CHALLENGES FOR THE DEVELOPMENT OF UNFAIR CONTRACT TERMS LAW IN NIGERIA*

Many businesses operate at the moment by making a glowing statement in their marketing and trying to weasel out of them in the small print by obscure and complex jargon – Michael Furmston.1

INTRODUCTION

In October 2012, the Lagos State Law Reform Commission set in motion the machinery for the reform of the *Law Reform (Contracts) Law*[2] as part of the broader objective of bringing the law of contracts in touch with the peculiar needs and challenges of modern day business transactions. One of the major areas identified as being in need of legislative intervention was the area of provision of statutory safeguards against unfair contract terms, particularly in cases involving consumer adhesion standard-form contracts that inevitably involve manifest inequality of bargaining relations between contracting parties.[3] Undoubtedly, such contracts are quite pervasive in diverse aspects of trade and commerce, notably in contracts of carriage of goods and persons, sale of goods, banking and diverse other areas. Oftentimes, hapless consumers find themselves at the mercy of unfair supplier-biased terms, with little or no possibility for protesting against the insertion of terms that would substantially deprive them of the benefit of the agreement. It is, however, gratifying that in many of these cases, the Nigerian judiciary has risen to the defence of consumers through proactive interpretations of the contract terms. Such initiative began in earnest in the case of *Adel Boshalli v Allied Commercial Exporters Ltd*,[4] where the Privy Council[5] held that an exclusion clause could not

* Dr Adejoke O. Oyewunmi & Dr Abiola O. Sanni, Senior Lecturers, Faculty of Law, University of Lagos.

1 Michael Furmston Chesire, Fifoot & Furmston's Law of Contract (Butterworths LexisNexis, 14th ed, 2001).

2 Law Reform (Contracts) Law, Cap L63, Laws of Lagos State, 1973 (Lagos State).

3 See A. Oyewunmi & A. Sanni, 'Consultation Paper on Reform of the Law Reform (Contracts) Law Cap L63 Laws Of Lagos State 2003', Unpublished Paper presented at the Stakeholders' Meeting organised by the Lagos State Law Reform Commission on 18th October, 2012 at the Lagos State Law Reform Commission Building, Ikeja, Lagos.

4 Adel Boshalli v. Allied Commercial Exporters Ltd (1961) 1 All NLR 917.

5 The apex court at the time the case was decided was the Privy Council. Although Nigeria became politically independent in 1960, appeal from the Federal Supreme Court continued to lie with the Privy Council in the United Kingdom until 1963, when Nigeria became a Republic under the 1963 Constitution.

avail a party in breach of a fundamental term. Consistent with the doctrine of judicial precedent, this position has been uncompromisingly applied in subsequent cases across the Nigerian courts.[6] However, following the 'triumph' of the rule of law approach as the prevailing rule in the United Kingdom, in the case of *Photo Production Limited v Securicor Transport*,[7] the Supreme Court of Nigeria in three straight decisions[8] made statements which suggested the jettisoning of the rule of law approach in favour of the rule of construction approach. The decisions of the Supreme Court drew flak from various writers[9] for the failure to pay due regard to local circumstances which were already skewed against consumers.

A light appeared at the end of the tunnel with statutory intervention by Anambra State, one of the 36 states in Nigeria, adopting the rule of law approach. What is more, a Bill titled 'Consumers Contract (Unfair Terms) Bill' was recently introduced during the Third Session of the National Assembly,[10] ostensibly to address the problem on a macro (national) level. On their part, the judiciary, notably at the Supreme Court level, despite early concerns about their seeming inclination towards the rule of construction in the wake of the House of Lords decision in *Photo Productions V Securicor*,[11] appears to be more inclined in favour of the rule of law approach.

This paper examines developments leading to the convergence of judicial and legislative efforts in favour of the rule of law approach and evaluates the challenges for the protection of consumer rights in Nigeria. The paper is divided into six parts. Following the introduction in Part One, Part Two traces the judicial development of the doctrine of fundamental breach in Nigeria up to 1986. Part Three presents a summary of the appraisal of the existing literature and the divergent view of

6 Even when there was division among the judges in the United Kingdom, as demonstrated by the conflicting dicta found in the Suisse Antlantique Societe d'Armement Maritime S.A. v. Rotterdamshe Kolen Central [1966] 2All ER 61, the position in Nigeria has been consistent.

7 [1980] 2 WLR 283.

8 The National Assembly in Nigeria consists of the Senate and the House of Representatives. See section 47 of The Constitution of the Federal Republic of Nigeria 1999 and Cap C23 Laws of the Federation of Nigeria 2004. The tenure of the Third National Assembly was between 2007-2011. The tenure of the current National Assembly will run from 2011-2015.

9 See Akinsanya v United Bank for Africa Ltd, [1986] 4 NWLR (Pt.85) 273, Attorney-General, Bendel State v United Bank for Africa Ltd [1986] 4 NWLR (Pt 37) 547 and Narumal & Sons Ltd v Niger Benue Transport Corporation Ltd. [1989] 2NWLR (Pt 108) 739.

10 See CK Agomo 'Effect of the Demise of the English Doctrine of Fundamental Breach on the Nigerian Law of Contract' (1981-83) 13 Nig. J Contemporary Law 69, CK Agomo 'Exclusion Clauses in Contracts and the Implications for Consumer Protection in the Nigerian Law of Contract' in OO Obilade (ed), A Blueprint for Nigerian Law (Faculty of Law University of Lagos, 1995) 4, FN Monye 'The Need to Restrict the Scope of Application of Exemption Clauses' (1991) 2 JUSTICE 19 and W Ajai 'Recent Trends in Fundamental Breach and Exclusion Clauses in the Consumer/Commercial Transaction' (1992-93) 16 Journal of Private and Property Law 37, IE Sagay Nigerian Law of Contract (Ibadan: Spectrum 2000).

