Exclusion Clauses in Mobile Communications Industry

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ABSTRACT
Exclusion clauses are contractual provisions commonly employed by mobile communications service providers to limit their liability and protect their interests. However, the extensive use of such clauses raises concerns regarding consumer rights and legal enforceability. This article presents an analysis of exclusion clauses in the mobile communications industry, aiming to shed light on their implications and consequences for consumers. By examining legal frameworks, industry practices, and relevant case studies, this study explores the enforceability of exclusion clauses, their impact on consumer protection, and potential legal challenges they may face. The paper highlights the need for a balanced approach that safeguards both the interests of service providers and the rights of consumers. By providing insights into this critical yet understudied aspect of mobile communications contracts, this article contributes to the broader discourse on fair contractual practices and encourages informed decision-making among policymakers, legal professionals, and consumers alike.

KEYWORDS: *Exclusion clauses, mobile communications industry, mobile communications contracts, mobile service contracts,*

INTRODUCTION

In entering contracts, parties are free to stipulate terms which should govern their transaction. These terms show the reciprocal promises made by the parties. In the same way, parties may insert exclusion clauses in the contract. These clauses show the extent of obligations assumed by the parties in event of any breach. The power of the parties in this regard is informed by the principle of freedom of contract.[1] Consequently, the manner in which parties couch the terms determines whether the terms are exclusion clauses or not. There are known types of exclusion clauses. These are:

[1] F. N. Monye, *Commercial Law: Sale of GoodsLecture Guide,* (Enugu: Faculty of Law UNEC, 2005), p. 37.

True Exclusion Clauses

The clause recognises a potential breach of contract, and then excuses liability for the breach. Alternatively, the clause is constructed in such a way that it only includes reasonable care to perform duties on one of the parties.[2] This is the exact clause that most mobile communications companies insert in their terms and conditions of sale. It is common practice these days to insert exclusion clauses whose aim is to curtail or exclude the contractual liability of a party which would otherwise arise if he fails to perform his obligations or some of them under the contract.[3] This is the crux of true exclusion clause.

Limitation Clauses

Limitation clause places a limit on the amount that can be claimed for a breach of contract, regardless of the actual loss. This type of clause is a contractual provision that restricts the remedies available to parties if a party defaults. Such a clause is valid unless it fails of its essential purpose or it has unconscionably limits consequential damages.[4] Thus, the imposition of a maximum liability for loss or damage[5] is limitation clause.

Time Limitation

The clause states that an action for a claim must be commenced within a certain period of time or the cause of action becomes extinguished. This type of exclusion clause seems rare in Nigeria. Definitely, time limitation clause will be an infringement on the consumers' right of access to court. This right is enshrined in section 6 (6) (b) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which stipulates that:

The judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between government and authority and to any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

The implication of the foregoing is that in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.[6] Since access to court is a constitutionally recognized right it is most improbable that exclusion clauses can rout it. It may only be restricted by a statute to a certain extent.[7] Even the statutory

[2] "ExcluClauses", *Wikipedia Free Internet Encyclopaedia* available at http://en.wikipedia.org/wiki/Exclusion_clause

3 Okany, op. cit., p. 119.

[4] B. A. Garner, *Black's Law Dictionary*, (9th edn., USA: Thomson West,2009), p. 1013.

[5] S. Bone, *Osborn's Concise Law Dictionary*, (9th edn., London: Sweet & Maxwell, 2001), p. 235.

[6] Constitution of the Federal Republic of Nigeria 1999 as Amended in 2011, s. 36(1).

[7] See for example Arbitration and Conciliation Act, Cap. A18 *Laws of the Federation* 2004, ss. 4 and 5 and Public Officers Protection Act, Cap. P41 *Laws of the Federation* 2004, s. 2(a).

restriction of the right of access to court is still controversial. This is because section 1 (1) declares that the constitution is supreme. The Supreme Court noted in *Tanko v. State*[8] that: "The Constitution (the grundnorm) of this country, indeed, the constitution of any country is supreme. It is by that the validity of any law, rules or enactment for the governance of any part of the country will always be tested".[9]If, therefore, any other law, treaty or enactment is inconsistent with the provisions of the 1999 Constitution, that other law, treaty or enactment will be *pro tanto*void by virtue of section 1(3) of the 1999 Constitution.[10] In *Olafisoye v. Federal Republic of Nigeria*[11]the Supreme Court beautifully expounded the law when it held that:

As our country is sovereign so too our Constitution and the court will always bow and kowtow to the sovereign nature of our Constitution, a sovereignty which gives rise to its supremacy over all laws of the land, including decisions by foreign courts.

