so serious that it could be said to have destroyed the whole contract, exclusion of

¹⁴R. Stone in the *"The Modern Law of Contract"* 8th Edn., 2009, Routledge-Cavendish, p. 293 described an additional rule, the rule of incorporation, and suggests that the courts have generally been concerned to limit the effect of exclusion clauses (particularly as regards consumers). They have therefore in this context applied fairly strict rules as to the incorporation of terms. He states that the rule of incorporation is based on the general principle that a party must have had reasonable notice of the exclusion clause at the time of contract in order for it to be effective.

¹⁵ H.G. Beale, W.D. Bishop and M.P. Furmston, *"Contract Cases and Materials,"* 2nd Edn., 1990, Butterworths, p. 682.

¹⁶[1934] 1 KB 17, cited in Beale, Bishop and Furmston, *supra*.

¹⁷ Beale, Bishop and Furmstone, *supra*.

¹⁸ [1967] 1 AC 361; [1966] a All ER 61, cited in R. Stone, *supra* at 306.

¹⁹ R. Stone, *supra* at 305.

liability would not be possible.²⁰ In that case, the House of Lords was of the opinion that parties should be allowed to determine their obligations and the effect of exclusion clauses in their contract, so that where an allegation of fundamental breach is made, the court should try to determine the intention of the parties as to whether such a breach was intended to be covered by any exclusion clause.²¹

The statutory approach in the UK is to render some exclusions void where they attempt to exclude or restrict liability for death or personal injury resulting from negligence, or subject them to the test of reasonableness where they try to exclude liability for negligence resulting in loss or damage.²² The UTCCR on the hand requires the courts to apply the test of “fairness” in determining clauses which exclude or restrict liability in consumer contracts.²³ Richard Stone suggests that it is likely that the statutory

provisions will determine the outcome of a case where the exclusion clause (a) is contained in a consumer contract, or (b) forms part of the defendant’s written standard terms, or (c) purports to exclude liability for the defendant’s negligence.²⁴ It is thus likely that where a case cannot be hinged on any of the three scenarios above, the court would adopt the rules of common law in determining the case before it.

In Nigerian, however, it would appear that only the first two of Richard Stone’s suggestions will apply once the Bill is enacted. The Bill seeks to regulate only terms in a contract concluded between a seller or supplier and a consumer where such terms have not been individually negotiated.²⁵ The provisions of the Bill are similar in many respects to the UTCCR than they are to the UCTA.

While the provisions of the UCTA apply to contracts between businesses, the Bill like the UTCCR applies only to consumer contracts. The Bill, however, has the potential to become wider in application than the UCTA in that it applies to all the terms in a contract with the consumer and is not limited only to exclusion clauses. This invariably means that the Bill would apply to render a term unfair even though it does not form part of the exclusion clause. Section 3(1) also suggests that the Bill will not apply to

²⁰ Supra at 305-306.

²¹ Supra at 307. See also the House of Lords decision in *Photo Production Ltd v Securior Transport Ltd* [1980] AC 827; [1980] 1 All ER 556, cited in R. Stone, supra at 307.

²² Section 2 UCTA. Also, exclusion or restriction of liability in respect of breach of contract is subject the test of “reasonableness” under sections 3 of the UCTA.

²³ A contractual term which has not been individually negotiated is generally regarded as unfair if it results in some detriment to the consumer pursuant to section 5 of UTCCR.

²⁴ R. Stone, supra at 310.

²⁵ Section 3 of the Bill.

consumer contracts which have been individually negotiated. Where some of the certain aspects of the contract were individually negotiated, however, section 3(4) states that the Bill will apply to other aspects of the contract if the overall assessment indicates that it is a pre-formulated standard contract.

The terms of the Bill are subject to test of "unfairness."²⁶ Section 4 of the Bill defines "unfair term" as meaning any term which contrary to the requirement of good faith causes significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. Unfair terms in consumer contracts under the Bill will be ineffective against the consumer.²⁷ In such an event, the contract itself will continue to bind the parties if it is capable of continuing in existence without the unfair term.