11 (1980) AC 827

writers on the way forward. Part Four is devoted to the consideration of recent judicial decisions and legislative intervention aimed at protecting the interest of consumers on this subject in Nigeria. Part Five examines the challenges facing the attempt to enact the Consumer Contract (Unfair Terms) Bill into law. The paper is concluded in Part Six with suggestions.

Part 2 – Judicial Development of the Doctrine of Fundamental Breach in Nigeria

Nigerian courts have considered and applied the doctrine of fundamental breach in a number of cases. One of the earliest cases where the issue was considered was *Adel Boshali v Allied Commercial Exporters Ltd*.[12] The case involved a contract for the sale of goods, where the buyer rejected the goods on the ground of their non-conformity to sample and description. The question was whether, in the first place, there was a breach of contract and, if so, whether the exemption clause could be applied in aid of the seller. The Judicial Committee of the Privy Council held that there was a breach of contract as the clothes supplied were not in conformity with their description. On the issue of the exemption clause, it was held, overruling the Federal Supreme Court, that:

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

Similarly, in the case of *Ogwu v Leventis Motors*,[13] the lorry supplied to the plaintiff under a hire purchase agreement with the defendants was at variance with the contract specification. It was in such a deplorable state that the engine soon broke down. The Court held that this involved a fundamental breach and, consequently, the defendants could not rely on the exemption clauses in the hire purchase agreement to avoid liability. In *Niger Insurance v Abed Brothers*,[14] the Supreme Court held that the implied term to repair the vehicle within a reasonable time was a fundamental term of the contract of insurance. Having breached this term, therefore, the appellants could not rely on the exemption clause in the insurance policy to avoid the consequences of its breach. Other relevant cases include *Polymera Industries Ltd v Societe Recharges Etudes Applications Plasitques*[15] (business to business transaction), as well as *CFAO v Animotu*[16] (consumer transaction), both of which were hire purchase cases where the courts applied the fundamental breach doctrine to preclude the application of exclusion clauses.

12 (1961) All NLR (Part 4) 917.
13 (1963) NNLR 115.
14 [1976] NCLR 37.
15 (1964) LLR 176.
16 (1966) 1 ALR Commercial 289.

In all these cases, the courts unequivocally applied the fundamental breach doctrine, regardless of whether the parties were consumers or business entities. Thus, the critical question was not about the nature of the parties, but rather, whether or not there was a breach of such nature as to render the act done by the defaulting party radically different from that contemplated under the contract. If this was answered in the affirmative, no exclusion clause, however broadly crafted, was allowed to override the obligations of the contract.

However, following the House of Lords decision in *Photo Productions V Securicor*,[17] the Nigerian Supreme Court was accused of having made a volte-face regarding its approach towards the application of exclusion clauses, without regard to local conditions and the interests of consumers.[18] This was because of the Court's decisions in three cases which came up in quick succession before it, each of which touched on the applicability or otherwise of exclusion clauses. The cases concerned are *Akinsanya v United Bank for Africa Ltd*,[19] *Attorney-General, Bendel State v United Bank for Africa Ltd*, [20] and *Narumal & Sons v Niger Benue Transport Company Ltd*.[21] 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. The Nigerian response, however, did little more than declare the new position in the United Kingdom, as none of the three cases actually turned on the issue of exclusion clause. In *Akinsanya v United Bank for Africa Ltd*, the appellant entered into a contract with the respondent bank to open a letter of credit in respect of a business transaction with a Swiss Company. The contract between the appellant and the respondent contained relevant exclusion clauses as follows:

> [i] It is understood that our engagement to pay shall continue in force notwithstanding any changes in our and/or your constitution and that no responsibility is to attach to yourselves or your correspondents as to the documents, beyond seeing that they purport to be in order.
> [ii] We agree to hold you and your correspondents harmless and indemnified in respect of any loss or damage that may arise in consequence of error or delay in transmission of your correspondents' messages or misinterpretations therefore or from any cause beyond your or their control.[22]

The case of the appellant was that the respondent could not rely on the exclusion clauses because of its breach of the contract, occasioned by its negligent performance of its contractual obligations, to wit, not taking adequate steps to verify the identity of the payee before making the payment. The Court however,

17 Ibid. Note 10.
18 Ibid. Note 8.
19 Akinsanya v UBA (1986) 4 NWLR (Pt. 39) 273.
20 (1989) NWLR (Pt.106) 730.
21 (1989) 2 NWLR (Pt.108) 739.
22 Akinsanya v. UBA. (1986) 4 NWLR (Pt. 39) 273.

held that there was no breach by the Respondent of the conditions, and having therefore performed the obligations under the contract with the appellant, the respondents were entitled to the benefit of the exclusion clauses. According to Karibi Whyte JSC,

> Respondents were therefore not negligent in regard to the question of whether or not the goods were shipped on a Conference Line Vessel. Respondents have no responsibility beyond being satisfied that the information ex facie in the documents presented for payment are correct… There was nothing more for the Respondent to do other than satisfy themselves on the document before them that the ship is a conference line vessel. This they have been held to have done since nothing on the face of the document … put them on inquiry.[23]

Having held, therefore, that there was no negligence or breach of duty, the Court's subsequent statements in favour of the 'construction of the clause, following the Interpretation theory, as against the Rule of Law theory'[24] were mere obiter.