In the case of *Ossai v. Federal Republic of Nigeria*[12]the Court of Appeal elucidates that the Constitution, as amended, occupies a kingly position in the *corpus* of our jurisprudence and its provisions are not only sacrosanct but override any other prescription of any other law that is antithetical to it.[13] Therefore, if the parties agree and actually insert time limitation clause in their agreement any of the parties may apply to court to set it aside for being antithetical to the provisions of the Constitution of the Federal Republic of Nigeria 1999 as amended which has a supreme position.

Incorporation of Exclusion Clauses in a Contract

Exclusion clauses can only bind parties to a contract or agreement only when the parties consent on the clauses. If there is no such consent exclusion clauses are not worth the papers they are written on. Therefore, exclusion must be incorporated in the agreement in line with the law. The person wishing to rely on the exclusion clause must show that it formed part of the contract. An exclusion clause can be incorporated in the contract by signature, by notice, or by previous course of dealings.[14] These approaches to incorporating exclusion clauses will be examined hereunder.

Incorporation by Signature

If the plaintiff signs a document having contractual effect containing an exclusion clause, it will automatically form part of the contract, and he is bound by its terms. This is so even if he has not

[8][2009] 14 WRN (Pt. 864) 580 at 674.

[9] The constitution of any country is what is usually called the organic law or grundnorm of the people. See *Dapianlong v. Dariye* [2007] 27 WRN 1 at 79.

[10] In *Jimoh v. Olawoye* [2003] 10 NWLR (Pt. 828) 307 the 1999 Constitution was held as supreme. In *Onyewu v. KSMCI* [2003] 10 NWLR (Pt. 827) 40 section 1(3) of the 1999 Constitution was adumbrated as having the force of nullifying any provision of any enactment that is in conflict with the provisions of the 1999 Constitution.

[11][2004] 4 NWLR (Pt. 864) 580 at 674.

[12][2013] 13 WRN 87.

[13]*Ibid.*, p. 110.

[14] "Exclusion and Limiting Clauses", *Law Teachers: The Law Essay Professionals* available at http://www.lawteacher.net/contract-law/lecture-notes/exclusion-clauses-lecture.php (last accessed 25 June 2013).

read the document and regardless of whether he understands it or not.[15] In *L'Estrange v. Graucob*[16] the plaintiff signed a form issued by the sellers of automatic slot machine which she ordered from them. The form contained an exclusion clause to the effect that: "Any express or implied condition, statement or warranty, statutory or otherwise not stated therein is hereby excluded". When the machine was delivered it was defective and the plaintiff brought an action for breach of contract. The defendant relied on the exclusion clause in his defence. The plaintiff argued that as at the time she signed the form she did not read the exclusion clause and thus knew nothing about the contents. The court held that when a document containing contractual terms is signed, then in the absence of fraud and misrepresentation, the party signing is bound. It is interesting to note that the party signing is bound on the basis that by signing he has signified his assent. However, even a signed document can be rendered wholly or partly ineffective if the other party has made a misrepresentation as to its effect.[17]Sagay notes that:

The position with regards to documents signed by the injured party, containing or incorporating excluding or limiting terms is simple and straightforward. In the absence of fraud, duress or misrepresentation, the person signing is bound by the excluding or limiting term whether or not he reads it.[18]

It should be noted that a document is signed document for the purpose of the rule in *L'Estrange v. Graucob*[19]if, though itself not signed, it is specifically incorporated by reference in another document which is signed.[20] In *Atu v. Face-to-Face Pools Ltd.*[21]the court applied the rule where an exemption was contained in an unsigned document entitled "Rules and Regulations for the 1971 – 72 Season" incorporated by reference in a signed football coupon. Consequently the rudimentary rule here is that if the party adversely affected by the contract appends his signature to the contractual document, even if in ignorance of its terms, he is bound by its terms.

