
Overview of the Consumer Contracts (Unfair Terms) Bill, 2010



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INTRODUCTION

When you buy goods or services you enter into a contract with the supplier of goods and services. This is called a consumer contract. A contract is an agreement between two or more people which is enforceable by law.

It is an underlying theme of the common law that contracts freely entered into will be enforced by the courts. The principle of contract has two key aspects: that persons are free to enter into a contract with any person they choose and to contract on any terms they want. Presumably it could also be said that every person has the freedom to refuse to contract if either the terms or the other party are unsuitable. This doctrine, along with the principle of caveat emptor (let the buyer beware) arose from the law merchant because the courts saw their role as one of upholding contracts.

However, this philosophy implies that parties are able to negotiate on an equal footing, have equal bargaining power, are equally able to look after their own interests and have a full understanding of the consequences of their actions and the terms of the contract. In reality, this may, and is not always the case. The development of common law principles such as illegality, incapacity, duress, undue influence, mistake, misrepresentation and deceit buttress the fact that parties sometimes do not always have equal bargaining powers when contracting. Furthermore, the rapid



development of standard term contracts in commercial transactions means that many a times, consumers may not advert their minds to certain unfair terms in the contract or perhaps because they have lesser bargaining powers, they agree to such unfair terms.

Thus, the **Consumer Contracts (Unfair Terms) Bill, 2010** seeks to address unfair terms in consumer contracts by protecting consumers who enter into legally binding contracts with suppliers where the contract is biased in favour of the supplier. Broadly, unfair terms in a consumer contract can be defined as those terms which are significantly weighted against the consumer.

It is therefore the aim of this Newsletter to examine the provisions of the Bill whilst benchmarking same with similar practices in the United Kingdom (UK) and Australia.

Highlights of the Bill

The Bill amongst other provisions defines unfair Terms in a contract and how such terms will be determined. Further, the Bill discusses remedies available to the consumer where unfair terms are contained in a contractual Agreement.

The Scope of Application

The Bill applies to any term in a contract concluded between a seller or supplier and a consumer where such terms have not

been individually negotiated.¹ Contracts excluded from the scope of this Bill include contracts relating to employment, succession rights, rights under family law, incorporation and organization of companies or partnerships and any term incorporated in order to comply with or which reflects statutory or regulatory provisions of the Federal Republic of Nigeria or the provision or principles of international conventions to which Nigeria is a party.²

Definition of Unfair Terms

An Unfair Term is defined as any term which, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.³ Furthermore, in determining whether a term satisfies the requirement of good faith, certain factors such as the strength of the bargaining positions of the parties; whether there has been an inducement to agree to the terms; whether the goods or services were sold or supplied to the special order of the consumer and the extent to which the seller or supplier has dealt fairly and equitably with the consumer is considered.⁴

¹S.3 (1) of the Bill. A term is regarded as not individually negotiated where it has been drafted in advance and the consumer has not been able to influence the substance of the term.

² First Schedule to the Bill

³ S. 4(1) of the Bill

⁴ Second Schedule to the Bill



In addition, the Bill provides an indicative and non-exhaustive list of terms which may be regarded as unfair.⁵

Assessment of Unfair Terms

An assessment of the unfair nature of a term shall be made taking into account the nature of the goods or services for which the contract was concluded and by referring, as at the time of the conclusion of the contract, to all circumstances attending the conclusion of the contract and to all the other terms of the contract of another contract on which it is dependent.⁶

Construction of Written Contracts

The Bill provides that a seller or supplier shall ensure that any written term of a contract is expressed in plain readable, intelligible language. Where there is doubt as to the meaning of a written term, the interpretation most favorable to the consumer shall prevail.⁷

Effect of Unfair Terms in a Contract

The effect of including an unfair term in a contract is that the contract shall not be binding on the consumer.⁸ However, the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.⁹

⁵ Third schedule to the Bill

⁶ S.6 of the Bill

⁷ S.7 of the Bill

⁸ S.8(1) of the Bill

⁹ S.8(2) of the Bill

Complaints of Unfair Terms

Complaints with respect to unfair terms in a contract shall be made to and considered by the Director of Fair Trading in Consumer Council¹⁰ (Director) or by the Minister of Commerce (Minister).¹¹

The Director is mandated to consider all complaints except where such complaints appear in his opinion to be frivolous or vexatious or a qualifying body has notified the Director that it agrees to consider the complaint.¹² The Bill further empowers the Director to apply for an injunction against any person or body utilizing, or recommending the use of unfair terms in contract.¹³ He shall however give reasons for applying for an injunction or otherwise.

