"TERMS AND CONDITIONS APPLY": THE WORLD OF EXCLUSION CLAUSES IN CONTRACTS

Abstract
Exclusion or exculpatory clauses are inserted into contracts to limit liability of the party relying on such clauses from otherwise obligations he owes the other party to the contract. This though acceptable in the world of contracts, has consistently come under judicial harmmer to the extent's that courts do not allow parties to wriggle out of clear cut intentions of the parties to the contract hence courts do not allow parties to exclude fundamental terms of the contract. Exclusion clauses come in different words; conditions, warranties, innonimate terms etc. The courts have interpreted them differently because different consequences flow from each but in all, the courts are guided by the principle of effecting the expressed intention of the parties and to give business efficacy to the contracts, because contractual terms are binding on the parties and even the courts. The newest specie of exculpatory clause is "Terms and Condition Apply". In written contracts, the parties agree to these terms and conditions before execution but in Parol contracts, this clause is not agreed upon as should be the case in a real contract where parties negotiate the terms and condition before hand. These terms and conditions are foisted upon the other party, (most times the general public that deal with the first party, which is usually a company), without any negotiation. The consequence is that any member of the public who deals with the company would have knowledge of the terms and condition, *subsequently*. This in our opinion is unfair as it makes the public enter into a contract, which terms and conditions they don't know before hand. The public would therefore contract at their own peril as such terms and condition may exculpate the company from its liability unknown to the public.

1.00 Introduction

Parties to a contract often try to limit their liabilities arising from their contracts. This practice has become a wide spread feature of many written contracts and this is done by the use of exclusion clauses, that is clauses that seek to exclude, limit or restrict a legal duty or obligation owed by one party to the other, under the contract which is ordinarily binding[1].

A party is allowed to exclude, limit or restrict his civil liabilities for most torts or contracts but such allowance is subject to the powers of the Courts not to exonerate, or permit a wrong doer from the consequences of his acts of fraud[2]. Accordingly the harder the parties try to wriggle out of their contractual obligations, the harder the courts look at the nature of such clauses to see whether the obligation breached are fundamental, warranties, conditions, innonimate or intermediate terms of the contract, as various implications flow from each.

There are various species of exclusion clauses. There are the true ones, those that limit the quantum the other party can claim in damages and those that extinguish the right to damages based on time factor but the one that perhaps is most controversial now is the one that reminds the other party that terms and conditions, not known to other party applies in the "contract"

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[1] Intercontinental Bank Ltd V. Brifina Ltd (2012) Vol 5 -7 Pt II MJSC 37.

[2] FATB V. Partnership Invest Coy Ltd (2003) 18 NWLR (Pt 851) P35.

2.01 Meaning Of Exclusion Clauses

Exclusion clauses also called exemption clauses, or exculpatory clauses have been defined by authors. The word 'exemption' is ordinarily defined as an official permission not to do something or pay something that you would normally have to pay[3].

Blacks Law Dictionary[4] defines 'exemption from 3 perspectives thus:

1. Freedom from a duty, liability or other requirement
2. A privilege given to a judgment debtor by law, allowing the debtor to retain certain property without liability
3. Tax: An amount allowed as a deduction from adjusted gross income used to determine taxable income

Exemption clause on the other hand is defined as a contractual provision that a party will not be liable for damages for which that party would otherwise have ordinarily been liable[5].

A learned Author[6] has written that

"An exemption clause may take many forms, but all such clauses have one thing in common in that they exempt a party from a liability which he would have borne had it not been for the clause. In some cases, an exemption clause merely relieves a party from certain purely contractual obligations, for example, the duties of a seller in a contract for sale regarding the quality and fitness of the goods. In other cases exemption clauses go further and protect the party not merely from contractual liability but even from liability which would otherwise have arisen in tort. For example a shipping company's ticket may exempt the company from liability to the passenger for any injuries however caused. Now if the passenger is injured as a result of the company's employees, that would in the normal cause, give rise to an action in tort for negligence, quite apart from the contract".

Exemption clauses are also those provisions in a contract under which one party, (usually the one that drafted the Agreement) is protected from being sued by the other party for damages loss, negligence, non-performance etc or its liabilities are severally restricted. Banks for example use exclusion clauses in documents of foreign trade where they accept no liability for any injury to the customer unless it can be proven to have been the direct result of their negligence or mistake.

3.00 Origin of Exclusion Clauses

Exclusion clauses originated from the United States of America where some Southern States used clauses to exclude certain citizens especially blacks from voting unless their grandfathers were eligible voters.

The original grandfather clauses were contained in new state constitutions and Jim Crow Laws passed from 1890 to 1910 in many of the Southern United States to prevent blacks Mexican Americans (in Texas), and certain whites from voting. Prohibitions on Freemen's voting in place before 1870 were nullified by the Fifteenth Amendment.

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[3] Oxford Advance Learners Dictionary of Current English (7th ed) P 509.

[4] *Ibid* P 653.

[5] *Ibid*.

[6] Atiya P.S, *An Introduction to the Law of Contract* 3rd ed, (1981 p 167.

After Conservative white Democrats took control of state legislatures again after the compromise of 1877, they began to work to restrict the ability of blacks to vote. Paramilitary groups such as the *Ku Klux Kaln* had intimidated blacks or barred them from the polls in numerous elections before the Redemption. The coalition of populists and Republicans in fusion tickets in the 1890s threatened Democratic control and increased statutes and passed new constitutions creating restrictive voter registration rules. Examples include imposition of poll taxes and residency and literacy tests. An exemption to such requirements was made for persons allowed to vote before the American civil war, and any of their descendants. The term *grandfather* clause arose from the fact that laws tied the then current generation's voting rights to those of their grandfathers.