Section 7 of the Bill requires that a seller or supplier must ensure that the terms of the contract are expressed in plain readable, intelligible language. In case of doubt on the meaning of a term, the Bill stipulates that the interpretation most favorable to the consumer would be adopted. That section would most likely give statutory effect to the common law *contra proferentem* rule discussed above.

²⁶ See sections 3(2) and 4.

²⁷ Section 5(1) of the Bill stipulates that unfair terms in contracts with a consumer shall not be binding on the consumer. See also section 8 of the Bill.

Practical Issues

As earlier indicated in the background section of this paper, the First Schedule to the Bill removes certain contracts from the scope of the Bill. These include contracts relating to a) employment b) succession rights c) rights under family law d) incorporation and organization of companies or partnerships e) any term incorporated in a contract in order to comply with – i) statutory or regulatory provisions in Nigeria, or ii) with the provisions or principles of international conventions to which Nigeria is a party.

Thus, it is important to note that the Bill specifically removes from the scope of its application, contracts relating to employment. One difficulty in this regard may be in determining whether the phrase, *contracts relating to employment*, as used in the First Schedule to the Bill covers every conceivable form of contract relating to employment or whether some contracts can be removed from its scope. The court in the recent English case of **Commerzbank AG v Keen**²⁸ held that if, under the contract of employment, the employer supplies services or goods to the employee for his use, then, the employee to whom they are supplied for his consumption could reasonably be regarded as a consumer of the goods or services supplied. The question is, would a court in Nigeria applying the provisions of

²⁸ [2006] ECWA Civ 1536.

the First Schedule to the Bill find that because the underlying contract relates to employment, the contract is one "relating to employment" pursuant to the Bill even though it was in fact for the provision of goods and services? The court in that case held that the employee did not contract with his employer as a consumer. Thus, it may not be possible for a court in Nigeria to hold that contracts of employment requiring employees to perform *work* are in fact consumer contracts whose terms are worthy of protection under the Bill.

Nevertheless, such employment contracts and others under the First Schedule to the Bill may be worthy of consideration under rules of common law. It is important to note for instance, that where the issue in the employment contract relates to exclusion of liability for negligence in the performance of a contract, such as negligence resulting in death or personal injury of the employee, the court relying on the common law rule of construction may apply the principles set out by the Privy council in **Canada Steamship Lines Ltd v The King**²⁹ where Lord Morton stated as follows:

- (1) If the clause contains language which expressly exempts the person in whose favor it is made (hereinafter called the 'proferens') from

the consequences of the negligence of his own servants, effect must given to that provision ...

- (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens ...
- (3) If the words are wide enough for the above purpose, the court must then consider whether the 'head of the damage may be based on some ground other than negligence' ... The 'other' ground must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification ... the existence of a possible head of damage other than negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of the servants.³⁰

Thus, under the current approach, courts would attempt to assess the intentions and reasonable expectations of the parties when considering clauses excluding liability from negligence.

²⁹ [1952] AC 192 at p. 208, cited by R. Stone Supra at 301.

³⁰ R. Stone, supra at 301.

Similarly, the First Schedule to the Bill permits parties to include provisions which would ensure compliance with statutory or regulatory provisions in Nigeria or international conventions to which Nigeria is a party even if the inclusion would amount to exclusion or restriction of liability which would have otherwise accrued under the contract. One example of the latter could be found in Convention for Unification of Certain Rules for International Carriage of Goods by Air (Montreal, 1999) to which Nigeria is a party.³¹ The Convention contains provisions limiting the liability of the carrier in relation to delay, baggage and cargo.³² Thus, any limitation of liability made pursuant to the Convention would fall outside the scope of this Bill.

Conclusion

In the wake of boilerplate clauses and generic provisions which have today come to be known and accepted as standard terms of an agreement, the Bill promises to protect the interests of disadvantaged contracting parties. Given the gap which currently exists in this area of law, it will be in the interest of the average Nigerian consumer for the passage of the Bill to be accelerated.

³¹ Nigeria ratified the Montreal Convention in 1999.

³² Article 22. See also Article 23 on conversion of monetary units.

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