Statutory Control of Exclusion Clauses in Mobile Communication: A Comparative Analysis of the Nigerian Environment and Selected Jurisdictions

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ABSTRACT
This article presents a comparative analysis of the statutory control of exclusion clauses in the context of mobile communication, focusing on the Nigerian legal framework and selected jurisdictions. Exclusion clauses are contractual provisions that limit or exclude liability for certain actions or omissions. In the mobile communication sector, these clauses are often used by service providers to allocate risks and protect their interests. The selected jurisdictions for comparison include the United States, the United Kingdom, and Canada, which have well-developed legal systems and robust consumer protection frameworks. By examining their statutory control mechanisms, valuable insights can be gained to inform potential improvements in the Nigerian legal framework. Findings of the study have both theoretical and practical implications. The comparative analysis offers a comprehensive examination of the statutory control of exclusion clauses in mobile communication, highlighting the need for a balanced legal framework that effectively safeguards consumer rights while supporting the growth and development of the mobile communication industry in Nigeria.

Keywords: Contract law, statutory control, exclusion clauses, mobile communication

INTRODUCTION
The issue of exclusion clauses have been an integral part of contract law globally. Law itself cannot be studied in isolation. It is salutary for the development of law in Nigeria to examine the various provisions of law in different jurisdictions in order to enhance the operation of law in the country. After all, the development of the Nigeria law started with the received English law, the statutes of general applications, common law and equity. Therefore, these laws formed the base for the development of the Nigerian law. Consequently, it is necessary to examine the operation of exclusion clause in other jurisdictions as a necessity for the understanding of its procedures in Nigeria.

Australia
Where legislation and case law are in conflict, there is a presumption that legislation takes precedence insofar as there is any inconsistency. In Australia, the courts have consistently stated that the text of the statute is used first, and it is read as it is written, using the ordinary meaning of the words of the statute. It is also presumed that if legislation is not enacted pursuant to a specific provision of the federal Constitution, the states will have authority over the relevant matter in their respective jurisdictions. The provisions of exclusion clauses in mobile communications sector in Australia are analogous to what obtains in Nigeria. For example terms and conditions of Lebara [3] provide that:

Lebara does not warrant that the Services will be free of blockages, delays, Network failure, congestion, interferences or faults of any kind. Lebara will not be responsible for any loss or damage that may arise as a result.
Similar provisions are contained in the terms and conditions of the Nigerian network providers. However in Australia, the courts have a tendency of requiring the party relying on the clause to have drafted it properly so that it exempts them from the liability arising, and if any ambiguity is present, the courts usually interpret it strictly against the party relying on the clause.[5] As espoused in Darlington Future Ltd. v. Delcon Australia Pty. Ltd.,[6] the meaning of an exclusion clause is construed in its ordinary and natural meaning in the context. Although the meaning is construed like any other ordinary clause in a contract, it is necessary to examine the clause in the light of the contract as a whole. The judge in R. & B. Custom Brokers Co. Ltd. v. United Dominions Trust Ltd.[7] refused to allow an exemption clause, which failed to cover the nature of the implied term, on the grounds that it did not make specific and explicit reference to that term.[8] Clearly, the Australian law is analogous to the Nigerian law vis-a-vis exclusion clauses.

United States of America

In Consumer Product Safety v. GTE Sylvania, Inc.[9] The US Supreme Court held that: "The familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself in the absence of a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Also in Connecticut Nat.’l. Bank v. Germain[10] the US Supreme Court further entrenched that: “In interpreting a statute a court should always turn to one cardinal canon before all others. . . . Courts must presume that a legislature says in a statute what it means and means in a statute what it says there”. In the same vein, the court has come to presume that parties intend that the agreement they voluntarily entered into is absolutely binding on them. The court then can stand aloof on matters concerning terms of a contract because it is not the responsibility of the court to formulate terms of an agreement for the contracting parties.

