Issues in Exclusion Clauses in the Mobile Communications Industry: Statutory Control and Exclusion Clauses as Terms of Contract

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Abstract

The use of exclusion clauses in the mobile communications industry has become a prominent feature of contractual agreements between service providers and consumers. These contractual provisions, designed to limit the liability of service providers, have raised significant concerns regarding consumer protection. This article explores the salient issues surrounding the use of exclusion clauses in the mobile communications industry, with a specific focus on statutory control and exclusion clause as terms of contract. It examines the legal and practical implications of these clauses and their impact on consumer rights and remedies. The article also considers the challenges posed by complex contractual language in exclusion clauses. The paper is a contribution to ongoing discourses on consumer protection within the dynamic mobile communications landscape.

Keywords: *Exclusion clause, mobile communication, mobile communication industry, terms of contract*

Introduction

In the rapidly evolving landscape of the mobile communications industry, the use of exclusion clauses has become a crucial aspect of contractual agreements between service providers and consumers. These contractual provisions, often buried within the fine print of user agreements, aim to limit the liability of service providers by excluding or restricting certain rights, remedies, or obligations. However, the incorporation and application of exclusion clauses in the mobile communications industry have raised significant concerns regarding consumer protection. The paper explores the salient issues surrounding the use of exclusion clauses in the mobile communications industry, with a particular focus on statutory control and exclusion clause as terms of contract. By examining these issues, the article aims to contribute to the ongoing discourse surrounding consumer protection in the mobile communications. Besides its academic intents, the work seeks to provide valuable insights for industry stakeholders, and consumers alike, facilitating informed decision-making and fostering fair and transparent contractual relationships in the evolving mobile communications landscape.

Statutory Control

The statute has been deployed to the rescue of consumers in controlling the use of exclusion clauses. Even if exclusion clauses are incorporated into the contract and so would be effective, there are various statutory controls over the types of clauses that may have legal effect. For example section 4(3) of the Hire-Purchase Act stipulates that:

> The warranties and conditions set out in subsection (1) above shall be implied notwithstanding any agreement to the contrary, and the owner shall not be entitled to rely on any provision in the agreement excluding or modifying the condition set out in subsection (2) above unless he proved that before the agreement was made the provision was brought to the notice of the hirer and its effect made clear to him. [1]

Clearly there are statutory implied terms which protect the hirer and which the goods owner cannot exclude by agreement.[2] This position of law is vindicated by the dictates of section 3(b) and (e) of the Hire-Purchase Act which states that:

> The following provisions in an agreement shall be void, that is to say, any provision – whereby the right conferred on a hirer by this Act to determine the hire-purchase agreement is excluded or restricted, or any liability in addition to the liability imposed by this Act is imposed on a hirer by reason of the termination of the hire-purchase by him under this Act or whereby any owner or seller is relieved from liability for the acts or defaults of any person acting on his behalf in connection with the formation or conclusion of a hire-purchase or credit-sale agreement.

The foregoing has shown that the law has also a role to play in curtailing the excessive use of exclusion clauses in the mobile communications sector. It is the provisions of the law that determine in some cases the scope and nature of the clause that will be legally sustainable in the mobile communications sector in Nigeria.

Exclusion Clause as Terms of Contract

Exclusion clauses have permeated the mobile communications related transactions. There is no single network provider in Nigeria that does not have terms and conditions for almost every aspect of their transactions with network users. These clauses cover true exclusion clauses, limitation clauses and time limitation. Even in their advertisement they make bogus offers in the belief that it will not be binding on them. However, the law has been that offer made to the world is binding on the maker. [3]

Sometimes the exclusion clauses used by these network providers may not be expressly incorporated but may be implied. Thus it is necessary to examine two types of implied terms that are germane to this study:

Terms Implied by Custom and Usage

Custom and usage are general rules and practice that have become the norm through unvarying habit and common use.[4] Where these custom and usage operate as binding rule of law, independently of any agreement on the part of those subject to them, they will assume the toga of legal customs. Thus neither of the parties can truncate it by any agreement. Terms may be implied into a contract from local custom, the usage or practice of a particular trade or market or from a course of prior dealing between the parties concerned. The first two of these are

essentially the same conceptually, but it is convenient also to deal with the case of prior course of dealing because all these categories may be considered to belong to a residual category having features in common with each other and common differences from other types of terms implied. Custom is used to refer to the case of a term implied in a particular locality while 'usage' refers to terms implied within a particular trade. The term trade practice is synonymous with trade usage, but a distinction has been drawn between usages which may give rise to an implied term and mere trade practice which will not suffice. It is important to note here, however, that custom as a source of implication is now seen very largely as a dead letter. According to Austen-Baker: "It is rare in modern times to find that a contract is varied or enlarged by custom".[5] Consequently, terms implied by custom and usage are those general rules and practices that have become the norm in a particular type of transaction and once such transaction is executed, the terms will be applied in apportioning liability if any among the parties.