After the United States Supreme Court found such provisions unconstitutional, states were forced to stop using the *grandfather* clauses to provide exemption to literacy tests. Without the grandfather clauses, tens of thousands of poor southern whites were disenfranchised in the early 20th century. As decades passed, southern states tended to expand the franchise for poor whites, but most blacks could not vote until after passage of the 1965 voting Rights Ratification Act[7]. Ratification in 1964 of the twenty-forth Amendment to the United States constitution prohibited the use of poll taxes in federal elections, but some states continued to use them in state elections. In spite of its origin, today the term grandfather clause does not retain any pejorative sense.

4.00 Types of Exclusion Clauses

4.01 True Exclusion Clause: This type of exclusion clause recognizes anticipatory breach/potential flashpoints of breach in the contract and tries to excuse liability for the breaches[8]. Alternatively, it is couched in such a manner that it would include a high degree of reasonable care to perform the delegation on one of the parties.

4.02 Damages Limitation Clause: This type of exclusion clause places a limit on the amount to be claimed by the other party for a breach of the contract irrespective of the actual loss.

4.03 Time Limitation Clause: This type of exclusion clause states that an action for breach of the contract must be commenced within a certain period of time, or the cause of action becomes extinguished[9].

5.00 Contracts

A contract is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law[10]. A learned Author[11] concurs thus:

A contract is an agreement between two or more parties WITH AN INTENTION TO CREATE LEGAL OBLIGATION that will be legally enforceable".

While in theory the basis of the law of contract is 'agreement', that is a consensual meeting of the intention of both (offeror and offeree) in legal reality (practice) the "agreement" may be a

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7 Glenn F., The *Disenfranchisement Myth: Poor Whites and Suffrage Restriction in Alabama, Auburn* (University of Georgia Press, 2004), P 136.

8 FGN V Zebra Energy Ltd (2003) I MJSC 1 – 194.

9 Nwolisa V. Nwabufor (2011) Vol 6 Pt II MJSC 80.

10 Garxer B.A. *Black Law Dictionary* (8th ed, USA, Thomson West 2004 P. 341.

11 Sagay, I.E. *Nigerian Law of Contract (*2nd edition Ibadan, Sepctrum Books Ltd 2000 P. 31.

mirage because it is not always the meeting of the actual intentions that prevail when determining legal duties but the meeting of the "intentions" as stated in the contract. There exist at common law (except for the mitigating effects of the doctrines of mistake, misrepresentation, frustration) no duty to satisfy a 'reasonable' expectation. It is only the terms of the contract that are binding[12].
In many cases parties have no real option but to accept the terms offered to them because of the impracticability of negotiating an amendment to the contract. This situation arises when some terms of the contract are implied by custom or trade.

5.01 Terms of the Contract

This is the nitty-gritty of the contract, the basis of the agreement or what is sort to be achieved by the contract. It is the embodiment of the intentions of the parties. The terms of the contract are expressed in words. It is the word(s) used in couching a term of the contract that classifies the term.

5.02 Nature and Effect of Contractual Terms

Obligations created by a contract are not all of equal importance. Thus, one term may be of major importance whose breach could lead to a discharge of the contract while another term may be a relatively minor one whose breach could result only in damages. Accordingly, over a long period of time, various terminologies have evolved to represent the various categories of contractual terms and liabilities. Currently, four categories of terms have been identified in the following descending order of importance:

1. Warranties
2. Innominate or intermediate terms
3. Conditions
4. Fundamental terms

5.03 Conditions and Warranties:

The oldest and most commonly used of these four terms are conditions and warranties. Black Law Dictionary[13] defines the term condition to mean: 1. A future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance. For example, if Jones promises to pay Smith $500 for repairing a car, smith's failure to repair the car (an implied or constructive condition) relieves Jones of the promise to pay. 2. A stipulation or prerequisite in a contract, will, or other instrument, constituting the essence of the instrument. If a court construes a contractual term to be a condition, then its untruth or breach will entitle the party to whom it is made to be discharged from all liabilities under the contract.

On the other hand, it[14] defines a warranty as follows: 1. Property. A covenant by which the grantor in a deed promises to secure to the grantee the estate conveyed in the deed and pledges to compensate the grantee if the grantee is evicted by someone having better title. The covenant is binding on the grantor's heirs. Historically, a warrantor was expected to turn over land. But cash compensation could be substituted. 2. Contracts. An express or implied

[12] AG Ferrero V. Henkel (2003) Vol 5 – 7 MJSC Pt 1, P. 55.

[13] *Op. cit.,* P. 333.

[14] *Ibid*, Note 10.

promise that something in furtherance of the contract is guaranteed by one of the contracting parties; especially, a seller's promise that the thing being sold is as represented or promised. Although a court may treat a misrepresentation as an implied warranty, in general a warranty differs from a representation in four principal ways:

1. A warranty is conclusively presumed to be material, while the burden is on the party claiming breach to show that a representation is material;
2. A warranty must be strictly complied with, while substantial truth is the only requirement for a representation;
3. A warranty is an essential part of a contract, while a representation is usually only a collateral inducement; and
4. An express warranty is usually written on the face of the contract, while representation may be written or oral.

According to the source[15]

> Two points must be born in mind, in the first place, the words 'condition' and 'warranty' are not invariably kept as distinct as accuracy of definition demands; and in insurance law especially 'warranty' is very commonly used in the sense ascribed to 'condition' ... in the second place, the injured party, if he chooses to waive his right to repudiate the contract on breach of a condition, may still bring an action for such damages as he has sustained.