Furthermore, the qualifying body may apply for an injunction where it has notified the director of its intention to apply for such an injunction at least 14 days before the application is made and the Director consents to the application within a shorter period.¹⁴

¹⁰ S.9 of the Bill

¹¹ S.11 of the Bill

¹² S. 9 of the Bill. Qualifying bodies as described in the third schedule to the Bill include Electronic and Data Protection Registrar in Nigeria, Managing Director of Power Holding Company of Nigeria, Nigerian Railway Regulator, Executive Directors of All Communication Networks operating in Nigeria, Director General of all State Water Board, Every weight and Measures authority in Nigeria, Chief Executive Officers, SMEDAN and Chief Executives of Associations, Department of Petroleum and Gas Resources in Nigeria.

¹³ S.10 of the Bill

¹⁴ S.10 (2) of the Bill



With respect to complaints made to the Minister, such complaints shall be considered except where the Minister is of the opinion that the complaint is frivolous or vexatious. Where the Minister considers such complaints and the contract term to be unfair, he may refer the matter to the Attorney General to bring proceedings for an injunction against the person using or recommending the use of such unfair terms. The Minister just as is the case with the Director shall give reasons for applying for an injunction or vice versa.

Retrospective Nature of the Bill

The Bill is to apply to all contracts entered into before, on or after the Act comes into force.¹⁵

Comparison with the UK and Australia

The proposed Nigerian legislation shares a lot of similarities with the UK and Australian regulations on Unfair Contract terms.

In the UK, unfair terms in contract is governed by the Unfair Contract Terms Act 1977 (UCTA or the "Act"). The Act offers statutory protection from unfair terms in contract in addition to the protection offered by common law.

In Australia, unfair terms in contract is governed by the Australian Consumer Law (ACL).

¹⁵ S.13 of the Act

Definition of Unfair Terms

UK: Contract terms are unfair where in the event that, at the time the contract was formed, the term would not have been considered to be fair and reasonable having regard to the circumstances which were known or should have been known to the parties.

Australia: Under the ACL, a term will be unfair if it would cause a significant imbalance in the parties' rights and obligations under the contract, it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, and it would be detrimental to a party (whether financial or otherwise) if it were to be applied and relied on.¹⁶

Scope of Application

UK: The Act applies both to business and consumer contracts. However, the Act does not apply to certain contracts such as insurance contracts, contracts for the transfer of land, creation, transfer, or termination of a right in any patent, copyright, registered design, technical or commercial information, or other intellectual property, formation or dissolution of companies, and creation or transfer of a right in a security.

Australia: The ACL regulates unfair terms in standard form consumer contracts between

¹⁶ S. 11 of ACL



businesses and consumers.¹⁷ The ACL does not define standard form contracts, however, it creates a presumption that a contract is a standard form contract in circumstances where it is alleged that the contract is of such a kind.¹⁸ Several factors the court could take into account in determining if a contract is a standard form contract includes:¹⁹

- whether one of the parties has all or most of the bargaining power relating to the transaction;
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;
- whether a party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented;
- whether a party was given an effective opportunity to negotiate the terms of the contract;
- whether the terms of the contract take into account the specific characteristics of the parties or the particular transaction;
- any other matter prescribed by the regulations

Contracts such as insurance contracts, constitutions of companies or managed investment schemes; or certain shipping

contracts²⁰ do not fall within the scope of the ACL.

Certain terms also fall outside the scope of the ACL namely; terms which define the main subject matter of a contract; terms that set the "upfront price" payable under the contract (provided the price was disclosed before the contract was entered into; and terms required or permitted by Commonwealth or State/Territory laws.²¹

Exclusion or Limitation of Liability

UK: Under the Act, liability cannot be excluded or limited for any of the following:

- *Exclusion of liability for negligence:* For death or personal injury resulting from a party's own negligence; Liability for loss or damage may be excluded, but only where it is considered reasonable.²² Mere notice of the exclusion or restriction of liability is a not determinative indication that a person has accepted risk under a contract.
- *Liability for breach of contract:* where standard terms are used in a contractual relationship, businesses are not entitled to exclude or limit liability arising from their own breach, or change the performance of the contract in the event of a breach of contract by the business,

¹⁷S. 23(3) ACL. Consumer contracts is a contract with an individual for the supply of goods or services, sale/grant of interest in land, supply of a financial product, financial services which is wholly or predominantly for personal domestic or household use or consumption.

¹⁸ S.27 (1) of ACL

¹⁹ S.27(2)ACL

²⁰Example: contracts for the carriage of goods by ship or marine towage.