In America, there are seven top wireless telecommunications service providers, greatest to smallest by current subscribers, are: Verizon Wireless,[11] AT&T Mobility,[12] Sprint Corporation,[13] T-Mobile US,[14] America Movil (TracFone Wireless),[15] U.S. Cellular[16] and Leap Wireless (Cricket Wireless)[17] (5.3 million). Of these, AT&T and T-Mobile use the GSM standard, while the other providers on the list use CDMA, with the exception of TracFone using a combination of both GSM and CDMA. Verizon, AT&T, Sprint and T-Mobile each operate nationwide wireless networks which cover most of the population in the United States. The smaller carriers provide native network coverage across selected regions of the United States while supplementing nationwide coverage through roaming agreements with other carriers.

There is a drastic difference between what is obtainable in Nigeria and what is obtainable in America. In Nigeria, MTN reserves the right to make changes to the rates for the service from time to time. But in America Verizon stipulates that:

We may change prices or any other term of your Service or this agreement at any time, but we'll provide notice first, including written notice if you have Post pay Service. If you use your Service after the change takes effect that means you're accepting the change. If you're a Post pay customer and a change to your Plan or this agreement has a material adverse effect on you, you can cancel the line of Service that has been affected within 60 days of receiving the notice with no early termination fee if we fail to negate the change after you notify us of your objection to it.[18]

This explains why in Nigeria there is usually a hike in call rates without any form of reference of option to the subscriber. Unfortunately, in Nigeria there is lack of zeal among subscribers to protect their rights and ensure that the network providers do not turn into shylocks.

Britain

The situation in the United Kingdom, where the Unfair Contracts Terms 1977 has greatly impacted the ordinary nature of such exclusion clauses is worth emulating in Nigeria.
Lord Denning MR aptly outlined the journey of exclusion clauses in the United Kingdom in his popular dictum in the case of *George Mitchell v. Finney Lock Steed* [19] thus:

None of you nowadays will remember the trouble we had when I was called to the Bar- with exemption clauses. They were printed in small print on the back of tickets, order forms and invoices. They were contained in catalogues and time tables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were, he was bound. All this was done in the name of ‘freedom of contract’. But the freedom was all on the side of the big concern which had the use of the printing press. No freedom for the little man who took the ticket or order forms or invoice. The big concern said, ‘take it or leave it’. The little man had no option but to take it. The big man could and did exempt itself from liability in its own interest without regard to the little man. It got away with it time after time. When the courts said to the big concern, ‘you must put it in clear words’, the big concern had no hesitation doing so. It knew well that the little man would never read the exemption clauses or understand them. Faced with this abuse of power by the strong against the weak- by the use of the small print of the conditions – the judges did what they could to put a curb upon it. They still had before them, the idol, ‘freedom of contract’. They still knelt down and worshipped it, but they concealed under their cloak a secret weapon. They used it to stab the idol in the back. This weapon was called the true construction of the contract. They used it with great skill and ingenuity. They used it to depart from the natural meaning of the exemption clauses and to put upon them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability; or that in the circumstances, the big concern was not entitled to rely on the exemption clause. But when the clause was itself reasonable and gave rise to a reasonable result, the judges upheld it; at any rate, when the clause did not exclude liability entirely but only limited it to a reasonable amount.

In the same case at the House of Lords, Lord Bridge put paid to the issue when he stated that the passing of the Unfair Contract Terms Act 1977 has removed from judges the temptation to resort to the device of ascribing to words appearing in exemption clauses tortured meanings so as to avoid giving effect to an exclusion or limitation of liability when the judge thought that in the circumstances, to do so, would be unfair. The objective of the Unfair Contract Terms 1977 is to, among others, render terms which exclude or limit liability subject to the test of reasonableness or even ineffective so as to limit their applicability where they violate the rights of consumers.