Both terms are used in many different senses and, indeed, interchangeably on many occasions. Thus, of condition alone, it is said that there are at least twelve different senses in which it could be used. In the words of James L.J., in Re Lees, Exp. Collins:

> Conditions may be precedent, subsequent or inherent. A condition is precedent when, unless it is complied with, the estate does not arise. It is subsequent when if broken, the estate is defeated. it is inherent when the estate is qualified, restrained or charged by it[16].

Thus, an agreement, subject to the preparation of a formal contract, is one subjected to a condition precedent. For that agreement is not binding until a formal contract has been drawn up and signed. Thus, there is a condition precedent when the rights or obligations under an agreement are suspended until the happening of a stated event[17].

In **Pym V. Camobell**[18] an agreement by the defendant to buy the plaintiff's invention was made subject to the approval of a third party, an engineer. It was held that there was no binding agreement until that approval was obtained. Also in **Pickard V. Innes**[19], decided by the former full court of Ghana (Cape Coast), the defendants offered to engage the plaintiff as a surveyor provided his current employers did not object to his leaving. (The defendants depended on the goodwill of the plaintiff's current employers). The plaintiff could not obtain his current employers' consent to leave and join the defendants, and the latter refused to

[15] *Op. Cit*., P. 333.

[16] *Ibid*, note 35.

[17] William R. A., *Principles of the Law of Contract*, (Arthur L. Corbin ed)., 3d. Am. Ed. (1919). P. 223.

[18] (1875) 10 Ch. App. 367; (1876) 7 QBD 410.

[19] U.B.A v. Tejumola & Sons Ltd (1988) 2 NWLR (pt 79) p. 662.

employ him. On suing the defendants for breach of contract, it was held that his failure to fulfill the condition precedent operated to terminate the defendants offer[20].

As was stated above by James L. J., in **Re Lees, Exp. Collins (supra)**, there is another category of condition known as condition subsequent[21]. These are said to occur where the happening of the event operates to destroy an existing obligation. It does appear there is no convincing illustration of this concept yet. One is therefore left with the credence of resorting to an unreported case of **African Continental Bank Ltd V. Okonkwo**[22] which tend to offer the closest illustration so far on condition subsequent. The defendant had applied to the plaintiff for a loan of twenty thousand naira (N20,000.00). During the consideration of this application, the plaintiff invited an estate valuer to value the property which the defendant was offering as security. The valuer charged a fee of N958 for this services, and this was debited to the defendant's account with his consent. When subsequently the application for a loan was not approved, the defendant refused liability for the valuer's fee. The plaintiffs contested this. It was held by Akpori, J., that the defendant was right in repudiating liability for the fee. According to the learned justice:

> The clear understanding of the parties was that the defendant would pay the N958 as cost of the valuation if the loan of N20,000 was approved... it would be unfair to the defendant for him to be made to pay as much as N958 for the valuation of his property against a loan which was never granted.

According to Prof. Sagay[23] this case[24] more closely illustrate the concept of conditions subsequent for it could be argued that the subsequent failure of the bank to grant the defendant the loan, operated to destroy the defendant's earlier obligation to pay for the valuation.

Conditions inherent (i.e. conditions which qualify the obligations contained in the contract) on the other hand is a term in the contract itself (not external to it) which may be enforced against one or the other of the parties.[25]

As stated earlier, the term "warranty" is also used for the same purpose and, for some time, no clear distinction was made between them. However, clarity was brought into the subject matter by the distinction created by section 11 (1) (b)[26] which defined condition as a stipulation in a contract of sale, the breach of which may give rise to a right to treat the contract as repudiated (or right to damages), and a warranty as a stipulation, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated[27]. It, therefore, follows that while a condition which attracts the

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[20] (1856) 6 E & B 370.

[21] Gold Coast FCT (1919) 1.

[22] See also Aberfoyle Plantations v. Cheng. (1960) AC 115; (1959) 3 ALL ER, 10; Bentworth Finance Ltd V. Lubert (1968) 1 QB 680; (1967) 2 ALL ER, 810.

[23] See Cheshire and Ftifoot, Op. Cit., P. 131 (18th edition) Furmson P. 148.

[24] Niwoisa V. Nwabufor (Unreported) High Court of Bendel States, Akpovi, J. Suit No. A/20/80 Cited in Sagay, Op. Cit., p. 132.

[25] Op. Cit., p. 132.

[26] Nwobasi v. Nwabufor (supra)

[27] Ibid.

remedies of repudiation and damages must be a major term, a warranty which attracts the remedy of damages only must be a relatively minor term. This is confirmed by section 62[28] which describes a warranty as being collateral to the main purpose of the contract. Although time is no equivalent elaboration on the nature of a condition, it would follow that if a warranty is collateral to the main purpose of the contract, a condition must at least be essential to it.

The distinction between conditions and warranties, though difficult to recognize at times, is well illustrated by two cases. In **Poussard V. Spiers &** Pond[29], an actress was engaged to play a leading part in a *French Operetta* as from the beginning of its run. As a result if illness she was unable to take up her role until a week after performances had started. In the meantime, the producers, who had engaged a substitute to replace her, refused to have her back. She instituted an action for breach of contract. It was held that her failure to appear for the final rehearsals and the early performances of the *operetta* constituted a breach of condition and that the defendants were entitled to treat the contract as discharged.

By contrast, in **Bettini V. Gye**[30], the defendant entered into a contract to engage the plaintiff as a singer in operas and concerts for a period of three months. The plaintiff undertook to be in London at least six days before the commencement of his engagements for rehearsals. He, however, only arrived two days before the engagement commenced and the defendant thereupon repudiated the contract. It was held that the term as to rehearsals was a warranty, and whilst the defendant could have sued for damages for the plaintiff's lateness in showing up, he could not repudiated the contract.