Incorporation by Notice

Notice is the legal notification required by law or agreement or imparted by operation of law as a result of some facts. It may also mean definite legal cognizance, actual or constructive, of an existing right or title.[22] The exclusion clause may be contained in an unsigned document such as a ticket or a notice. In such a case, reasonable and sufficient notice of the existence of the exclusion clause should be given. For this requirement to be satisfied:

[15]*L'Estrange v. Graucob* [1934] 2 KB 394.

[16]*Ibid.*

[17]*Curtis v. Chemical Cleaning Co.* [1951] 1 KB 805.

[18]Sagay, *op. cit.*, pp. 167 – 168.

[19]*Op. cit.*

[20]Okany, *op. cit.*, p. 120.

[21][1974] 4 UILR 131.

[22] Garner, *op. cit.*, p. 1164.

(i) The clause must be contained in a contractual document, that is one which the reasonable person would assume to contain contractual terms, and not in a document which merely acknowledges payment such as a receipt.[23]

In *Chapelton v. Barry UDC*[24]the plaintiff wished to hire two deck-chairs from the defendant council. Near the pile of chairs there was a notice stating that each chair was available for hire at two pence per session of three hours. The plaintiff took two chairs and obtained a ticket from the attendant, which he put in his pocket without reading. The chair he was sitting on collapsed and he was injured. The defendant in their defence denied any liability on the ground that there was a provision at the back of the ticket excluding them from any liability for any injury or damage arising from the hire of the chair. The court held that no reasonable person would imagine that the ticket was anything but a receipt for the money paid for the chairs. The ticket was therefore issued at the conclusion of the contract.

(ii) The existence of the exclusion clause must be brought to the notice of the other party before or at the time the contract is entered into.[25] In *Olley v. Marlborough*[26]a husband and wife booked in at the reception desk of a hotel and paid for a week's stay. They then went upstairs to the bedroom. On the wall in the bedroom was a notice on the wall stating that the hotel would not be liable for articles lost or stolen unless handed in for safe custody? The wife then left her fur coat in the bedroom, closed the self-locking door, went downstairs and hung the key on a board in the reception office. In her absence the key was wrongly taken by a third party who opened the bedroom door and stole the fur cloth. The court held that the exemption clause could not avail the defendants because the contract was made at the reception desk and the plaintiff did not see and could not have seen the exemption clause until later.

(iii) Reasonably sufficient notice of the clause must be given. It should be noted that reasonable, not actual notice is required.[27] In the case of *Otegbeye v. Little*[28]a receipt limiting the liability of the defendant shipping company was issued to the agent of the plaintiff when he made payment for a certain cargo of kolanut on behalf of the plaintiff. There was unchallenged evidence that both the agent and the plaintiff were illiterate in the language in which the receipt was written. On the loss of the cargo of kolanuts, the plaintiff sued for 260 million pounds damage, but the defendant company, *inter alia*, relied on the exemption clause contained in the printed receipt issued to the plaintiff's agent. The court refused to allow the defendants to rely on the exemption clause because sufficient notice of the exemption clause was not given to the plaintiff.

What is reasonable is a question of fact depending on all the circumstances and the situation of the parties. Attention should be drawn to the existence of exclusion clauses by clear words on

[23]*Parker v. SE Railway Co*. [1877] 2 CPD 416 and *Chappleton v. Barry UDC* [1940] 1 KB 532.

[24]*Ibid.*

[25]*Olley v. Marlborough Court* [1949] 1 KB 532.

[26]*Ibid.*

[27]*Thompson v. LMS Railway* [1930] 1 KB 41.

[28][1907] 1 NLR 70.

the front of any document delivered to the plaintiff.[29] It seems that the degree of notice required may increase according to the gravity or unusualness of the clause in question.