In *Con-Stan Industries of Australia Pty. Ltd. v. Norwich Winterthur (Australia) Ltd.*[6] the Court, in joint judgment, set out the criteria for implying terms by custom derived from earlier authority to the effect that the existence of a custom or usage that will justify the implication of a term into a contract is a question of fact. There must be evidence that the custom relied on is so well known and acquiesced in that everyone making a contract in that situation can reasonably be presumed to have imported that term into the contract. The custom must be so notorious that everybody in the trade enters into a contract with that usage as an implied term. It must be uniform as well as reasonable, and it must have quite as much certainty as the written contract itself.

A term will not be implied into a contract on the basis of custom where it is contrary to the express terms of the agreement. The justification for this principle is that, in so far as it relates to written contracts, it is simply an application of the parol evidence rule, by which extrinsic evidence is generally inadmissible to add to, vary or contradict the express terms of a contract which has been reduced to writing. A more fundamental explanation is that the presumed intention of the parties, on which the importation of the custom rests must yield to their actual intention as embodied in the express terms of the contract, regardless of whether the contract is written or oral.

A person may be bound by a custom notwithstanding the fact that he had no knowledge of it. Historically the courts approached this question in a rather different way. It was said that, as a general rule, a person who was ignorant of the existence of a custom or usage was not bound by it. To this rule there was a qualification that a person would be presumed to know of the usage if it was of such notoriety that all persons dealing in that sphere could easily ascertain the nature and content of the custom. It would then be reasonable to impute that knowledge to a person, notwithstanding his ignorance of it.

In this way, the issue of notoriety came to be co-extensive with the question of imputed knowledge. The achievement of sufficient notoriety was both a necessary and sufficient condition for knowledge of a custom to be attributed to a person who was in fact unaware of it. The result is that in modern times nothing turns on the presence or absence of actual knowledge of the custom; that matter will stand or fall with the resolution of the issue of the degree of notoriety which the custom has achieved.[7]

Terms Implied by Courts

When terms are implied by courts, the general rule is that they can be excluded by express provision in any agreement.[8] The courts have developed an apparent distinction between terms implied in fact and those implied in law. Terms implied in fact are said to arise when they are strictly necessary to give effect to the reasonable expectations of the parties. Terms implied in law are confined to particular categories of contract, particularly employment contracts or contracts between landlords and tenants, as necessary incidents of the relationship. For instance, in every employment contract, there is an implied term of mutual trust and confidence, supporting the notion that workplace relations depend on partnership. [9]

There is also an ongoing debate as to whether the rules of remoteness [10]and frustration[11] or common mistake[12] are best characterized as implied terms.[13] Remoteness places a limit on the compensatory award given for breach of contract, so if unlikely losses result or losses are not something that one would generally expect compensation for, compensation is not payable. Recent judicial support for its status as an implied term derives from the judgment of Lord Hoffmann in *Transfield Shipping Inc. v. Mercator Shipping Inc*.[14] Transfield Shipping was a charterer. It hired use of Mercator's ship, *The Achilleas*. Transfield was meant to have the ship for five to seven months, and return it not later than midnight, May 2, 2004. Mercator contracted to let the ship to another charterer[15] on May 8, 2004 at £39,500 a day for four to six months. But Transfield did not return the ship until May 11. With two weeks to go they got a job to carry coals from Qingdao, China across the Yellow Sea to Tobata and Oita, Japan. Since it was returned late, the new charterer, Cargill, agreed to take the ship, but only at £31,500 a day, since the freight market had fallen sharply.

The question was how much Transfield should pay to Mercator for returning the ship late. Transfield argued they should only pay an amount reflecting the difference between the first contract rate and the market rate for daily hire during the delay, at the market rate prevailing then. This would make £158,301.17. Mercator argued Transfield should pay the amount they had lost on the new chartering contract because of the late return, which adding up the cost over the months would be £1,364,584.37.