It should be noted that whilst in **Poussard v. Spiers & Pond**[31], the plaintiff failed to show up for the first seven days of the actual performance, in **Bettini v. Gye**[32] the last two days of rehearsals and the opening of performance, hence, the former breach was mere breach of warranty[33].

5.04 Innominate or intermediate terms:

In more recent times, a new term has been evolved by the courts, which is really a hybrid between a condition and a warranty. A breach of terms within this category could lead either to damages or repudiation, depending on the effects of the breach. If the breach is so devastating as to deprive the injured party of substantially the benefit which it was the intention of the parties that he should obtain from the contract, then the remedy would be repudiation; otherwise, it would be damages.

This term was first vigorously canvassed by the Court of Appeal (particularly by Diplock, L.J.) in **Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaish**[34] whose facts are as follows: the Defendants chartered a ship from the plaintiffs for twenty four months on time

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[28] Sale of Goods Act 1973.

[29] See the Sale of Goods Law of Western Nigeria (1958) S. 12(1), (2) for Identical Provisions.

[30] Sales of Goods Act, 1973.

[31] (1876) 1 QBD 410.

[32] (1876) 1 Q.B.D. 183.

[33] *Ibid.*

[34] (1962)2QB 26; (1962) All ER 474.

charter, for cargo service. The vessel was delivered, and it sailed from Liverpool in the United Kingdom to Newport News in the United States and loaded a large cargo of coal for Osaka in Japan. The engine room staff were incompetent and the engines were old. The ship broke down and was held up for five weeks on the journey to Osaka. The charters repudiated the contract for this reason even though the contract still had twenty months to run. In an action brought by the owners for wrongful repudiation, Salmond J. found that the vessel was unseaworthy, having regard to her engine-room staff, but that the owners' breach of contract did not entitle the charterers to rescind the contract and that the contract was not frustrated. In Appeal to the Court of Appeal, this judgment was affirmed.

Diplock, L.J. sought to answer the question: In what event can a party be relived of his undertaking to do that which he has agreed to do but has not yet done? In short, in what circumstances does such a party have a right to repudiate a contract? The test, according to him, was the same in every case, whether it was a result of breach due to the default of one party or for frustration where no party is at fault. He then stated the test thus:

> ..does the occurrence of the event (breach) deprive the party who has further undertakings still to perform (the injured party) of substantially the whole benefit which it was the intention of the parties as expressed in the contract that they should obtain as the consideration for performing those undertakings?

If it does, then the injured party can repudiate the contract, otherwise he can only obtain damages for the breach.

Since this new scheme was phrased in such wide terms, what was the place of conditions and warranties in it? Or had they been eliminated by the doctrine? According to the court, although there were many simple contractual undertakings which could be identified per se as either conditions or warranties, there were, however, many other contractual undertakings such complex character which could not be categorized as either conditions or warranties. It is this third group of case to which the test of "substantial benefit" applied. The seaworthiness test was such a complex undertaking, incorporating both trivial and fundamental requirements, that it was clearly a clause within the third category of terms, or innominate terms. In this case, the breach only entitled the charterers to damages and not to repudiation. I think the unseaworthiness should be a breach of the term of the contract which should entitle the party to repudiation of the contract.

Also in **Cehave V. Bremer,** otherwise known as the Hausa Nord[35], a German company sold 12,000 tons of United States citrus pulp pellets to be used as cattle food to a Dutch company for about 100,000 pound. The contract provided that the goods were to be delivered in good condition. On arrival in Rotterndam (Netherlands) from the United States, it was found that a small proportion of the cargo had become bad as a result of overheating. The buyers rejected the goods and claimed a refund of the purchase price. The Court ordered the sale of the whole cargo, which was bought by a third party for 30,000 pounds and resold to the buyer for that price.

[35] (1976) QQB 44; (1975) All ER 739, CA

The Court of Appeal held that apart from conditions and warranties, there was a third type of term, the intermediate term, the effect of which depended on the gravity of the breach. If the breach goes to the root of the contract, the injured party is entitled to treat himself as discharged; if not, he is not entitled to do so. According to Lord Denning, the first task of a court when faced with a breach of contract suit is to see whether the stipulation breached on its true construction is a condition strictly so called:

> ...that is a stipulation such that, for any breach of it, the other party is entitled to treat himself as discharged. Secondly, if it is not such a condition, then look at the extent of the actual breach which has taken place. If it is such as to go to the root of the contract, the other party is entitled to treat himself as discharged[36].

Applying this tests, it was held that the clause stipulating that the shipment was to be in good condition, was neither a condition nor a warranty, but an intermediate term, since the breach did not go to the root of the contract, the buyer was not entitled to repudiate the contract.

More recent decisions have established clearly that although this third category of contractual term has been recognized and accepted, the traditional terms – conditions and warranties – are still relevant and applicable in a large number of situations. Furthermore, in the interest of certainty of the law, once a type of clause in contracts has been accepted previously as a condition per se it will continue to remain a condition and will not come under the new rubric of intermediate terms[37].

Thus, in the *Mihalis Angelos*[38] a character of a ship was held entitled to repudiate the contract because the ship, which under the terms of the contract was supposed to be ready to load by July 1, was not ready to so do by July 17. The Court of Appeal dismissed the notion that the readiness to load clause was not a condition but an intermediate term. It held that it was a condition in the "old sense" of the word "condition", i.e., "when it has been broken, the other party can, if it wishes... elect to be released from performance of his further obligations under the contract".

Amongst the reasons proffered by the Court for taking this stand was that it tended towards certainty in the law, and that the clause "expected ready to load" had always been regarded as a condition.