Similarly, the case of *Attorney-General, Bendel State & Ors. v. United Bank For Africa Ltd* involved a credit transaction in respect of a proposed purchase of an aircraft by the appellants, in respect of which an irrevocable documentary credit was opened, at their request, in favour of the seller of the aircraft.[25] The contract between the appellant and respondent contained similar exclusion clauses as obtained in the *Akinsanya* case. Before payment was effected, the appellants informed the respondent branch office in Benin City that the aircraft, the subject matter of the contract, and letter of credit had been sold and payment should be suspended. However, this information was only communicated by the Benin City Branch to the head office two days after the beneficiary was paid by the confirming bank. The Court found that the respondents did not conform to the stipulations of the contract with the appellant, as contained in the letter of credit and the application for the credit. On this basis, the appellants had a right to reject the documents and refuse to reimburse the bank or to recover the amount prepaid if, as in this case, the credit had been prepaid. However, rather than reject the documents, the appellants accepted the non-conforming documents and did not raise any query until a year later, when a panel of enquiry was set up to investigate the matter. It was on the basis of this inexplicable delay that the court held 'where the buyer fails reasonably to reject non-conforming documents, it is manifestly inequitable to permit him at a later date to update his own act to the detriment of the bank.' The decision in favour of the respondent bank was, therefore, not based on the application of the exclusion clause to avoid the consequences of the negligence of the respondent or breach of its obligations. As noted by the Supreme Court, the decision was not hinged on the application or otherwise of the exclusion

23 Ibid.
24 Ibid.
25 (1989) NWLR (Pt 106) 730.

clause, which provided that '[w]e agree to hold you and your correspondents harmless and indemnified in respect of any loss or damage that may arise … from any cause beyond your control.' This was because, in the words of the Court,

> the loss in this case was not beyond the control of the defendant … I however agree that the appellants' delay and inaction in rejecting the payment to Stiber for a period of thirty one months after the receipt of the documents defeats their claims in this action.[26]

Similarly, Bello JSC stated:

> I would have found the Respondent liable for breach of contract or negligence but for the fact that the Appellants slept over their right for a period of over thirty months. Undue delay by a party to a credit in the exercise of his right to reject constitutes ratification or waiver of any irregularity committed by the defaulting party. Undue delay may also amount to estoppell… [T]he Appellants slept over their right for over thirty months. Their claim must fail on this ground.[27]

In both cases, therefore, the issue of liability appear to have been determined on grounds other than the reliance on the exclusion clause. In *Narumal & Sons v Niger Benue Transport Company Ltd*,[28] the action was for charter fees owed by the appellants in respect of a vessel let to them by the respondents. The appellants however, counterclaimed for damages suffered by them when the goods conveyed in the vessel became soaked in sea water and, therefore, depreciated in value as a result of a fault in the vessel. The main contention of the appellant was that the vessel was not seaworthy at the commencement of the voyage, contrary to an express stipulation in the agreement. Consequently, the appellant argued that having breached this express fundamental term, the respondent could not rely on the exclusion clause. Again, the Supreme Court made statements to the effect that the rule of construction was the applicable rule and not the rule of law, holding that the latter was no longer good law. According to Oputa JSC,

> there is no rule of law that an exception clause is nullified by a fundamental breach of contract or breach of a fundamental term. In each case, the question is one of construction of the contract to find out whether the exception clause was intended to give exemptions from the consequences of the fundamental breach.[29]

The fact, however, is that there was no fundamental breach since the vessel was held to be seaworthy. Thus, subsequent pronouncements on the hypothetical

26 Per Coker JSC .
27 Per Bello JSC.
28 Ibid.
29 Per Oputa JSC at 768

scenario, that even if it was not seaworthy, the exclusion clause was broad enough to cover this contingency, having been couched in terms that the respondent 'accepts no responsibility or liability for any damage or loss however caused to the goods',[30] were mere obiter.

PART 3 Appraisal of the Existing Literature and the Divergent View of Authors

The power relation between suppliers of goods and services and consumers with regard to the scope and import of exclusion clauses began to attract the interest of Nigerian academics soon after these three Supreme Court decisions. In fact, right after the House of Lords decision in *Photo Production Limited v Securicor Transport,*[31] CK Agomo, in an early reflection on the case,[32] expressed the view that it was a setback to the consumer protectionist campaign and urged Nigerian courts to avoid the likely pitfalls of the case bearing in mind the different prevailing conditions in the United Kingdom and Nigeria. The writer concluded that '[g]enerally, we have to wait and see how far the Nigerian courts will be prepared to go along with the House of Lords.'[33]

The subject became popular in academic write-ups following the three straight decisions of the Supreme Court that seemingly affirmed the rule of construction as the prevailing rule in Nigeria. All the writers[34] expressed concerns on the predominant influence of the *Photo Production* case on the Supreme Court, when the Nigerian courts were not bound to follow the decision of the House of Lords. Sagay, described the development as an 'uncritical imitation of English law,' stating that 'the English decision was with respect, mechanically followed as if it was binding on the Supreme Court of Nigeria.'[35]

Agomo rightly noted that:

> In the three cases examined the question of exclusion clauses and fundamental breach were not directly in issue, which means that all the statements were made obiter… However, the facts remains that the highest court of the land deemed it important to say something concerning the issue, even if only by the way. It will therefore amount to our burying our heads in the sand like the proverbial ostrich by relying on a technicality instead of facing the reality of the situation. The rule of construction is now the applicable rule in Nigeria.[36]

30 Ibid.
31 Ibid.
32 Agomo, C.K., Effect of the Demise of the English Doctrine of Fundamental Breach on the Nigerian Law of Contract, above n 9 at pp.69-76.
33 Ibid, p 76.
34 Agomo, above n 9.
35 Ibid.
36 Ibid, p 10.

Others, like Ajai, based their concerns on the realities of the Nigerian situation, which, unlike the system in the United Kingdom, does not have in place a well-developed system of consumer protection. The insurance industry is also not well developed in Nigeria. According to Ajai:

> In Nigeria, however, it is notorious fact that the practice of taking out liability insurance in commercial transaction is rare and that people have little or no confidence (and deservedly too) in the insurance industry. Conditions are therefore not the same as in the UK and our courts cannot pretend that they are.[37]

There is a consensus that Nigeria should adopt a two-pronged approach in response to the challenge. The first is to enact a law similar to the *Unfair Contract Terms Act 1977* of the United Kingdom, while the second is for the Nigerian courts to be proactive in their approach in construing the effect of fundamental breach in consumer contracts. According to Agomo:

> The Unfair Contract Term Act has no direct effect on the Nigerian law of contract, being a post January 1, 1900 statute. Indirectly however, it may come to have some effect in so far as the Nigeria courts follow English decisions in appropriate cases. The idea behind the Act is a worthy one; therefore, we hope that the Nigerian lawmakers would borrow a leaf from that piece legislation at the right time.[38]