Incorporation by Previous Course of Dealings

Even where there has been insufficient notice, an exclusion clause may nevertheless be incorporated where there has been a previous consistent course of dealing between the parties on the same terms. This view finds illustration in the case of *McCutcheon v. MacBrayne*.[30] In this case the defendant ship sank when ferrying the plaintiff's car across the sea, causing loss of the car also. It was established in evidence that the plaintiff had carried out this transaction on a number of occasions. On some occasions he was asked to sign a document exempting the defendant from liability for loss. In some cases he was not asked to sign some document. In the circumstances where the plaintiff had signed the document he had not bothered to read them though he realised they must contain some conditions. The court held that in spite of the previous course of dealings, the plaintiff's agent could not be imputed with the knowledge of the exemption clause since he never read the documents and therefore had no actual knowledge of their contents. Indubitably the previous dealings between the plaintiff and the defendants cannot ignite the effective application of exclusion clause to the transaction.

As against a private consumer, a considerable number of past transactions may be required.[31]Even if there is no course of dealing, an exclusion clause may still become part of the contract through trade usage or custom. In *British Crane Hire Corporation v. Ipswich Plant Hire Ltd.*[32]both parties were in the business of hiring out heavy moving equipment. The defendant arranged by telephone for a drag line crane from the plaintiff. The arrangement agreed on fees but was silent on conditions of hire. The Plaintiff sent a printed form of the agreement to the defendant for signing in accordance with usual practice. The crane without any fault sank in a marshy ground before the defendant signed the printed form of the agreement. This unsigned agreement contained the usual practice of including exclusion clause to the effect that hirers are liable to indemnify owners against liability in the sort of situation that had occurred. The defendant resisted the inclusion of the clause in the agreement with the defendant. The court upheld the exclusion clause stating that:

It is clear that both parties knew quite well that conditions were habitually imposed by the supplier of these machines and both parties knew the substance of these conditions. In particular that if the crane sank in a soft ground it was the hirer's job to recover it.[33]

Also in *Spurling v. Bradshaw*[34]the defendant brought a counter claim against the plaintiff for damage to his goods stored at the plaintiff's warehouse. The plaintiff pleaded an exemption

[29]For example "For conditions, see back".

[30][1964] 1 WLR 125.

[31]*Hollier v. Rambler Motors* [1972] 2 AB 71.

[32][1975] QB 303.

[33]*Ibid.*, p. 316.

[34][1956] 2 All ER 121.

clause contained in a document given to the defendant after the conclusion of the storage contract. However, the defendant had earlier admitted that in previous course of dealings with the plaintiff in connection with the storage, he had received similar documents, though he never really bothered to read them. It was held that the previous dealings had duly implicated the defendant with notice of the exemption clause and that he was therefore bound by it.

The foregoing position of law seems to find accommodation in the presumptive stipulations of the Nigerian law. In Nigeria the law is that the court may presume the existence of any fact which it deems likely to have happened, regard shall be had to the common course of natural events, human conduct and public and private businesses, in their relationship to the facts of the particular case and in particular the court may presume that the common course of business has been followed in particular cases.[35] Thus incorporation of exclusion clause in a contract may be deduced from the common course of business as shown in the case of *Spurling v. Bradshaw*.[36]

Judicial Regulation of Exclusion Clauses

When dispute arises between parties to an agreement or contract, the court becomes handy for the resolution of such dispute. Though many[37] have canvassed the use of Alternative dispute resolution instead of litigation in settling disputes among parties, the court still retains its pre-eminence as the highest temple of justice. In the case of *Ayoola v. Ajibare*[38]the Court of Appeal accentuates that it is incumbent on a court to provide a congenial environment for parties to ventilate their grievances, either in prosecution or defence of a matter, in keeping with the tenets of the inalienable principle of fair hearing.[39] Therefore before a court can determine disputes relating to an agreement containing exclusion clause, the court must be satisfied that it has the jurisdiction to do so.

Jurisdiction is a threshold issue. In *Zain Nigeria Limited v. Ilorin*[40]Agube JCA stated that the law is settled on a plethora of authorities that because of the fundamental importance of jurisdiction in the adjudicatory process, it can be raised at any stage of proceeding at the lower court and even for the first time on appeal to the Court of Appeal or Supreme Court, in that no matter how beautifully and brilliantly the proceedings were conducted, if eventually it is discovered that the court be it of first instance or of appellate jurisdiction , lacked the requisite

[35] Evidence Act 2011, s. 167 (c).