This view was confirmed in **Bunge Corporation, New York V. Tradax Export S. A., Panama**[39] where a seller of goods was held entitled to repudiate the sale agreement because the buyer, who was required by the terms of the contract to give the seller at least fifteen days notice of when a vessel to ship the goods would be ready, gave thirteen days notice instead. It was held that the stipulation as to date of readiness was a condition, and that notice short of the stipulated period by even one day was a breach of condition.

According to the Court, in mercantile contracts, stipulations as to time were always treated as being of the essence of the contract, i.e., as conditions. Such stipulations were not susceptible

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[36] Ibid, note 31, p. 739 at 745.

[37] Sagay, I.E. op cit., P 135.

[38] Maredelanto Compania Naviera S.A v. Bergbau – GinbH(1971) 1 QB 164; (1970) 3 All ER 125.

[39] (1981) 1 WLR 711; (1981) 2 All ER 531.

to the test propounded for intermediate terms. Apart from this, English law did recognize as conditions contractual terms which did not pass the test propounded by the Court in the **Hong Kong Fir Case**[40]**.**

The Court in the **Bunge Corporation case**[41] was very critical of its own earlier decision in **Hong Kong Fir case (Supra)** and appeared to be questioning not only the validity of that decision, but the very existence of intermediate terms. It might, therefore, be stated that the large majority of terms will be a term be treated as an intermediate term. And this will be when such a term is of such uncertain or complex nature that it cannot be decided on the face of it whether it is condition or a warranty. In such a case, the remedy available to the injured party will depend on whether that breach has deprived him of substantially the benefit of what it was intended he should obtain from the contract.
In other words of Prof. Sagay[42]:

> It should be noted that when a court decides that a breached term is either a condition or a warranty, the court is examining the quality of the term broken, and is basing its judgment on this, whereas when it holds that a term is an intermediate term, the court then considers the effect of the breach and bases its judgment on this factor. One other factor to note is that where parties stipulate in advance what the consequence of a breach of a particular clause in a contract is to be, this will be accepted and enforced by the court. Thus, if the parties stipulate that breach of clause "A" is to result in damages and breach of clause "B" is to result in repudiation, this must be respected and enforced by the court.

However, It is not sufficient to call a clause "condition" and another "warranty" if it for the court to classify terms in this manner. Parties may find that a clause referred to as a "condition" may on examination be classified by the court as a warranty or other class of term[43].

5.04 Fundamental Terms:

Black's Law Dictionary defines the phrase Fundamental Terms in the following ways:

1. A contractual provision that must be included for a contract to exist; a contractual provision that specifies an essential purpose of the contract, so that a breach of the provision through inadequate performance makes the performance not only defective but essentially different from what had been promised.
2. A contractual provision that must be included in the contract top satisfy the statute of frauds. Also termed essential term; vital term[44].

In **Smeaton Hanscomb & Co. Ltd. V. Sassoon I. Setty Son & Co. (No. 1)**[45], **Delvin J.** defined a fundamental term as something which underlines the whole contract so that if not

[40] Ibid.
[41] *Ibid.*
[42] *Op. Cit*., p. 136 – 137.
[43] L. Schuler AG v. Wickham Machine Tools Sales Ltd (1974) AC 235, (1973) All ER 39, H. L.
[44] Op. Cit., p. 1608.
[45] (1953) 1 WLR. 1468 at p. 1470.

complied with, the performance becomes totally different from that which the contract contemplates. As Lord Abinger stated in *Chanter v. Hopkins*[46]

> If a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty; there is no warranty that he should sell him beans; the contract is to sell peas and if he sends him anything else in their stead, it is non-performance of it.

Thus, a fundamental term is a term of even greater importance than a condition. It is the term which constitutes the main purpose of the contract, and failure to comply with it is equivalent to not performing the contract. Just as in the case of conditions, the breach of a fundamental term will entitle the injured party to repudiate the contract.

Additionally, a party in breach of a fundamental term cannot normally escape his liability by reliance on an exclusion clause. Illustrations of breaches of fundamental terms abound in the following cases:

(a) Supplying a broken-down piece of iron mongery in a contract for the supply of a car[47].
(b) Delivery of pine logs in a contract for the delivery of mahogany logs[48].
(c) In a contract for the supply of copra cake, supplying same, but so adulterated with castor oil as to poison cattle to which it was fed[49].
(d) In a contract for the guarding of premises, deliberate burning down of the premises by those employed to guard it[50].
(e) In a contract for the sale of cabbage seeds for the purposes of cultivation and harvesting for sale, the supply of cabbage seeds only suitable as bird feeds[51].

It therefore follows that the contents of a contract depend primarily on the words used by the parties in entering into the contract: these make up its express terms. A contract may, in addition, contain terms which are not expressly stated, but which are implied, either because the parties so intended, or by operation of law, or by custom or usage[52]

In other words, courts have frequently found it necessary in construing the terms of a contract to assume the existence of certain terms not expressly included by the parties to the contract in order to give it what is popularly referred to as "business efficacy", i.e. to make it capable of being performed effectively. The net effect of these phenomena is the recognition of three types of implied terms:

(a) Terms implied by custom;
(b) Terms implied by statute; and
(c) Terms implied by court.

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[46] (1838) 4 M & W 399 at p. 404; 150 ER 1484.

[47] Karsales (Harrow) v. Vallis (1956) WLR 936; (1956)2 All ER 866, CA.

[48] Smeaton Hanscomi & Co. Ltd v. Sasson. Setty son & Co. (No.1) (1953) 1 WLR 1468 at 1470.

[49] Pinnock Bros v. Lewis & Peat Ltd (1923) 1 KB 690.

