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Exclusion Clauses:
When He Who Pays The Piper Does Not Dictate The Tune!!!

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> "In Business, Parties To A Contract Are Free To Limit Or Exclude Obligations Arising From Their Transaction"

It is trite that parties are free to contract as they please; and the law recognises and enforces the rights of parties as stated in a contract. In exercise of this right, a person may decide to exclude or otherwise limit the obligations which should ordinarily be binding on him arising from that contract. Exclusion and limitation clauses are clauses inserted in a contract in order to exclude or limit the liability of a party in the contract.

Typically, exclusion and limitation clauses are binding on parties as there is a general presumption of intention on contractual terms: ***Cannitec International Company Limited v. Solel Boneh Nigeria Limited***.[1] This article seeks to shed light on the applicability of exclusion and limitation clauses and the role of the *Consumer Protection Council (CPC)* in reducing its operation.

Operation of Exclusion and Limitation Clauses

In business, parties to a contract are free to limit or exclude obligations arising from their transaction. Exclusion and Limitation clauses are more common in standard form contracts and are more often than not used to reduce liability of an offending party. Standard form contracts, otherwise called contracts of adhesion, are mostly used by banks, airlines, logistics and other service providers etc. They are also used in hotels and restaurants where signs are placed in car parks that read *"cars are parked at owner's risk"*. In the *Supreme Court (SC)* case of ***Anyah v Imo Concorde Hotels,***[2] it was held that a hotel proprietor was not liable for a vehicle that was stolen in its premises. The rationale behind the decision was that there did not exist a duty of care between the car owner and the hotel proprietor. Liability exclusion in this scenario can be negated by tort.

The enforcement of exclusion and limitation clauses depends on varying events such as the excluding clause being part of the contract. It can either be part of the contract or referred to in the contract as an appendix. This is to ensure that the other party is aware of the exclusion before entering into the contract. That a party fails to read the portion of a contract containing the exclusion/limitation clause despite being given the contract, is of no effect: ***Enemchukwu v. Okoye.***[3]

There is a plethora of cases on airlines and logistics services where they sought to limit their liability on the basis of a limitation clause. In the case of

1 *[2017] 10 NWLR (Pt. 1572), 66*
2 *[1992] 4 NWLR (Pt. 234) 210*
3 *(2016) LPELR-40027(CA)*

airlines, Nigeria is a signatory to treaties such as the ***Montreal Convention for the Unification of Certain Rules for International Carriage by Air 1999*** and as such issues on liability are governed by it. Most limitation clauses as contained in various international conventions would cease to apply in the event of negligence. However, negligence as determined by the courts, has been a difficult issue to prove.

In ***Cameroon Airlines v. Jumai Abdul-Kareem,***[4] the Court of Appeal (CA) held that it is not sufficient for the act or omission that is relied on to have been done recklessly; it must also be shown to have been done with knowledge that damage would probably result. A similar decision was reached by the CA in ***Emirates Airline v. Tochukwu Aforka.***[5]

This is akin to arbitration clauses in a contract. Typically, a contract containing an arbitration clause should be referred to arbitration when dispute arises rather than an action being instituted at the court. However, the courts have held that before an application for stay of proceedings can be granted, the party seeking to refer the suit to arbitration must have taken steps in furtherance of arbitration such as appointing an arbitrator: ***UBA v. Trident Consulting Limited***.[6]

Furthermore, a similar decision was reached in the recent case of ***Mekwunye v. Lotus Capital Limited.***[7]

While it is easy to understand the rationale of the courts in ***Mekwunye's case*** (denying defendants the opportunity to needlessly delay suits under the guise of arbitration), the intent of courts in cases of limitation clauses is more difficult to understand. Disputes regarding these clauses occur when the service provider claims exemption from his liability, thereby depriving the receiving party of compensation to which he should have been entitled.

The law should aim to protect a party to a contract who receives unsatisfactory services from his transaction and is entitled to some compensation arising from the other party failing to fulfill its responsibilities. It should be difficult for the person responsible for the loss to absolve himself of liability on the basis of an exclusion clause or limiting term. Initially, exclusion clauses were frowned at by the courts.[8] In ***Karsales (Harrow) Limited v. Wallis***, Lord Denning stated as follows: *"It is now settled that exempting clauses, no matter how widely they are expressed, only avail the party when he is carrying out contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him turn blind eye to his obligation."*

However, since the decision of the *House of the Lords* in ***Photo Production Limited v. Securicor Transport,***[9] Nigerian courts begun favouring a more constructive interpretation of exclusion clauses thereby widening its applicability.[10]

In ***Narumal & Sons Limited v. N.B.T.C. Limited,***[11] the Defendants contracted the Plaintiff's services to transport goods to Lagos. The goods were not delivered in good condition to which the Defendant refused to pay the contract sum. The trial court held in favour of the defendant, that the Plaintiff's barges were not seaworthy containing leakages through which the goods were damaged.

