



UNFAIR TERMS IN
STANDARD FORM
CONTRACTS –
A NEED FOR LEGAL
REFORM IN
E-COMMERCE
TRANSACTIONS

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Standard form contracts (SFCs) are agreements mostly used in E-commerce transactions, which contain terms and conditions that regulate the rights and obligations of the contracting parties. They employ standardised, non-negotiated provisions, usually in pre-printed forms, which are mostly used for contracts of the same nature. They are sometimes referred to as ‘boilerplate contracts’, ‘contracts of adhesion’, or ‘take it or leave it’ contracts. They can be seen in terms and conditions of banking transactions, contracts of carriage of goods and persons, insurance contracts, contracts for hire purchase, contracts for buying and selling of products and services, and many more.

SFCs have become rampant with the rapid growth of the modern commercial market, where contracts are entered into with a mere click of the mouse. SFCs are mostly used by businesses because they save the time and cost normally required to

negotiate the many details of individual customer contracts when a product is sold, or a service is rendered. However, these contracts can also abuse consumer rights because of the unequal bargaining power that exists in favour of the party who prepares the SFC, which is usually the business or supplier. The contracts may contain unfair terms, which are prejudicial to consumers who have little or no choice but to accept said terms and conditions or refuse them.

SFCs are usually long and complex and do not allow consumers ample time to check them or send them to lawyers to review or negotiate on individual terms before they assent to them. In addition, the SFCs are usually not placed or posted in the most conspicuous manner and are normally not legible enough for consumers to see or be encouraged to go through them.

Lord Reid in *Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale*, rightly stated that

'In the ordinary way the customer has no time to read them, and if he did read them, he would probably not understand them. And if he did understand and object to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same'

WHAT CONSTITUTES UNFAIR TERMS IN AN SFC?

There is no set list on what can be categorised as unfair terms in SFCs. Unfair contract terms are determined on a case-by-case basis, where an imbalance in bargaining power exists between a consumer and a supplier. This can lead to unfavourable terms drafted by the supplier to the detriment of the consumer.

ARE UNFAIR CONTRACT TERMS RESTRICTED TO EXEMPTION AND LIABILITY CLAUSES ALONE?

Unfair contract terms are not restricted to exemption and limitation of liability clauses alone. These days, unfair terms in SFCs go beyond that and may even extend to the fundamental terms of the contract.

For instance, unfair terms can even be seen in dispute resolution mechanisms imputed in SFCs. A typical example would be where an arbitration clause is imputed in an SFC. Arbitration is not cost-effective as a means of dispute resolution. This applies especially for consumers who, by the provisions of an SFC infused with an arbitration clause, are compelled to resort to arbitration for a dispute arising out of their purchase of goods or services that are only worth a small sum. When such a consumer weighs the worth of the goods or services complained of against the cost of arbitration, they would be discouraged from pursuing any kind of relief due to the high cost of arbitration. This makes an arbitration clause in an SFC an unfair contract term.



WHY THE NEED TO PROTECT CONSUMER RIGHTS?

SFCs are inevitable in today's modern commercial market. This is due to their advantages in making the conduct of business more efficient, convenient, and cost-effective. The fact that the contract terms are not individually negotiated, thereby causing a significant imbalance in the parties' rights and obligations under the contract, makes it pertinent to safeguard the rights of weaker parties in these contracts.

More so, most of the products or services offered by these businesses are essential to societal functionality. For example, these include operating a bank account and other financial activities, travelling to places using airlines, or logistics services. Hence, when faced with these SFCs, consumers are left with no option but to 'take it' rather than 'leave it'. This compels them to accept unfavourable terms, which they have little or no say over.

DOES NIGERIA HAVE LAWS THAT REGULATE SFCs?

No, there is no legislation that primarily deals with unfair terms in contracts in

Nigeria. Although there have been numerous efforts by the Nigerian government to protect consumer rights, such as the formulation and passing of primary Consumer Protection Legislation in Nigeria, the **Federal Competition and Consumer Protection Act 2018**. The regulatory environment for the protection of consumer rights as it relates to unfair terms in SFCs in Nigeria is still largely insufficient and generally not specific enough. Just a portion of the FCCPA deals with unfair contract terms, but not on a holistic level like other countries have done.¹

Taking a cue from other countries such as the United Kingdom, which has specific legislations against unfair contract terms², Nigeria should make similar legislations on unfair contract terms. Australia³ and New Zealand⁴, amongst other countries, also have specific legislations that deal with unfair terms.