Ajai posited that nothing stops an activist and progressive judiciary from developing the law in this direction considering that in Nigeria, law reform is usually sluggish.[39] According to the learned writer:

> There is the need for a law on 'unconscionable' or 'unfair' contract terms. The court should also move in that direction even before the legislature intervenes and even complements statute law…

Monye was sceptical about the prospect of having legislative intervention in this area for two important reasons. First, numerous suggestions had been made in this regard, but the legislature seemed to have turned a deaf ear to the need for such legislation. Also, one should not lose sight of the problem of implementation. She expressed the view that the rule of law principle be retained as the applicable rule. This will enable the court to decide each case on its merit. According to the learned author what is required is an effective development of the case law to take care of the lacuna left by the legislature and this can only be achieved by a positive exercise of judicial discretion to achieve a just result.[40]

37 Ajai, above n 9 at pp 45-6.
38 Agomo, above n 9 p 71.
39 Ajai, above n 9 at.43.
40 Monye, above n 7 at p 25.

Perhaps Monye's pessimism is justified, considering that over a decade after the identification of the problem there is yet to be in most parts of Nigeria an effective consumer protection law to tackle the problem. The *Nigerian Consumer Protection Council Act*, which was promulgated in 1992 to provide speedy redress to consumers in diverse areas related to consumer protection, quite unfortunately makes no specific mention of this very important and highly pervasive problem. There are, however, some potentially valuable provisions under the Act, notably Section 31, which gives the Minister power to make regulations and may be utilised to provide succour to hapless victims of unconscionable terms in contracts.[41] Things appeared to be at low ebb at the time of the three Supreme Court decisions and the future appeared dim for the doctrine of fundamental protection and consumer protection.

PART FOUR Review of Post 1989 Judicial Responses to Exclusion Clauses and Fundamental Breach

As discussed above, in the Supreme Court cases of *Akinsanya v United Bank for Africa*, *Attorney General Bendel State & Ors. V. United Bank of Africa* and *Narumal& Sons v Niger Benue Transport Company Ltd*, the pronouncements of the Supreme Court of Nigeria concerning the application of the rule of construction vis-à-vis the rule of law were mere obiter, and had nothing to do with the decisions arrived at by the Court. Furthermore, in fairness to the justices, the three cases were not consumer transactions. Rather, they were clear examples of business-to-business transactions. In the case of *Attorney-General Bendel State v United Bank for Africa*,[42] the other party was even an agency of the state. Thus, the relative power situation can be said to be fairly balanced. Accordingly, in our view, the Court did not make any categorical statement which can be said to apply directly to consumer contracts if and when one comes up in the future. Indeed, a consideration of the cases arising in this area since that period, reveal the preparedness of Nigerian courts to look into the circumstances of individual cases to do justice to all parties, including by reverting to the rule of law in aid of the consumer or enforcing the exclusion clause against him/her, according to the circumstances of the case and in the interest of justice.

In the case of *DHL v Chidi,*[43] for example, the case was a business to consumer transaction pertaining to liability for non-delivery of parcel by a courier company. Edozie JCA (as he then was) held that the non-delivery of the parcel constituted a fundamental breach of the postal contract and that the exemption clause relied upon by the appellant was inoperative.

Commenting on this case, Sagay expressed the view that the case was *per incuriam* because Narumal's case was not brought to the attention of the court. The learned

41 To the best of our knowledge, no such regulations have so far been made.
42 Ibid.
43 [1994] 2 NWLR (Pt329) 720 at 742.

writer concluded by calling on the Supreme Court as follows:

> There is, therefore, a compelling need for the Supreme Court to give a clarifying judgment which as a matter of principle, recognizes that contracts in Nigeria are concluded and performed in a totally different socio-economic and cultural environment from that of United Kingdom. [44]

On the other hand, in *Iwuoha v Nigerian Railway Corporation,*[45] which was also a consumer transaction, the circumstances were such that the Court deemed it reasonable and expedient to uphold the application of the exclusion clause. The case involved a contract of carriage, whereby the respondents undertook to transport by rail the appellant's three boxes from Aba to Bukuru. In the course of the journey, two of the boxes got lost, as a result of which the appellants claimed compensation to the tune of N40 500, being the full value of the lost goods. The respondent accepted that it received the packages from the appellant and also accepted liability for losing two of the bags. However, it denied the claim for N40 500, rather stating that the claim was limited to only N20 per box, as provided in the exclusion clause contained in the contract. The appellant had failed to declare the value and contents of the packages, as required under the *Nigerian Railway Corporation Act* and regulations, which were, in turn, incorporated by reference into the waybill issued to the plaintiff at the time of payment. The question of whether the waybill constituted an integral part of the contract between the parties and whether the plaintiff had knowledge of the clause and was bound by it were all answered in the affirmative.[46] Relevant provisions of the *Railway Act* and regulations were displayed prominently all around the railway station and the appellant was deemed to be aware of the terms. Non-conformity with these terms entitled the respondents to rely on an exclusion clause in the Act and regulations limiting the liability of the railway to only N20 per package. Liability for loss of the packages was therefore limited to N40.

This case is justified on the basis that the exclusion was not absolute, and neither was it unconscionable. It merely provided what, in our view, were reasonable conditions precedent to entitlement to recovery of the full value of loss sustained by customers of the railway company. The conditions to declare the value of the goods, and submit them for inspection for verification purposes were expedient measures to minimise fraudulent claims, which, if unchecked, can ruin the profitability and even viability of the carrier. This is a clear example of a situation where the accommodation of adhesion consumer contracts whose terms are properly incorporated in contracts is justified. This is because, as observed by Burgess, such a contract is ideally suited to provide support for mass-market institutions on which modern societal progress is based. [47] In other words, this

44 Sagay, p 201.

45 [1997] 4 NWLR (Part 500) 419.