The case therefore raises a fundamental point of principle in the law of contractual damage: is the rule that a party may recover losses which were foreseeable an external rule of law, imposed upon the parties to every contract in default of express provision to the contrary, or is it a *prima facie* assumption about what the parties may be taken to have intended, no doubt applicable in the great majority of cases but capable of rebuttal in cases in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses?

The court pointed out that the majority of arbitrators had applied too crude a test of what the type of foreseeable loss was. The question was not simply, what was a probable loss, but what the parties had in mind, or what was in their contemplation, regarding the nature of the business transaction. Reliance was placed on the statement in *Satef-Huntenes Albertus SPA v. Paloma Tercera Shipping Co. SA* [16] asking what a reasonable person would have thought his responsibility was.

The test appears to be: have the facts in question come to the defendant's knowledge in such circumstances that a reasonable person in the shoes of the defendant would, if he had considered the matter at the time of making the contract, have contemplated that, in the event

of a breach by him, such facts were to be taken into account when considering his responsibility for loss suffered by the plaintiff as a result of such breach. Lord Hoffmann said one should look at the background of market expectations. Liability for the next contract would be completely unquantifiable.

Frustration is a rule which brings contracts to an end in the event of some unforeseen event subsequent to the agreement which would make performance of obligations radically different from that envisaged, for instance because a car for sale is destroyed before it is delivered. Common mistake, as a doctrine, following the *Great Peace Shipping Ltd. v. Tsavliris Salvage (International) Ltd.[17]*, analogous to frustration, can similarly be said to imply a term that a contract will be extinguished if entered into on the false pretence that performance would be possible. In that case, Tsavliris were in the business of salvaging ships and aiding ships in difficulty in the South Indian Ocean. Tsavliris were advised a vessel named "Cape Providence" was in trouble. They used the Ocean Routes service to try and find a salvage tug nearby, and were told that there was one about 35 miles away called the "Great Peace". Tsavliris contacted its owners, and agreement was made to hire the tug for a minimum of five days. It then became apparent that the Great Peace was not 35 miles from the Cape Providence, but 410 miles. Tsavliris then found a closer tug and terminated the contract with Great Peace Ltd. Great Peace Ltd sued. Tsavliris argued it was a common mistake as to the location of the stricken vessel and this invalidated the contract.

Lord Phillips of Worth Matravers MR held that the mistake was not sufficiently fundamental to void the contract. It was going to take 22 hours to do 410 miles, but that was not a delay to make performance "essentially different from those the parties envisaged when the contract was concluded". It was opined that common mistake could not be explained on the ground that it is an implied term, although it does apply only when a contract is silent. Just as the doctrine of frustration only applies if the contract contains no provision that covers the situation, the same should be true of common mistake. The following elements are necessary before a common mistake will void a contract, through analogy to frustration, from the case, *Blakeley v. Muller & Co.*,[18] per Lord Alverstone CJ:

(i) There must be a common assumption as to the existence of a state of affairs;
(ii) There must be no warranty by either party that that state of affairs exists;
(iii) The non-existence of the state of affairs must not be attributable to the fault of either party;
(iv) The non-existence of the state of affairs must render performance of the contract impossible; and,
(v) The state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

Unfair Terms Provisions in Mobile Communications Transaction

The terms and conditions leaflets of the mobile communication cannot escape the rules of unfair terms provisions. They are numerous and inelegantly crafted. However, these two points are not sufficient to hook the terms and conditions with the allegation of flouting the unfair terms rules. Consumers have legislative protection from unfair terms in consumer contracts. An unfair term in a standard consumer contract is a term that is significantly weighted against

the consumer. In other words, the contract contains a statement that puts the consumer at a disadvantage. A supplier of goods or services can have an advantage over the consumer by including such an unfair term in a contract. Under The European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 however, consumer contracts are open to a test of fairness. Any term found by a Court to be unfair, is ineffective.[19] There are three main categories that unfair terms may fall into.

Terms that give the supplier of goods or services the right to change the terms of the contract. Terms that limit the liability of the supplier of goods and services. For example, there shall be no liability for death or personal injury arising out of act or omission by the supplier of goods or services. Terms that put an unfair burden on the consumer. For example, a term states that a deposit will be kept by the supplier of goods or services if the consumer cancels the contract but does not include a term saying that the supplier of goods or services will pay compensation if it does not fulfil its commitments.