Consequently, in Britain the network providers are conscious of the Unfair Contract Terms 1977 and have consistently couched the terms and conditions of service provision in line with the Act. It may also be safe to say that Britain has a better legal frame work for the statutory control of exclusion clauses in mobile communications. A reform of this nature is necessary in Nigerian laws in order to limit the incidents of violation of consumer rights and to remove the issue of construction of warranties and similar terms of contract from the purview of conjecture. In a free market society, where market forces largely determine the prices of goods and services, adequate laws for the protection of consumers should be put in place, especially when there is an absence of laws governing competition in the society.[20]

**Canada**

The Supreme Court of Canada’s judgment in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*[21] has been described as putting to rest the doctrine of fundamental breach. In that case The Province of British Columbia issued a request for expressions of interest for the design and construction of a highway. Six teams responded with submissions including Tercon and Brentwood. A few months later, the Province informed the six proponents that it now intended to design
the highway itself and issued a request for proposals for its construction. The request for proposals set out a specifically defined project and contemplated that proposals would be evaluated according to specific criteria. Under its terms, only the six original proponents were eligible to submit a proposal; those received from any other party would not be considered. The request for proposals also included an exclusion of liability clause which stated:

Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this request for proposals, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.

As it lacked expertise in drilling and blasting, Brentwood entered into a pre-bidding agreement with another construction company - EAC, which was not a qualified bidder, to undertake the work as a joint venture. This arrangement allowed Brentwood to prepare a more competitive proposal. Ultimately, Brentwood submitted a bid in its own name with EAC listed as a "major member" of the team. Brentwood and Tercon were the two short-listed proponents and the Province selected Brentwood for the project. Tercon brought an action in damages against the Province.

The trial judge found that the Brentwood bid was, in fact, submitted by a joint venture of Brentwood and EAC and that the Province, which was aware of the situation, breached the express provisions of the tendering contract with Tercon by considering a bid from an ineligible bidder and by awarding it the work. The court also held that, as a matter of construction, the exclusion clause did not bar recovery for the breaches she had found. The clause was ambiguous and she resolved this ambiguity in Tercon's favour under the doctrine of contra proferentem.[22] She held that the Province’s breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the Province’s breach. The Court of Appeal set aside the decision, holding that the exclusion clause was clear and unambiguous and barred compensation for all defaults.

Many court watchers would argue that that doctrine was effectively abolished in Canada by the Canadian Supreme Court’s decision in Hunter Engineering Co. v. Syncrude Canada Ltd.,[23] handed down more than 20 years before the decision in Tercon.[24] The court in Tercon described the doctrine this way:

...where the defendant had so egregiously breached the contract so as to deny the plaintiff substantially the whole of its benefit … the innocent party was excused from further performance but the defendant could still be held liable for the consequences of its "fundamental breach" even if the parties had excluded liability by clear and express language.

In Hunter Engineering Co. v. Syncrude Canada Ltd.supra, the court unanimously agreed that the doctrine was no longer the law of Canada. In that case, Syncrude ordered 32 mining gearboxes from Hunter which were fabricated by a subcontractor. The specifications were provided by Syncrude, but Hunter designed the gearboxes. The second contract, between Syncrude and Allis-Chambers, was for the supply of an extraction conveyor system and included four extraction gearboxes to drive the machinery. Those gearboxes were built according to the same design as the mining gearboxes supplied by Hunter and were fabricated by the subcontractor. The gearboxes entered service on November 24, 1977. Both contracts included time-limited warranties. The Allis-Chambers warranty also stated it represented the only warranty given, and no other warranty or conditions, statutory or otherwise, were to be implied. The warranty was for 24 months, or for 12 months after the gearboxes entered service. Both contracts provided that the laws of Ontario were to apply.

In September and October of 1979 defects were discovered in the gearboxes which were repaired at a cost of $400,000. Allis-Chambers denied responsibility due to the expired warranty. Syncrude sued claiming a fundamental breach, but failed at trial. The Court of Appeal found that there was a fundamental breach and that the warranty clause was not intended to exclude liability for fundamental breach.