46 This gives a little concern however, to the extent that the waybill was issued after payment.

47 See A Burgess, 'Consumer Adhesion Contracts and Unfair Terms: A Critique of Current

type of contract derives legitimacy from the fact that it serves the public interest.[48]

In the subsequent case of *Eagle Super Pack (Nig) Ltd v African Continental Bank Plc,*[49] a business to business transaction, the issue was whether the respondent bank, which was sued for breach of contract by the plaintiff, could rely on the provisions of the Uniform Customs Practice for Documentary Credits for the purpose of excluding liability for the breach of its contract with the plaintiff. The court, however, held that in order for the provisions to be applicable, it had to have been incorporated into the contract between the parties. There was no evidence to this effect and the respondent bank was 'caught by the well established rule in the law of contract that that a defendant relying on an exemption clause must show that the plaintiff had been made aware of the exemption clause'.[50] Having held that the exemption clause was not part of the contract between the parties, the Supreme Court however, further went on to hold that an exemption clause did not provide an absolute defence, as it may not avail a party who has been guilty of a fundamental breach of the contract.[51] The Supreme Court, therefore, appeared to have reintroduced the rule of law approach, even though it had actually been established that the clause had not been incorporated into the contract.

Unlike earlier cases discussed above, the two next cases involve the interpretation and application of statutory safeguards against the abuse of exclusion clauses, which the court applied in aid of the injured party.[52] The first of these cases was *International Messengers (Nig) Ltd v Pegofor Industries Ltd*.[53] Here the airway bill formed the basis of the contract of carriage by air between the appellant and respondent. By its terms, the appellants agreed to transport the respondent's faulty machinery to Italy for repairs. The Bill contained an exemption clause limiting the liability of the appellant/carrier to N500. With the appellants having failed in their obligations under the contract to transport the machine within the agreed time or at all, the respondent ordered new parts and sued the appellants for damages for breach of contract. The appellants attempt to rely on the exclusion clause met a brick wall, as the court held that the appellant could not rely on the clause which was contrary to Section 190 of the *Contract Law of Anambra State*. The section provides that:

> nothing in the foregoing shall be construed as to enable a party guilty of fundamental breach of a contract, or breach of a fundamental term to rely upon an exemption clause so as to escape liability.

This decision was followed shortly afterwards by the Court of Appeal in *Union*

Theory and a Suggestion' (1986) 15 Anglo-Am. L. Rev 255 at 274.

48 Ibid.

49 [2006] 19 NWLR (Pt 1013) 20.

50 Per Oguntade JSC (as he then was) at p 45.

51 Per Tabai JSC at p 59

52 Anambra State Contract Law 1986, discussed below.

53 [2005] 15 NWLR (Pt 947) 1.

Bank of Nigeria Plc v Omniproducts (Nig) Ltd & Anor.[54] The case involved a foreign exchange transaction between the appellants and the respondents, in respect of which the appellants sought to rely on a broad exemption clause in the contract that excluded all liability. The Court however relied on section 190 of the *Contract Law*, *Cap 32 of Anambra State*, as well as the case of *International Messengers (Nig) Ltd v Pegofor Industries Ltd*,[55] to hold that the exemption could not exempt liability for negligent execution of contract.

In none of these cases can there be said to have been a miscarriage of justice on the basis of the application of the rule of construction, as the courts in Nigeria have made it clear that they are prepared to revert to the rule of law where the justice of the case so demands. Admittedly, however, they have been aided in achieving this objective in the latter two decisions by the existence of Anambra State law. In *Eagle Super Pack (Nig) Ltd v African Continental Bank Plc*, it might have been a little more difficult but for the fact that at the end of the day, the provisions containing the exclusion clause were found not to be part of the contract, while in *Iwuoha,* the appellant's non-conformity with the requirements of the statute regulating carriage of goods by rail jeopardised its claim and enabled the respondent benefit from the clause limiting its liability.

On the whole, the courts have been quite proactive. It can, however, only do so much. There is therefore a need for statutory intervention that mandates minimum standards of protection for consumers from unfair contract terms.

PART FIVE: Review of Pockets of Legislative Intervention

Rather unfortunately, at present, there is no consumer protection specific statute in Nigeria that comprehensively deals with the multifaceted aspects of the protection of consumers, including with regard to unfair contract terms. The *Consumer Protection Council Act*,[56] which establishes the Nigerian Consumer Protection Council to respond to diverse issues related to consumer welfare, is conspicuously silent on the issue of exclusion clauses and unfair terms in contracts.[57] However, it

54 [2006] 15 NWLR (Pt 1003) 660.

55 Above n 53.

56 The Act was promulgated in 1992. It is now in Cap C25, Laws of the Federation of Nigeria 2004.

57 See Section 2 of the Act, which provides for that the functions of the Council shall be to:

(a) provide speedy redress to consumers complaints through negotiations, mediation and conciliations;

(b) seek ways and means of removing or eliminating from the market hazardous products and causing offenders to replace such products with safer and more appropriate alternatives;

(c) publish from time to time, list of products whose consumption and sale have been banned, withdrawn, severally restricted or not approved by the Federal Government or foreign governments;

(d) cause an offending company, firm, trade, association or individual to protect, compensate, provide relief and safeguards to injured consumers or communities from adverse effects of technologies that are inherently harmful, injurious,

does give the Minister power to make regulations as necessary to give full effect to the provisions of the Act, and it is submitted, consumer protection.