[36]*Op. cit.*

[37] O. D. Amucheazi, "The Arbitration Alternative to the Settlement of Environmental Disputes", in O. D. Amucheazi and C. A. Ogbuabor (eds.), *Thematic Issues in Nigerian Arbitration Law and Practice*, pp. 68 – 89 at 68, G. Ezejiofor, *The Law of Arbitration in Nigeria*, (Ikeja: Longman Nigeria Plc., 1997), p. 12, P. O. Idornigie, "Alternative Dispute Resolution Mechanisms", in A. F. Afolayan and P. C. Okorie, *Modern Civil Procedure Law*, pp. 563 – 585, I. Enemo, "The Future of Conflict Resolution and Conflict Resolution Mechanisms in Africa", *Nigerian Journal of Public Law*, vol. 2 No. 1 2009, pp. 92 – 104 at 100 etc.

[38][2013] 10 WRN 162.

[39]*Ibid.*, p. 179.

[40][2013] 10 WRN 21.

jurisdiction to entertain the suit, the entire proceeding will be tantamount to a nullity.[41] Consequently jurisdiction is the linchpin or spinal cord of all adjudications, which oxygenates all proceedings by keeping them alive, is not amenable to waiver, admissions, acquiescence, collusion or compromise of any kind nor can parties donate jurisdiction to a court using any of these conducts.[42]

It is necessary to explain that the court cannot act in vacuum. Parties must approach the court first by filing the appropriate process with the intent of invoking the adjudicatory powers of the court. In ventilating their grievances, parties make certain claims which the court may or may not grant the parties. The exercise of the courts discretion in granting an application is subject to numerous variables. However, the court is confined to the claims of the parties and is not expected to exceed the confines of the parties' claims. In the case of *Etukudo v. Udoakagha*[43]the position of law is explicitly espoused thus: "This position of law must of course follow from the principle that a court of law not being a charitable institution does not grant to a party a relief which he does not seek."[44] It is from the vantage point of the parties' claim and counter-claim that the court will explore the possibility and tenability of regulating the use of exclusion clauses in extenuating liabilities for breach of contractual obligations. The courts have developed some approaches to effectively regulate the use of exclusion clauses to limit liability. These approaches are:

Strict Literal Interpretation

For an exclusion clause to operate, it must cover the breach where the liability arises as a result of breach of contract. If there is an exclusion clause, then the type of liability arising is also important. Generally, there are two varieties of liabilities namely strict liability and liability for negligence.

Strict liability is liability that does not depend on actual negligence or intent to harm but that is based on the breach of an absolute duty to make something safe. Strict liability most often applies either to ultra-hazardous activities or in product liability cases.[45] Strict liability claims focus on the product itself. Under strict liability, the manufacturer is liable if the product is defective, even if the manufacturer was not negligent in making that product defective.[46] California was the first to throw away the fiction of a warranty and to boldly assert the doctrine of strict

[41]*Ibid.*, pp. 66 – 67. See also the cases of *Madukolu v. Nkemdilim*[2001] 46 WRN1, *Obikoya v. The Registrar of Companies and Official Receiver of Pool House Group (Nig.) Ltd.* [1975] 4 SC 31, *Ezomo v. Oyakhire*[1985] 1 NWLR (Pt. 2) 195, *African Newspapers of Nigeria Ltd. &Ors. v. FRN* [1985] 2 NWLR (Pt. 6) 137, *Attorney General of the Federation v. Abubakar* [2008] 16 NWLR (Pt. 1112) 135 and *Inakoju v. Adeleke* [2007] 4 NWLR (Pt. 1025) 423.

[42] See the cases of *Okolo v. UBN Ltd.* [2004] 13 WRN 62, *Mobil (Nig.) Unltd. V. Monokpo*[2003] 18 NWLR (Pt. 852) 346 and *Gafar v. Government of Kwara State* [2007] 4 NWLR (Pt. 1024) 375.

[43][2013] 5 WRN 78.

[44]*Ibid.*, p. 90. *Awoniyi v. AMORC* [2000] 10 NWLR (Pt. 676) 522, *Afrotech Technical Services (Nig.) Ltd. v. M. I. A. & Son Ltd.* [2000] 12 SC (Pt. II) 1, *Ekpenyong v. Nyong*[1997] 4 NWLR (Pt. 498) 16 and *Union Beverages v. Owolabi*[1998] 2 NWLR (Pt. 68) 128.