[50] Photo Production v. Securicor Transport Ltd (1980) AC 827; (1980) 1 All ER 556.

[51] George Mitchel (Chesterhall) Ltd v. Finney Lock Seeds (1981) 131 New L.J. 480.

[52] Treitel, *The Law of Contract* (8th ed., Sweet & Maxwell Stevens) 316.

5.05 Terms Implied by Custom or Trade:

A contract is subject to terms that are sanctioned by custom, whether commercial or otherwise, although such terms have not been expressly mentioned in the contract. This principle and its mode of application were clearly spelt out by Park, B., in **Hutton V. Warren**[53] about a century and a half ago:

> It has long been settled, that, in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle or presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.

Thus, in **British Crane Hire Corporation V. Ipswich Plant Hire Ltd**[54]**,** the plaintiffs and defendants were both in the business of hiring earth-moving equipment. The defendants who were then engaged in drainage work arranged by telephone for a drag line crane from the plaintiffs. Although the fee was agreed, nothing was said about conditions of hire. The plaintiffs, in accordance with usual practice, sent a printed form of the agreement to the defendants for signature. Before it was signed, the crane, without anyone's fault, sank in marshy ground. Under the conditions in the printed but unsigned form, which was similar to those used by all firms in the crane hiring business, including the defendants, hirers are liable to indemnify owners against liability in the sort of situation that had occurred. The defendant, however, resisted the incorporation of this term into the contract.

The Court of Appeal unanimously held that the term had been incorporated. Both parties were in the trade, and the defendants knew that firms in the plant hiring trade always imposed such conditions in regard to the hiring of plant. In the words of Lord Denning:

> ... It is clear both parties knew quite well that conditions were habitually imposed by the supplier of these machines; and both parties knew the substance of these conditions. In particular that if the crane sank in soft ground it was the hirer's job to recover it[55].

One can, therefore, state without fear of equivocation that a custom is implied only when it has not been expressly or implicitly excluded by the contract[56] and where the usage is well-established and notorious, that both parties to the contract are either familiar with it or must be presumed to be familiar with it[57]. Lord Jenkins stated in **London Export corporation v. Jubilee Coffee Roaster Co.** thus.

> An alleged custom can be incorporated into a contract only if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion and, further, a custom will only be imported into

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53 (1836) 1 M & W 466 at p. 475.

54 (1975) QB 303; (1974) 1 All ER 1059, CA.

55 *Ibid*.

56 Les Affreteus Reunts Societe Anonyme v. Walford (London) Ltd (1919(AC 801; 88 LJKB 861.

57 Bank of the North v. Poland (1969) 3 ALR 217.

> a contract where it can be so imported consistently with the tenor of the document as a whole[58].

Thus, in **Les Affreteus Reunis Societe Anonyme v. Walford**[59]. Walford, a broker, negotiated a charterparty between his clients, the ship-owners and hirers. His contract with the ship-owners stipulated that he was to be paid a commission of three percent of the estimated gross amount of the hire on the signing of the contract of hire. After the signing but before the hirer paid for the charter, the ship was requisitioned by government and so the hire fee was not paid. The owners, therefore, denied any liability to Walford for his three percent commission on the ground that under the custom of the trade, commission was only payable when the hire fee had been paid. In an action brought by Walford for an order of specific performance of the agreement, it was held by the House of Lords that he was entitled to the payment of the commission. The alleged custom could not prevail over the express terms of the contract.

Also in **Gottschalt v. Elder Dempster & Co. Ltd**[60]**,** under a contract for the carriage of Goods by sea, the terms of which were contained in a bill of lading, the defendant undertook to consign some package from Liverpool to the plaintiffs in Lagos. Although the defendants safely delivered the packages in the customs shade on arrival, one of them was missing when the plaintiffs finally took delivery. The plaintiffs sued the defendants for the loss. Although the defendants' liability under the bill of lading ceased as soon as the goods were discharged, the plaintiffs' sought to introduce and rely on a custom of the port according to which the defendants' liability would have continued even after the discharge of the goods. It was held by the full court, affirming the decision of the Divisional Court, that "no evidence of custom can override the terms of written contract.

Also, in **Leyland (Nig) Ltd v. Dizengoff**[61], the respondent agreed to sell four 55 ton low bed trailers for N244,000. The offer contained a condition that a discount of 18% would be allowed if payment was made within thirty days from receipt of the respondent's invoice. The appellant failed to pay for the goods within thirty days of delivery whereupon the respondent sued for the recovery of the full purchase price. The case of the respondent was that the 18% discount given to the appellant was on the condition that the appellant should pay the reduced price of N200,00 within thirty days discount. The appellant, however, denied the existence of any such condition and argued implying that this was a trade custom.

Rejecting this argument, the Court of Appeal held that there was no evidence of such custom before the court and that in any case no evidence of custom can override the express term of a contract. The intention of the parties as clearly expressed in the contract was that 18% discount was granted subject to the appellant making payment of the reduced price within thirty days of the presentation of the invoice or delivery of the goods.

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58 (1958) 2 All ER 41 at p. 420.

59 *Ibid*, p. 861.

60 (1917) 3 NLR 16.

61 (1990) 2 NWLR (pt 134) 610 CA.

As was stated above; if an alleged custom is not sufficiently well established so as to be known or presumed known to all engaged in the relevant trade, then it cannot be applied to a contract in which notice of it has not been given to one of the parties[62].