Apart from the Consumer Protection Council Act, whose prospective role in the new dispensation is discussed further below, there are some provisions in other relevant statutes that, in varying degrees, touch on the issue of exemption clauses and unfair contract terms. These include the sale of goods laws of the various states,[58] the *Hire Purchase Act*,[59] the *Insurance Act*,[60] the *Weight and Measures Act*,[61] and the *Standards Organsation Act*.[62] Under the *Sale of Goods Act*, certain terms are implied into every contract of sale. These include the implied condition that the seller shall have a right to sell the goods, that the goods shall correspond with the description, that subject to certain requirements, the goods shall be fit for their purpose and shall be of merchantable quality, and also that the goods shall correspond with sample in the case of sale by sample.[63] The protection offered by these provisions is however, effectively negated by the fact that the provisions are only applicable in the absence of evidence of contrary intention, as the law allows the parties, including suppliers of goods to contract out of the obligations.[64] Additionally, Section 55 of the *Sale of Goods Act* provides that 'where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage…' The statute, therefore, affords very limited protection against unfair contract terms because, notwithstanding the inequality of bargaining power, it still holds sacred the principles of freedom and sanctity of contract.

violent or highly hazardous;

(e) organise and undertake campaigns and other forms of activities as will lead to increased public consumer awareness;

(f) encourage trade, industry and professional associations to develop and enforce in their various fields quality standards designed to safeguard the interest of consumers;

(g) issue guidelines to manufacturers, importers, dealers and wholesalers in relation to their obligation under this Decree;

(h) encourage the formation of voluntary consumer groups or associations for consumers well being;

(i) 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;

(j) encourage the adoption of appropriate measures to ensure that products are safe for either intended or normally safe use; and

(k) perform such other functions as may be imposed on the Council pursuant to this Decree.

58 See for example the Sale of Goods Law Cap S2 Laws of Lagos State 2003, which is an almost exact reproduction of the Sale of Goods Act 1893.

59 Cap H4, Laws of the Federation of Nigeria 2004.

60 See the Insurance Act 2003.

61 Cap W3, Laws of the Federation of Nigeria 2004.

62 Cap S9, Laws of the Federation of Nigeria 2004.

63 See sections 13-15 Sale of Goods Law of Lagos State, Cap S2 Laws of Lagos State 2003 and the Sale of Goods Law of different states.

64 Section 13 of the Sales of Goods Law begins with the phrase '[i]n a contract of sale, unless the circumstances of the contract are such as to show a different intention'.

On its part, the *Hire Purchase Act* contains mandatory provisions protective of the hirer/consumer and such oppressive terms are void if included in the hire purchase transaction.[65] Similarly, Section 55 of the *Insurance Act 2003*, provides mandatory provisions protective of the interests of insured parties as consumers, to the extent that the provisions prevent spurious repudiation of liability on the part of insurers for the breach of sometimes irrelevant terms which are couched as warranties, applying the notorious 'basis of the contract' clause.[66] To the extent, however, that these two latter statutes with their mandatory protective provisions are only applicable in particular transactions falling within their limited scope, ie hire purchase and insurance contracts, they are of no use in the vast majority of other contractual dealings, notably those dealing with sale of goods and services, banking, carriage of goods and persons, etc. What is needed, therefore, is a broad-based statute that has a much wider reach.

To the knowledge of these writers, the first statutory intervention giving statutory basis to the rule of law approach in contracts generally came from Anambra State via its *Contract Law 1986*. The *Contract Law of Anambra State* is an attempt to codify principles of commercial contracts ranging from general principles of the *Law of Contracts*, *Sale of Goods* and *Hire Purchase*. Sections 189-190 which are directly relevant to this discourse provide thus:

> 189. Parties to a contract shall have the right to limit or exclude their liability for breach of contract; provided that the exemption clauses are clearly expressed and without ambiguity.

---

65 Section 3 of the Hire Purchase Act, Cap H4, Laws of the Federation 2004 provides: "The following provisions in an agreement that is to say, any provision:

(a) whereby an owner or a person acting on his behalf is authorized to enter upon any premises for the purpose of taking possession of goods which have been let under a hire-purchase agreement or is relieved from liability for any such entry; or
(b) 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 agreement by him under this Act; or
(c) whereby a hirer, after the determination of the hire-purchase agreement or the bailment in any manner whatsoever, is subject to a liability which exceeds the liability he would have been subject if the agreement had been determined by him under this Act; or
(d) whereby any person acting on behalf of an owner or seller in connection with the formation or conclusion of a hire-purchase or credit-sale agreement is treated as or deemed to be the agent of the hirer or buyer; or
(e) whereby an 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; or
(f) whereby a hirer or buyer is required to avail himself of the services, as insurer or repairer or in other capacity whatsoever, of a person other than a person selected by the hirer or buyer in the exercise of his unfettered discretion."

66 See for example, cases like Akpata v African Alliance Insurance Co (1967) 3 A.L.R. (Comm.) 264 and Northern Assurance Co v. Wuraola (1969) NCLR 4, which were both decided under the common law freedom of contract regime, before statutory intervention..

> 190. Nothing in the foregoing provisions shall be construed as to enable a party guilty of a fundamental term to rely upon an exemption clause to escape liability.

While preserving the utility of limiting or exclusion clauses, provided they are clearly worded, the law codifies the rule of law approach. It is however submitted that the threshold established under section 189 is lesser that what is expected. For example, the standard of reasonableness is not made a requirement for the validity of a limiting or exclusion clause. In our view, the law should have comprehensively codified the conditions established in plethora of cases for the court to allow a party to rely on a limiting or exclusion clause. A review of the applicable cases in this regard will show that the documents containing the clause must have been an integral part of the contract and not a mere acknowledgement of payment.[67] Where the clause is contained in a signed document reasonable notice of the clause must have given,[68] the exclusion clause will be construed strictly against the party relying on it.[69]

A further limitation of the law, in our view, is that it failed to define 'fundamental term'. A lack of definition of breach of fundamental term means that this will depend on the facts of each case thus negating the objective of certainty and predictability, which the legislative intervention was meant to achieve.