4 *[2003] 11 NWLR (Pt. 830) 1 at 22*
5 *[2015] 9 NWLR (Pt. 1463) 80*
6 *(2013) 4 CLRN 119*
7 *(2018) LPELR-45546 (CA)*
8 *[1956] EWCA Civ 4*
9 *[1980] 2 WLR 283*
10 See for example, ***Akinsanya v United Bank for Africa Limited (1986) 4 NWLR (Pt. 39), 273.***
11 *[1989] 2 NWLR (Pt.106) 730*

In the trial court's views, this was a material breach and as such the Plaintiff could not rely on an exemption clause in the contract. The SC, on a contrary opinion, held that the barges were seaworthy thus no fundamental breach was committed. The SC went further to hold that even if the barges had been unseaworthy, the exemption clause in the contract would have availed the plaintiff.[12] The SC further held that there is no rule of law that exception clause is nullified by a fundamental breach of contract. The question to be asked is, what is the incentive for optimum service? If even a fundamental breach of a contract can be sidestepped by the existence of an exclusion clause, what is the hope of an affected customer? It should be borne in mind that these contracts are more often than not, contracts of adhesion, leaving no room for negotiation among parties.

Rather than constructive mode of interpretation, contracts containing exclusion and limitation clauses can be interpreted through the *contra proferentem* rule of interpretation. The rule states that any ambiguous clause/subject of interpretational dispute should be interpreted *against* the interests of the party that requested that the clause is included. In the case of insurance contracts for instance, the *contra proferentem* rule would direct the court to rule against the insurer if a clause in the contract is vague; same approach is also mandated by the rule in the case of contracts with airlines.

Courts use a multi-step process in determining whether the *contra proferentem* rule applies in the review of a contract. The first step is to review the contract language to determine whether a clause is ambiguous enough to cause uncertainty. If the clause is determined to be ambiguous, the court will then attempt to determine the intent of the parties when they entered into the contract. If the evidence does not dispel the ambiguous nature of the contract language, then *contra proferentem* is applied in favour of the party that did not include the language.

The *National Industrial Court*, in ***Mr. Kurt Severinsen v. Emerging Markets Telecommunication Services Limited***,[13] considered the use of the *contra proferentem* rule in determining the intent of the parties in a Release and Discharge Certificate. It held that the rule was not applicable as the Plaintiff included the disputed clause to represent its interest as the drafting of the Release and Discharge Certificate were all at the behest of the defendant. In ***DHL International Nigeria Limited v. Mr. Segun Apata,***[14] the Respondent had sent goods using the Appellant's delivery service; but the goods were lost in transit. The Appellant sought to rely on a limitation of liability clause in its standard form contract with the Respondent to deny liability. The Federal High Court held that the Appellant could not rely on same as it was unreasonable and effect could not be given to same. This decision

12 Narumal's case (Supra) 753-754.
13 ***Suit No: NIC/LA/42/2010***
14 ***(2011) LPELR-CA/I/218/2004***

was subsequently overturned at the Court of Appeal though on the basis of fair hearing not being granted to the Appellant.

Conclusion and Recommendations

Nigeria must ensure that its citizens are able to receive qualitative services rendered for payments. The *CPC* needs to be at the forefront of pushing this engagement in holding airlines and other service providers, accountable based on their representations. ***Section 2 Consumer Protection Council Act***[15] provides that the function of the *CPC* shall include: *"provide speedy redress to consumers' complaints through negotiations, mediation and conciliations; ensure that consumers' interests receive due consideration at appropriate forum and to provide redress to obnoxious practices or the unscrupulous exploitation of consumers by companies, firms, trade association or individual."*

There is also the need to consider enacting legislation to cater for these issues. In the United Kingdom, there is the *Unfair Contract Terms Act 1997* which legislated on the issues of avoidance of liability by parties to a contract through clauses such as limitation and exclusion clauses. Furthermore, in the United States, the *Federal Trade Commission (FTC)* established in 1914 by the *FTC Act 1914* ruled that all significant conditions and limitations (of liability) in contracts are to be clearly and conspicuously presented. This was to guard against densely packed lines of fine print and footnotes or fast-scrolling disclosures which service providers often use to include limitation clauses.

The *FTC* provides guidance on the issue of fine print and deceptive advertising on its website: If a disclosure or term is necessary to prevent such deception, it must be conspicuously placed so that consumers will actually notice it; a fine-print disclosure at the bottom of a print advertisement; a disclaimer buried in a body of text unrelated to the claim being qualified; a brief video superscript in a television ad; or a disclaimer that is easily missed on a website are not likely to be effective.

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The *FTC* has and will continue to enforce these rules. In 2009, it fined a web company, *Commerce Planet*, US$500, 000 for placing a fine-print disclosure at the bottom of the screen. Consumers were able to complete the transaction without ever having noticed it.

The *CPC* must display a similar will (backed with proper legislation) in demanding accountability from service providers. It is high time Nigeria moves on from the era of service providers hiding behind exclusion and limitation clauses to cover up their ineptitude or quality of service delivery gaps. The decision of the *SC* in ***Narumal's case***, if followed to the latter, will operate as a free rein for nonchalant service providers. This is not even mentioning issues like loss of business, utilization of alternate capital which would have otherwise been used for other areas. We must hold service providers accountable if we are to make progress as a nation

15 *Cap. C25 LFN 2004*