²¹S.27 of the ACL

²² S.2 of UCTA



except in the case that the change of performance obligations satisfies the test of reasonableness.²³

- *Liability to pay indemnity:* Indemnity clauses are those which protect an individual or a supplier from legal action in the event of professional negligence. A consumer cannot be made to indemnify another party to the contract or a third party to the contract except to the extent that term of the contract meets the requirements of the test of reasonableness.²⁴
- *Exclusion of liability for defective goods in contracts:* Liability for defective consumer goods cannot be limited or excluded, regardless of whether the defect arose during the manufacture of the goods or by the fault of the supplier or distributor themselves.²⁵
- *Exclusion of liability in contracts for the sale of goods and hire purchase:* Statutory rights with regard to Sale of Goods and Supply of Goods and Services legislation.²⁶
- *Exclusion of liability arising from a misrepresentation:* Misrepresentation in the form of false or inaccurate claims.²⁷

Australia: Under the ACL, certain terms are considered unfair such as:

- A term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract. Terms within this category will already be void as purporting to exclude or limit liability for the breach of terms implied under consumer protection legislation.
- Terms that permits one party (but not another party) to terminate the contract.
- A term that penalizes, or has the effect of penalizing one party (but not another party) for a breach or termination of the contract.
- A term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract.
- A term that limits, or has the effect of limiting, the evidence one party can adduce in proceedings relating to the said contract.

The Assessment of Unfair Terms

UK: The assessment of unfair terms in contract is dependent on the test of “**reasonableness**”. The term “reasonable” is not precisely defined by the Act. However S. 11 of the Act provides that certain factors can be taken into account in determining reasonableness. Some of which includes:

- Whether the term is a fair and reasonable one to include in the contract.

²³ S.3 of UCTA

²⁴ S.4 of UCTA

²⁵ S.6 of UCTA

²⁶ S.7 of UCTA

²⁷ S.8 of UCTA



- The information available to both parties when the contract was drawn up.
- Whether the contract was negotiated or in standard form.
- Whether the items purchased were produced or adapted to particular requirements.
- Whether the buyer had the bargaining power to negotiate better terms.
- Whether an inducement was offered to the customer.
- The fairness and reasonableness are decided at the time the contract is entered - not with hindsight knowing of the events which in fact occurred.
- Where the term is restricting rather than excluding liability, regard is to be had to the resources of the party seeking to rely on the term and the availability of insurance.
- The burden is on the party seeking to enforce the term to show that it was fair and reasonable.

Furthermore, the test of reasonableness also imports an element of good faith into the contract. "Good faith" in the context of the UCTA requires that customers are dealt with fairly and openly. When standard terms are drafted to protect commercial objectives, those standard terms may not go further than necessary to protect those legitimate commercial interests.

Australia: Three factors are considered by the courts in determining whether a contract term is fair namely:

- The extent to which the term is transparent. A term is transparent under the ACL if it is expressed in reasonably plain language, legible, presented clearly and readily available to any party affected by the term.²⁸
- The contract as a whole²⁹ and
- Such matter as the Court thinks is relevant³⁰.

The ACL provides that the onus is on the party who would be advantaged by the term to prove that it is reasonably necessary in order to protect the legitimate interests of that party (typically the trader).³¹

Interpretation of Contracts containing Ambiguity

UK: Just as is the case with the Nigerian Unfair Contracts Bill,³² the terms in a contract must be expressed in plain and intelligible language. Where the consumer is placed at a disadvantage because the meaning of a term is not clear, the meaning most favorable to the consumer will apply.

Australia: The ACL requires that terms in a contract should be expressed in reasonably

²⁸ S.24(2) ACL

²⁹ Ibid

³⁰ Ibid

³¹ S.24(4) of ACL

³² S.7 of the Bill



plain language, legible, and presented clearly.³³

Remedies

UK: Under the Act, the Office of Fair Trading may apply for an injunction preventing the relevant unfair clause from being used. Similar to what obtains under the Bill; Qualifying bodies also have enforcement powers, notably including the Information Commissioner, the Consumers Association, Financial Services Authority, all trading standards services.

Australia: Under the ACL, only the court has powers to declare a term unfair even though complaints of unfair terms in contract may be made to the Financial Ombudsman Service (FOS) or the Credit Ombudsman Service Ltd (COSL). Complaints may also be made directly to the Australian Securities and Investments Commission (ASIC).

CONCLUSION

In the wake of boiler plate clauses and generic provisions which have today come to be known and accepted as standard terms of an agreement, the Bill promises to give respite to disadvantaged contracting parties. Perhaps even more worthy of note are such clauses as severability, confidentiality, force majeure, indemnities

and liability clauses which may now be the subject of an injunction in a court of law.

The Nigerian Bill fails to set defined standards like the UK and Australian laws which presume the discretionary powers of the Director of the consumer council and the Minister of Commerce. Perhaps it may have been apposite to have a review panel which would include legal practitioners for the purpose of hearing and treating these complaints given the usual bureaucratic hurdles which have characterized such complaints in the past.

Nevertheless, there is no doubt that once the Bill is passed into law, it would to a great extent solve the problem of unfair terms associated mostly with standard form contracts and boiler plate clauses.

³³S.24(2) ACL



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