[45] Garner, *op. cit.*, p. 998.

[46]"Product Liability" *Wikipedia, Free Internet Encyclopedia*, available at http://en.wikipedia.org/wiki/Product_liability (last accessed 03 July 2013).

liability for defective products, in 1963.[47] In *Escola v. Coca-Cola Bottling Co.*[48] Justice Traynor laid the foundation for the use of strict liability with these words:

Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.[49]

After this decision, the Supreme Court of California proceeded to extend strict liability to all parties involved in the manufacturing, distribution, and sale of defective products including retailers[50] and in 1969 made it clear that such defendants were liable not only to direct customers and users, but also to any innocent bystanders randomly injured by defective products.[51]

Since then, many jurisdictions have been swayed by Justice Traynor's arguments on behalf of the strict liability rule in *Escola* and subsequent cases. Although the Supreme Court of California has since become more conservative, it continues to endorse and expand the doctrine. In 2002, it held that strict liability for defective products even applies to makers of component products that are installed into and sold as part of real property.[52] However, strict liability is not limitless. In 2012, the Court held that manufacturers are liable under strict liability and negligence only for defects in their products, as distinguished from other products that could potentially be used with their products.[53]

[47]See *Greenman v. Yuba Power Products*, 59 Cal. 2d 57 (1963).

[48]24 Cal. 2d 453, 462 (1944).

[49] "Product liability", *Wikipedia, The Free Internet Encyclopedia*, available at http://en.wikipedia.org/wiki/Product_liability (last accessed 05 July 2013).

[50]*Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256 (1964).

[51]*Elmore v. American Motors Corp.*, 70 Cal. 2d 578 (1969).

[52]*Jimenez v. Superior Court (T.M. Cobb Co.)*,29 Cal. 4th 473 (2002) in which window manufacturers were held liable to homebuyers for defective windows that had been installed by developers into new homes.

[53]*O'Neil v. Crane Co.*, 53 Cal. 4th 335 (2012).

Presently, courts usually require that the party relying on exclusion clause must properly and unambiguously draft the clause in order to achieve the intended exclusion of liability. If any ambiguity is present, the courts usually interpret it strictly against the party relying on the clause.

As espoused in *Darlington Future Ltd. v. Delcon Australia Pty. Ltd.*,[54] the meaning of exclusion clause is construed in its ordinary and natural meaning in the context. Although the meaning may be construed like any other ordinary clause in the contract but the clause must be examined in the light of the contract as a whole. The judge in *R & B Custom Brokers Co. Ltd. v. United Dominions Trust Ltd.*[55] refused to allow an exemption clause which did not cover the nature of the implied term on the grounds that it did not make specific and explicit reference to that term.[56]

Negligence is the breach of legal duty to take care which results in damage undesired by the defendant to the plaintiff.[57] Liability for negligence is built on the trilogy of duty of care, breach of that duty and the resultant damage.[58]

In the case of *British Airways v. Atoyebi*[59]it was held that it is well settled law, that there are basically three elements that constitute an action in negligence to wit:

The existence of a duty of care owed to the complainant by the appellant.

Failure to attain the standard of care prescribed by the law; and

Damage or injury suffered by the complainant as a result of the breach of the duty of care owed thereto.[60]

In *Brawal Shipping (Nig.) Ltd. v. Ometraco Int'l. Ltd.*[61]the essential elements of negligence are established as follows:

- That the appellant owed the respondents a duty of care.
- That the appellant failed to exercise that duty of care and
- That the appellant's failure occasioned the damage or loss suffered by the respondent.

Thus it is trite that negligence, as the term goes, denotes the failure by a party to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. The term also denotes culpable carelessness.[62] Thus exclusion clause may be regulated by the court through the use of liability for negligence.

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[54](1986) 161 CLR 500.

[55][1988] 1 All ER 847.

[56]The term in question was the implied term as to fitness-to-purpose pursuant to the Sale of Goods Act 1979, s. 14(3).

[57] G. Kodilinye and O. Aluko, *Nigerian Law of Torts*, (Ibadan: Spectrum Books Ltd., 2003), p. 38.