Thus, in **Bank of the North v. Poland**[63], the plaintiffs were bankers in Kano and the defendants were Lloyd's underwriters in London. The plaintiffs made a proposal for insurance which was accepted by the defendants and the agents of Llyod's in London. The effect of the express terms of the policy was to give the plaintiffs a right to claim payment in Kano for losses in Nigeria. The plaintiffs took out a writ in Kano for service on the defendants in London alleging a loss in Nigeria covered by the policy and a failure by the defendants to pay according to the terms of the policy, i.e., to pay in Nigeria. In challenging the jurisdiction of the Nigerian court over the case, the defendants also denied that they were liable to pay in Nigeria. They adduced evidence to establish that by the customs and usages of Lloyd's, insurance money could not be paid directly to the assured in Nigeria, and that on the contrary an assured can only obtain payment of a claim from Lloyd's underwriters approved brokers, and that in this case, payment could only be made in London, through approved brokers. The plaintiffs contended that the usages of Lloyd of which they had no knowledge and to which their notice had not been drawn, could not be imported into the contract. It was held that the alleged Lloyd's customs or usages were not part of the contract. All that the defendant established was that the Lloyd's customs allegedly bind the underwriter and the broker, but not the assured. Therefore, in the absence of the latter's knowledge of the customs and assent to them, they could not be incorporated into the contract. Thus, Lloyd's customs had not yet acquired sufficient notoriety and general acceptance to be applicable to all transactions with Lloyd's underwriters. The process of the development and the establishment of a custom is clearly stated by Furmston as follows:

> A particular practice is shown to exist and the parties to the contract are proved to have relied on it. In course of time it is assumed by the courts to be so prevalent in a trade or locality as to form the foundation of all contracts made within the trade of locality, unless expressly (and Prof. Sagay added the word 'implicitly') excluded[64].

5.06 Terms Implied by Statute

Over a long period of time, courts gradually accepted and enforced certain terms into contracts (mainly for the sale of goods) even though they were not expressly stipulated. This was done mainly to protect the weaker party (usually the buyers or consumers) in contracts for the sale of goods. By sections 12 to 15[65], certain terms are implied in all contracts for the sale of goods unless expressly excluded. The terms implied are as to title, description, suitability for purpose, sample and merchantable quality.

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[62] Sagay I.E. op. cit P 141.

[63] *Ibid*.

[64] Cheshire and Fiffot, op. cit., p. 117.

[65] Sale of Goods Act 1893 (which applied to Nigeria directly as an English Statute of General Application enacted before 1900. See Supreme Court Ordinance 1876 S. 19 and the High Court Laws of the various State. However, the Western Region of Nigeria enacted its own sale of goods Law in 1958 known as Western Region Law No. 43 of 1958.

61. Prof. Sagay, Op. Cit., p. 141
1. Above, note p.

6.00 Manner of Incorporation of Exclusion Clauses into Contracts

In legal provisions, it seems that there are three methods of incorporation of these clauses. They are as follows:

6.01 Incorporation by Signature

According to **L'Estrange v. Graucob,** if the clause is written on a document which has been signed by the parties involved, then it is part of the contract. If a document has not been signed, any exemption clause which it contains will only be incorporated if the party relying on the clause (the 'proferens') can show that he took reasonable steps to bring it to the attention of the other party before the contract was made. In somewhat of a contradiction, that is to say that the proferens actually has to show that the other person read the clause or understood it (except where the clause is particularly unusual or onerous). It is not even necessary like the 'reasonable man's test in tort: the party trying to rely on the clause needs to take reasonable steps to bring it to the attention of the other party.

6.02 Incorporation by Notice

The general rule as provided in **Parker v. SE Railway**[66] is that an exclusion clause will have been incorporated into the contract if the person relying on it took reasonable steps to draw it to the other party's attention. **Thornton v. Shoe Lane Parking**[67] seems to indicate that the wider the clause, the more the party relying on it will have had to have done to bring to it the other parties' attention. The notice must be given before formation of the contract as illustrated in **Olley v. Marlborough**[68].

6.03 Incorporation by Previous Course of Dealings

According to **McCutcheon v. David MacBrayne Ltd**[69], terms (including exclusion clauses) may be incorporated into a contract if course of dealings between the parties were "regular and consistent". What this means usually depends on the facts. However, the courts have indicated that equality of bargaining power between the parties may be taken into account.

After the conclusion of the formation of a valid contract, the next matter of importance is to determine the extent of the obligations undertaken by the parties to the contract. This will itself involve a consideration of various other factors, for example, apart from the express terms contained in a contract, the parties' responsibilities may be further amplified by other terms known as implied terms. Thus, terms may be implied by the usage or custom of a particular trade, and unless these are expressly or implicitly excluded, they will be regarded as forming part and parcel of the contract[70].

Again, the full extent of the parties' obligations in a contract cannot be accurately determined until the terms are classified and evaluated. Terms are not all of equal importance). In between these we have conditions and the subsequently identified innominate or intermediate terms. Thus, the extent of a party's obligations, and the consequences of a breach of contract, can only be correctly assessed after determining the nature of the terms of the contract[71].

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[66] *Ibid*.
[67] (1934) 2 KB 394.
[68] (1877) 2 WLR 585.
[69] (1971) 2 WLR 585.
[70] (1949) 1 ALL ER 127.
[71] Sagay, I.E. op cit., p. 124.

Finally, it may, on occasions, be necessary for an aggrieved party to be advised on whether a term for whose breach he wants to sue was a "term of contract" or a "mere representation". Thus, in the process of negotiating an agreement which leads to the conclusion of a contract, the parties may have said or written many things. When the contract is finally concluded, it is a question of construction whether some of the things said during negotiation became a part of the contract or were mere representations. This will determine what the cause of action will be in case of a breach of the contract[72].

7.00 **Terms and Conditions Apply**

As stated earlier, contractual terms, are embodied in the contract document, except for parole contracts. These terms can be express terms or implied terms. They could be fundamental terms or warranties. Whichever form they take, the bottom line is that these terms, embodied in the contract are known to parties to the contract.