There are, however, fragments of statutory provisions that seek to prevent the use of unfair terms. Some of these are found in the Hire Purchase Act 2004, Sale of Goods Act, Contract Law of Anambra State 1986, Insurance Act 2003, etc. However, these legislations are applicable to only a limited scope of transactions involving specific types of consumers and

¹ Section 127 (1&2), 128 and 129 of the FCCPA 2018

² Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1994

³ Australian Consumer Law

⁴ New Zealand's Fair-Trading Act 1986.

do not provide a holistic protection of consumers in general.

Besides the attempt made recently in the enactment of some sections of the **Federal Competition and Consumer Protection Act 2018**, Nigeria had in the past attempted to provide legislation for unfair contract terms as was seen in the **Consumer Contracts (Regulation of Unfair Terms) Bill 2010**. Unfortunately, the bill did not materialise into law. If passed into law, the bill could have been a progressive legislation, which ought to have cured the lacuna in the regulation pertaining to unfair terms in SFCs in Nigeria and provided consumer protection.

WHAT IS THE ATTITUDE OF THE NIGERIAN JUDICIARY TOWARDS SFCs?

The Nigerian courts have applied common law principles, such as the rule of law and the rule of construction to interpret and control unfair contract terms especially in relation to the use of exemption and limitation of liability clauses by parties with higher bargaining power. However, there

are few case laws on this, and they do not appreciate or contemplate the wide use of SFCs, particularly in today's electronics transactions.

In the earliest case of ***Adel Boshalli v Allied Commercial Exporters Ltd***⁵, where the issue of fundamental breach was considered, the Privy council following the rule of law principle held thus:

'An exemption clause can only avail a party if he is carrying out the contract in its essential respect. A breach which goes to the root of the contract disentitles a party from relying on an exemption clause.'

However, as a result of the decision of the House of Lords in ***Photo Production Limited v Securicor Transport***, where the rule of construction was applied, the Nigerian Supreme Court in three cases⁶ rejected the usual protection of the doctrine of fundamental breach used in controlling unfair terms. In all three cases, the Supreme Court alluded to the development in the *Photo Productions* case as portending the demise of the rule of law in favour of the rule of construction.

⁵ (1961) 1 All NLR 917

⁶ *Akinsanya v United Bank for Africa Ltd*, *Attorney-General, Bendel State v United Bank for Africa Ltd*,

and *Narumal & Sons v Niger Benue Transport Company Ltd*

The Nigerian courts have, however, been proactive in protecting consumer rights by controlling the abuse of exclusion clauses in SFUs even when they have to adopt the rule of law as opposed to constructive interpretation. This can be seen in the cases of *International Messengers (Nig) Ltd v Pegofor Industries Ltd*⁷ and *Bank of Nigeria Plc v Omniproducts (Nig) Ltd & Anor*⁸, where the courts relying on **Section 190 of the Contract Law of Anambra State 1986** prevented the Appellant from relying on an exclusion clause to avoid liability.

There are very few cases on unfair contract terms and consumer protection in Nigeria as consumers are reluctant to institute court actions because of the high cost of litigation. There is a need for effective development of case law in Nigeria to take care of the lacuna left by the legislature. This can only be achieved by a proactive exercise of judicial discretion on a case-by-case basis to determine when exemption, limitation of liability clauses, and other

clauses in an SFC should or should not be enforceable.

CONCLUSION

Now more than ever, with the advancement of technology in commercial transactions, it is imperative that a reliable, uniform, and sustainable regulatory framework for commerce is promulgated. Just as technology keeps advancing, the law must keep up and stay up to date with current developments of technology in order to build a progressive society and make the country an attractive place to do business both on a domestic level and in the international sphere.

In view of this, it is recommended that a comprehensive and specific regulatory framework that tackles unfair terms in SFCs in Nigeria is formulated and implemented.

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⁷ [2005] 15 NWLR (Pt 947) 1

⁸ [2006] 15 NWLR (Pt 1003) 660