This list is not exhaustive. Terms that fit into one of the above categories may be fair and equally a term may be deemed to be unfair which does not fit into one of the above categories. Unfair terms violate the principle of good faith. If you enter a contract in good faith it means that your intentions are honest. The principle of good faith could be violated by, for example, inserting a term in the small print of the contract agreement where the consumer cannot see it easily.

In the case of written contracts, all terms must be written in plain, understandable language. If there is a doubt about the meaning of a term, the meaning that is most favourable to the consumer will prevail. If a term in the contract is found to be unfair, the remainder of the contract may still be legally binding on the consumer and the supplier of goods or services. This means that while one term or condition of the contract may be void, the remainder of the contract remains in force. Under the provisions, a term is unfair if the following three conditions are met:

i. It would cause a significant imbalance in the parties' rights and obligations arising under the contract;
ii. It is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and,
iii. It would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

In other words if the contract term is one-sided and greatly favours the business over the consumer, and there is no satisfactory commercial reason why the business needs such a term, and the consumer will suffer financial loss, inconvenience or other disadvantage if the term is enforced, then it may be unfair.[20]

In the mobile communications sector, there are certain terms that pervade the industry which will certainly be deemed unfair to the network users. For example, MTN terms and conditions stipulate that: “MTN reserves the right to make changes to the rates for the service from time to time”[21]. This is without any reference to the network users. Airtel also has a very reverberating term thus:

> The Customer remains liable for any charges incurred up to the effective date of termination. No refund of any fees (sic) will be granted, and no unused services credited to customers account, will be redeemable or convertible to cash or any other form of credit.[22]

The implication of the clause is that whether there is service or not the consumer/network user pays. This is also unfair.

Glo imposes the following terms on the network user:

> You[23] also recognize that the service may, from time to time, be adversely affected by events outside our control, including without limitation, congestion, network coverage, dropped connections, the performance of wireless enabled devices and maintenance of a secure network connection.[24]

By this clause, Glo has completely restrained the network users who subscribe to their network from complaining against any defect in network provision and service. There are terms of similar implication in Etisalat terms and conditions. Etisalat terms provide that:

> EMTS may suspend the service in whole or in part or disconnect the telephone numbers at any time (without being liable to compensate the subscriber in any way) if: the network or any part of it breaks down or requires modification or maintenance or if any third party providing the services to EMTS for any reason fails or is unable to or is unwilling to continue to (for any reason) provide the service(s), or if the subscriber is in breach of the terms of this agreement, or any other agreement with EMTS or exceeds (or is reasonably believed by EMTS to have exceeded) any financial limit imposed under this agreement, or the subscriber acts in such a way that in the reasonable opinion of EMTS, the operation of the services or any part of the Network may be jeopardised or impaired.[25]

Etisalat even stated that:

> The subscriber agrees to indemnify EMTS against all liabilities, claims, damages, losses, expenses and proceedings arising from or in any way connected with any breach of this agreement by the subscriber. This condition will survive termination of this agreement.[26]

There is no doubt that the foregoing terms are geared towards effectively excluding the liability of the network providers in the event of any serious breach of the terms and conditions of the service provision. However, the terms as couched above will be shown not to be binding on the consumer or network users. Thus it is at the discretion of network users to challenge any breach of network provisions and claim damages. The reliance on these exclusion clauses by network providers will surely crumple when subjected to the crucibles of the use of exclusion clauses.

Conclusion

The examination of salient issues in the use of exclusion clauses in the mobile communications industry, with a focus on statutory control and terms of contract, reveals the complex nature of these provisions. The analysis underscores the need to strike a balance between contractual freedom and safeguarding consumer rights. The interplay between statutory control and exclusion clauses highlights the importance of continually reassessing and updating legal frameworks to address the evolving mobile communications landscape. To mitigate the challenges associated with exclusion clauses, stakeholders in the mobile communications industry must proactively address these issues. Service providers should prioritize clear and transparent communication with consumers, ensuring that exclusion clauses are presented in a manner that is easily understood and

readily accessible. By recognizing the attendant salient issues stakeholders can work towards improving consumer protection and establishing fair and transparent contractual relationships.

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11. The prevention or hindering of the attainment of a goal, such as contractual performance.
12. A mistake in which each party misunderstands the other's intent.
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