Under the said Anambra *Contracts Law*, certain terms are implied into every contract of sale. These include the implied condition that the seller shall have a right to sell the goods, that the goods shall correspond with the description, that subject to certain requirements, the goods shall be fit for their purpose and shall be of merchantable quality and also that the goods shall correspond with sample in the case of sale by sample. Unfortunately, these provisions are not of much practical significance where the parties are not of equal bargaining power. This is because section 257 of the *Contracts Law* allows parties to exclude any of these implied terms if they so wish.[70]

The Consumer Contracts (Regulation of Unfair Terms) Bill 2010

The Consumer Contracts (Regulation of Unfair Terms) Bill 2010 (the Bill) consists of thirteen sections and four schedules. Schedule 1 contains a list of types of contracts excluded from the operation of the Bill while Schedule 2 lists the factors to be considered in determining whether a term satisfies the requirement of good faith. Schedule 3 contains a list of qualifying bodies to which consumers

67 Chapteon v Barry UDC [1940] 1 KB 532 CA, Mc Cutcheon v David Mac Brayne Ltd. [1964] 1 All ER 430.

68 Parker v South Eastern Ry Co. (1877) 2 C.P.D. 416. Olley v Marlborough Court Ltd [1914) 1 KB 532.

69 Baldry v Marshall (1925) 1 KB 260, (1924) ALL ER sep 155, Andrew v Singers (1934) 1 K.B. 17,

70 Monye, above n 9 at p 24.

could lodge complaints, while Schedule 4 provides a list of terms that may be considered as unfair.

The Bill applies to 'pre-formulated standard contracts'.[71] That is, any term in a contract concluded between a seller or supplier and a consumer where such a term has not been individually negotiated.[72] A 'consumer' means a natural person who, in making a contract to which the Bill applies, is acting for purposes that are outside his business.[73] A term of a contract shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has not been able to influence the substance of the term[74]. The onus of proving that such a term was individually negotiated lies on the seller.[75]

A term is considered to be unfair when it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.[76] In determining whether a term is unfair, regard shall be had to the nature of the goods or services, all circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.[77] In determining whether a term satisfies the requirement of good faith, regard shall be had to the tests listed in Schedule 2. Schedule 3 contains an indicative and non-exhaustive list of the terms that may be regarded as unfair. It would appear from the use of the word 'may' that the schedule is not meant to operate as a 'black list'[78] of prohibited terms. The contents of the list merely raise a presumption that the terms might be unfair. It is, therefore, a question of fact to be determined based on evidence on a case-by-case basis, whether a particular term is unfair. In our view, it would have been better for the Bill to carefully identify some of the terms that are considered abhorrent and declare them as void based on public policy. This was the approach adopted in the Hire Purchase Act and Insurance Act.[79] An unfair term is declared not to be binding on the consumer.[80] This, however, does not affect the contract as a whole if the contract is able to stand on its own without the unfair term.[81]

Section 7 obligates the seller or supplier to ensure that the terms of a written limiting or exclusion clause is expressed in plain, readable, intelligible language, and entrenches the rule in case of ambiguities. Under Section 9; the Director, Fair Trading in Consumer Protection Council has responsibility for considering any

71 Section 3(4).
72 Section 3(1).
73 Section 2.
74 Section 3(3).
75 Section 3(5).
76 Section 4(1).
77 Section 4(2) and section 6.
78 See Michael Furmston, above n 1.
79 Both discussed above.
80 Section 5(1) and 8(1).
81 Section 5(2) and 8(2).

complaint made to him that any contract term drawn up for general use is unfair, unless

> the complaint appears in the opinion of the Director to be frivolous or vexations; or
>
> a qualifying body has notified the Director that it agrees to consider the complaint.[82]

The above provisions seem to aim at cases before a breach has occurred. It does not, however, state who qualifies to present a complaint. It is submitted that a complainant should be extended to include non-governmental bodies for the protection of consumer interests. For example, if such a group considers a particular clause in a standard form contract in any sector, such as banking, to be unfair, there is no reason why their complaint should not be entertained. Such a liberal provision will give consumer protection a boost.

The Director may not consider the complaint where the following bodies listed in Schedule 3 have agreed to consider the complaint:

1. Electronic and Data Protection Registrar in Nigeria.
2. Managing Director, Power Holding Company of Nigeria (PHCN).
3. Executive Directors, All Communication Networks operating in Nigeria.
4. Director-General, All States Water Boards.
5. Managing Director, Nigerian Railway Regulator.
6. Every Weights and Measures authority in Nigeria.
7. Chief Executive Officers, SMEDAN.
8. Chief Executives of Associations, Department of Petroleum and Gas Resources in Nigeria.

In our view, the regulatory bodies of industries or sectors where use of standard form contracts are most prevalent ought to be included. These include banking, insurance, hire purchase, laundry, aviation contract, maritime contract, etc. The list of qualifying bodies should accordingly be expanded to include the regulatory bodies in these sectors. In fact, they should feature first and only be followed by those listed in Schedule 3.

The Director, Fair Trading or any qualifying body may apply for an injunction, including interim injunctions, if he considers it appropriate so to do.[83] In this regard, the qualifying body must have given the Director at least fourteen days notice

82 Section 9 (1).
83 Section 9(2) and (3), and Section 10.

and obtained the consent of the director.[84] Complaints may also be made to the Minister who may refer the matter to the Attorney-General to bring proceedings for injunction. The Minister is also vested with the power to make arrangement for the dissemination in such form and manner as they consider appropriate, such information and advice concerning the operation of the Bill as may appear to them to be expedient for public enlightenment purpose.[85] Express power is vested in the Director, the Minister and qualifying bodies to exercise the powers vested in them by the Bill.[86]

There is the risk of having too many persons or officers responsible for the implementation of the regulation. It is important to guard against multiplicity of actions. It is sufficient, in our view, if only the office of Director is charged with the responsibility and given a time frame within which to respond to complaints, while any interested party is allowed to appeal against the action or inaction of the Director to the Minister. This should not be allowed to become the case of too many cooks spoiling the broth.

Section 9 envisages that the Bill, when enacted into law, shall be administered by the Director, Fair Trading in Consumer Protection Council. This is remarkable in a number of ways. First, no such position or office is expressly provided for in the Consumer Protection Council Act.[87] It is, therefore, better, in our view, to avoid being specific in terms of which officer shall do what. It is sufficient if the power is vested in the Council. Second, since the provisions of the Bill were expected to be administered by the Consumer Protection Council, it would have been better to leverage on the provisions of section 31 of the Consumer Protection Council Act to make a regulation. Section 31 provides:

> The Council shall, with the approval of the Minister, have power to make regulations as may in its opinion be necessary or expedient for giving full effect to the provisions of this Act and for the administration thereof.