[58] C. C. Nweze, "Medical Negligence: Comparative Contemporary Legal Perspectives", in F. N. Monye (ed.), *Consumer Journal*, vol. 1, No. 1, 2005, pp. 35 – 67 at 37.

[59][2011] 16 WRN 84.

[60] See the *Makwe v. Nwukor*[2001] 14 NWLR (Pt. 733) 356.

[61][2011] 16 WRN 84.

[62] It is also termed actionable negligence; ordinary negligence and simple negligence. See the case of *British Airways v. Atoyebi*[2011] 2 WRN 37 at 78.

Contra Proferentem

The full maxim is *verbachartarumfortiusaccipiuntur contra proferentem*.[63] This is the doctrine that the construction least favourable to the person putting forwards an instrument should be adopted against him.[64]If, after attempting to construe an exclusion clause in accord with its ordinary and natural meaning of the words, there is still ambiguity then if the clause was imposed by one party upon the other without negotiation the *contra Proferentem*rule applies. Essentially this means that the clause will be construed against the person who imposed its inclusion, that is to say, *contra* the *proferens*. Although the court recognizes the liberty of the parties to fix their own contractual terms, nevertheless they regard the exemption clause with hostility and have tried to mitigate their injustice by resort to any loophole they might contain, particularly those contained in the standard forms.[65] It is therefore settled that once the conditions for admissibility of a document are met by the trial court and the document is admissible, the trial court is bound to employ and use the document against the maker.[66]

In terms of negligence, the courts have taken the approach that it is unlikely that someone would enter into a contract that allows the other party to evade fault based liability. As a result, if a party wishes to exempt his liability for negligence, he must make sure that the other party understands the effect of the exemption. In *Canada SS Lines Ltd. v. The King*[67] the court held that if the exclusion clauses mention negligence explicitly, then liability for negligence is excluded. If negligence is not mentioned, then liability for negligence is excluded only if the words used in the exclusion clause are wide enough to exclude liability for negligence. If there is any ambiguity, then the *contra proferentem* rule applies. If a claim on another basis can be made other than the negligence, then it covers it.

In Australia, the *four corners rule* has been adopted in preference over the idea of a *fundamental breach*.[68] Under the *four corners rule* the court will presume that parties to a contract will not exclude liability for losses arising from acts not authorised under the contract. However, if acts of negligence occur during authorized acts, then the exclusion clauses shall still apply. If the contract is for the carriage of goods, if the path is deviated from what was agreed, any exclusion clause will no longer applies.[69]

Consequently, the condition precedent to the enforcement of exclusion clauses is the *id idem* of the parties to the contract containing exclusion clauses. If there is any ambiguity or imprecision in the words used the court will apply the *contra proferentem*rule against the party

[63]Meaning that the words of written documents are construed more forcibly against the party using them.

[64] S. Bone, *Osborn's Concise Law Dictionary*, (9th edn., London: Sweet & Maxwell, 2001), p. 103.

[65]Okany, *op. cit.*, p. 122.

[66]*Okpako v. State* [2013] 11 WRN 31 at 62.

[67](1952) AC 192.

[68]*The Council of the City of Sydney v. West* [1965] 114 CLR 481.

[69] "Exclusion Clause", *Wikipedia, the Free Internet Encyclopaedia*, available at http://en.wikipedia.org/wiki/Exclusion_clause (last accessed 05 July 2013).

who inserted the exclusion clause. In the case of *Wallis, Son andWells v. Pratt*[70] a clause which excluded liability for breach of implied warranty was held not to exclude a b which the buyer was compelled to treat as a breach of warranty under section 11(1) (c) of the Sale of Goods Act because he has accepted the goodswas compelled to treat as a breach of warranty under section 11(1) (c) of the Sale of Goods Act, because he has accepted the goods.

CONCLUSION

This article has explored the significance and implications of exclusion clauses within the mobile communications industry. The study has shed light on the various types of exclusion clauses commonly employed by mobile service providers, including limitation of liability, service disruption, and termination clauses, among others. By analyzing relevant legal frameworks and court cases, we have demonstrated the potential consequences of such clauses on consumers and their rights. Findings of the study highlight the need for careful examination and regulation of these clauses to ensure a fair balance between consumer protection and business interests.

[70](1911) AC 394.