In the same manner, exclusion clauses are embodied in the contract by incorporation or by implication. However when it is incorporated into the contract document, the bottom line is that the parties know of them too.

Any party who signs the contract having knowledge of these terms and conditions has agreed to be bound or affected by those terms. Therefore while the courts are deciding on the extent of liabilities of the parties in relation to the contract terms, the Courts take judicial notice of the fact that these contractual terms no matter how obnoxious, were at least known to the parties.

However, some companies are now invoking terms not embodied in any contract upon their customers using "Terms and Conditions Apply". This is certainly an exclusion clause. Companies invoke this exclusion clause rampantly in situations where there are no written contract between them and their customers. Companies use this clause especially when they are promoting their products. They would make their offer to the public and at an obscure part of the document containing the offer, they would inscribe that "Term and Conditions Apply" or "T & C Apply" for short.

It is our view that this exclusion clause is obnoxious because the public, to whom the offer is made do not know what those Terms and Conditions are. Those conditions are not even spelt out in the obscure corner of the advertisement. Whatever they turn out to be, these terms and condition were not negotiated by the parties. It has the effect of way laying the customer and derogates from the prinapple of equal bargaining. The effect of "T &C applies is like shifting the goal post in a soccer match when the opponent (this time the customer) is about to score a goal. The customer may win in the promotion but when the goes to pick his price, the company can tell any story to evade liability.

But where a company unilaterally decides on the terms and conditions that are applicable, it then means that the customer who after knowledge of the advertised "T & C apply" eventually accepts the offer by partaking in the advertised promotion, does so at his own risk.

[72] *Ibid.*

"Terms and Conditions apply has the effect of reliving the company of "all liabilities" whatsoever. The worst is that the customer cannot even enforce any right as the clause effectively prevents him even on face value.

8.00 Recommendations/Conclusion

8.01 Recommendation

Against the backdrop of the fact that the world has become a global village due to the advancement in science and technology, it is imperative that this area of the law is further advanced and developed. Nigeria needs to upgrade this area of its laws to protect its largely illiterate citizen against the very crippling effect of exemption clauses. Nigeria and Nigerians will be at the receiving end of unrestricted exemption clauses especially in the area of external trade where people other than Nigerians are the ship owners and carriers of goods to Nigerian shores. Just like Prof. Sagay said that "in an underdeveloped country, in which standard of production of goods and other conditions for the protection of the consumer have either not been established, or if established remain unimplemented or unenforced, the rejection of any right to be protected against the consequences of a fundamental breach and breach of fundamental terms is a healthy rule of public policy. An unrestricted principle of "freedom of contract" would be dangerous and contrary to the public interest at the present stage of Nigeria's industrial and commercial development and culture".

In view of the fact that party relying on an exemption clause seeks to rely on it to shy away from his contractual liability thereby depriving the other party his remedy for the breach of the term in the contract. It is imperative that a legislation of note be put in place for the protection of consumers of goods and services in Nigeria to meet the growing trend in England as the development of the law in Nigeria did not occur independently of the position in England where the very harsh reality of the principle of exemption clauses had been greatly tempered by legislation. The purpose of the Unfair Contract Terms Act 1977 was stated in its preamble to be:

> ... to impose further limits on the extent to which under the law civil liability for breach of contract, negligence or other breach of duty, can be avoided by means of contract terms and otherwise...

The essential objection to any general control over exemption clauses is that such control is an unjustifiable interference with freedom of contract. This objection is valid only to the extent that there is true freedom of contract to interfere with. The objection has no validity where there is no realm possibility of negotiating contract terms, or where a party is not expected to read a contract, carefully or to understand its implications without legal advice. It is only in those circumstances that I believe that legislative intervention is justified. Having said that, there is need for statutory control of exemption clauses in Nigeria as obtained in England. It is seem difficult to have any legislative formular to distinguish between situations where there is genuine freedom of contract and those where there is no. Only individual scrutiny of all the circumstances to take into account the strength of the bargaining positions of the parties, the knowledge and understanding of the tem in question, the extent of which one party relied on the advice or skill of the other, and every other relevant fact, can lead to a valid distinction. It is the necessity to make that distinction that is the justification for legislative intervention.

8.02 Conclusion

Have exemption clauses met the yearnings of litigants or parties to a contract? The exchange of promises provide parties with certainty as to the scope and meaning of the contract and provides each party with the security of a remedy if the other party fails to fulfill his part of the bargain.

The UK Law Commissioner in their 1975 Report on exemption clauses cogently argued the case for control of exemption clauses. The commissions were in no doubt that in many cases such clauses operated against the public interest. They went on to say that all too often they are introduced in ways which result in the party affected by them remaining ignorant of their presence of import until it is too late. Secondly, the party seeking to impose the exemption clause may have the economic bargaining strength to insist on its acceptance and allow no room for negotiation. The use of exemption clauses leads to abuse, especially where the parties are not in positions of equal bargaining strength, we believe that the benefits of some measure of control outweigh any economic disadvantages which may be caused by this limited interference with the freedom of contract.

We have seen the efforts of the Courts to ameliorate the hardship imposed by the insertion of exemption clauses in commercial contracts. It does not appear that it has solved the problems which they were designed for. In this case one may be constrained and inclined to take the position of Ali Yusuf (SAN) wherein he canvassed and enjoined the Supreme Court of Nigeria to take another look at its position on Abed Brother's case (supra), where it took the common law position that as a matter of law, a fundamental breach of a contract by one party renders nugatory and of no effect an exemption clause inserted for the benefit of that party.