Section 2 provides that 'the Council shall (a) provide speedy redress to consumers' complaints through negotiation, mediation and conciliation. It is submitted that the object of the CPC is wide enough to accommodate this intervention. The advantage of regulation is that it is quicker and faster than the procedure for lawmaking. May we use this opportunity to call on the Consumer Protection Council to dust the Bill and prepare a regulation that shall be submitted to the Minister for approval and gazetting.

84 Section 10(2) and (3).
85 Section 11(7).
86 See section 12.
87 Cap C25 Laws of Federation of Nigeria 2004.

Challenges

As remarkable and far reaching as the provisions of the Bill may be, it has a few downsides. First, the Bill was introduced during the Third Session of the National Assembly, whose tenure ran from 2007-2011. The Bill had received little or no publicity in the media and was unable to garner the much needed support of stakeholders. Regrettably, the Bill was not passed into law before the end of the tenure of the Third Session of the National Assembly. The implication is that the Bill will have to be reintroduced at the National Assembly to begin a fresh cycle of legislative procedure.[88] This has not been done as at the time of writing this paper.

Secondly, the Bill, if enacted into law, will apply only in the Federal Capital Territory. This is because Nigeria operates a federal system consisting of thirty-six states and a Federal Capital Territory.[89] Legislative power of the federation is divided between the Federal and State by vesting exclusive powers in the National Assembly in respect of matters listed in the Exclusive Legislative List. In this regard, section 4 (1)-(5) of the 1999 Constitution provides:

4. (1) The legislative powers of the Federal Republic of Nigeria shall be vested in the National Assembly of the Federation, which shall consist of a Senate and a House of Representatives.
(2) The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part I of the Second Schedule to this Constitution.
(3) The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as

88 See section 58 of the 1999 Constitution provides:
(1) The power of the National Assembly to make laws shall be exercised by bills passed by both the Senate and the House of Representatives and, except as otherwise provided by subsection (5) of this section, assented to by the President.
(2) A bill may originate in either the Senate or the House of Representatives and shall not become law unless it has been passed and, except as otherwise provided by this section and section 59 of this Constitution, assented to in accordance with the provisions of this section.
(3) Where a bill has been passed by the House in which it originated, it shall be sent to the other House, and it shall be presented to the President for assent when it has been passed by that other House and agreement has been reached between the two Houses on any amendment made on it.
(4) Where a bill is presented to the President for assent, he shall within thirty days thereof signify that he assents or that he withholds assent.
(5) Where the President withholds his assent and the bill is again passed by each House by two-thirds majority, the bill shall become law and the assent of the President shall not be required.

89 Section 2(2) of the 1999 Constitution provides that 'Nigeria shall be a Federation consisting of States and a Federal Capital Territory'.

otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of States.

(4) In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say:

(a) any matter in the Concurrent Legislative List set out in the first column of Part II of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and
(b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

(5) If any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall, to the extent of the inconsistency, be void.

The foregoing provisions of Parts I and II of the Second Schedule show that the National Assembly has powers to make laws on all the subject matters on the Exclusive and Concurrent Legislative Lists. Any subject matter not listed on the Exclusive and Concurrent Legislative Lists are residual to the States. The power of the National Assembly to make laws on residual matters is limited to the Federal Capital Territory.[90] A perusal of the sixty-eight items on the Exclusive List and thirty items on the Concurrent List show that the subject matter of the Bill (consumer protection, contract or sale of goods) are not contained in either of the legislative lists. The implication is that the subject matter of the Bill falls within the residual power of the States. Therefore, even if the Bill were able to sail through the National Assembly, it would only apply in the Federal Capital Territory. There is a need for the state legislature across the country to take the initiative of reforming their laws on contracts, sales of goods and related issues to adequately safeguard consumer protection.

CONCLUSION

This paper has examined judicial and legislative developments in the area of unfair contract terms under Nigerian law. The examination reveals that in the few cases that have come before them, the courts have, to a large extent, and within the bounds of fairness and reasonability, risen to the occasion to safeguard hapless consumers from the harsh application of unfair contract terms. To achieve this objective, and despite statements in earlier Supreme Court cases in favour of

90 See the case of Attorney-General Lagos State v. Attorney-General Federation [2002] 9 NWLR (Pt.772) 222.

the rule of construction, the discussion has revealed a definite return by Nigerian courts to the rule of law approach. To usher in this new era was the Court of Appeal decision in *DHL v Chidi*,[91] while at the Supreme Court level, the case of *International Messengers (Nig) Ltd v Pegofor Industries Ltd*.[92] charted the way for the application of the rule of law, as entrenched in the *Contract Law of Anambra State*. The reality, however, is that most consumers may not have the financial muscle to embark on litigation, perhaps up to the Supreme Court level to obtain relief, particularly where the outcome is not certain. This statute, which sets out the terms with reasonable clarity, will be helpful in providing certainty to consumers.

However, even in the absence of statutory provisions, the rule of law approach had also been applied in some of the cases emanating from other states. It is not clear whether, or to what extent, this positive development has been influenced by academic writings where alarm was raised about the danger of indiscriminately following the position in the UK *Photo Productions v Securicor Transport* case in the different socio-economic context of Nigeria. Nevertheless, there is the need to sustain the interest of academics in this area. There is also the need to revisit the issue of a statutory framework for consumer protection, preferably through the provision of regulations pursuant to the powers of the Minister under the *Consumer Protection Council Act*. As noted in the paper, this is much easier to achieve than legislation. Such regulations should also take care of the issue of the provision of suitable machinery for consumer complaints, including providing dispute resolution machinery. These measures will provide certainty, promote accessibility and allay concerns of consumers, many of whom are probably suffering in silence for fear of the uncertainties, expenses and other concerns of litigation, particularly for low cost transactions. There is also the need for vibrant NGOs to champion the cause of consumers in all ramifications. Through these various measures, consumer protection in Nigeria will be strengthened considerably.

91 Above n 43
92 Above n 53