However, that did not mean that exclusion or limitation of liability clauses would always be enforced by a court. The court in Hunter was divided on the circumstances in which a court should refuse to give effect to exclusion or limitation of liability clause. Some members opted for an unconscionability test, while
others favoured unreasonableness and public policy tests. The court in Tercon resolved this difference of opinion by favouring an unconscionability exception to enforcement of an exclusion or limitation of liability clause. The court went on to hold that even if an exclusion exception or limitation of liability clause were not unconscionable vis-à-vis the parties, it may nevertheless be unenforceable if the court concludes that it is contrary to public policy. Although the court was unanimous on these aspects of Tercon, the court was split 5-4 on the interpretation of the exclusion clause in Tercon. The majority held that the clause did not apply, while the minority held that the clause did protect British Columbia from its breach of the RFP.

It is interesting to note that of all the judges who heard this case, seven [25] decided that the clause applied in the circumstances, while six judges [26] held that it did not. Only the trial judge, in obiter, held the clause to be unconscionable. None of the other 12 judges who heard the case found the clause to be unconscionable, although the four minority judges in the Canadian Supreme Court held that the clause was not unconscionable. The judgment also raises the question of what types of clauses will be subject to the unconscionability test. Put another way, will courts consider an entire agreement clause to be an exclusion or limitation of liability clause? Will a threshold or a cap on damages be considered in such clause? Are exclusion of implied warranty clauses subject to the unconscionability standard? These are just some of the questions that are likely to arise in the future.

As for the test to be used to determine if an exclusion or limitation of liability is unconscionable, neither the majority nor the minority in Tercon set out what the test should be. The majority found that the clause did not apply and, therefore, did not have to deal with whether the clause was unconscionable. The minority found the clause did apply, but found no inequality of bargaining power. Presumably, on that basis, the minority concluded that the clause was not unconscionable.

Tercon has been hailed for putting the final nail in the coffin of the doctrine of fundamental breach, a result supposedly achieved in effect by the court in Hunter in 1989 and another case in 1999. It is true that Tercon also probably makes it difficult to argue that an exclusion or limitation of liability clause is unconscionable in an agreement between sophisticated commercial parties.

On the other hand, the adoption of unconscionability still leaves a real risk that a court will refuse to give effect to such clauses in many consumer contracts. Therefore, the test of unconscionability becomes crucial for businesses dealing with consumers.

In Titus v. William F. Cooke Enterprises Inc.[27] MacPherson J. adopted the four-part test applied in an earlier Alberta Court of Appeal decision:

a. a grossly unfair and improvident transaction;

b. the victim’s lack of independent legal advice or other suitable advice;

c. an overwhelming imbalance in bargaining power caused by victim’s ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and

d. the other party’s knowingly taking advantage of this vulnerability.

Yet, in Birch v. Union of Taxation Employers, Local [28] the court used the two-part test employed in another decision while at the same time acknowledging that it does not appear to be a single articulation of a test applicable to all situations. This is not surprising given that the doctrine of unconscionability has been applied in a wide variety of cases. The Canadian Supreme Court itself has dealt with unconscionability in a few cases. In one decision, the court held that a special test for unconscionability should be used in the matrimonial context. It is certainly conceivable that the Canadian Supreme Court, in a subsequent decision, will have to determine the test for unconscionability in the case of exclusion or limitation of liability clauses. The introduction of the doctrine of public policy into the analysis introduces another element of uncertainty, unless the court narrowly circumscribes the concept of public policy in this context.

The fact that the nine members of the court in Tercon were divided on the interpretation of the clause highlights what has always been an important battle ground in the enforceability of exclusion and limitation of liability clauses — how broadly or how narrowly should such clauses be interpreted. The division in Tercon under scores the need for absolute clarity in the drafting of such clauses, even if clear
language will be a hard to sell. After all, what a contracting party wants to focus the other party’s attention on what little it has actually gained from the contract? Put another way, the emphasis on clear language may well result in perfection being the enemy of the good.

Nigerian Position
The position of Nigerian law as it relates to the enforcement of exclusion clauses in mobile communications is presently nebulous and unascertainable. The only option presently available to network users is to form consumer groups to negotiate the terms of such contract and where necessary pressure the network operators in order to offer better services and conditions.[29]

CONCLUSION
This article has provided a comparative analysis of the statutory control of exclusion clauses in mobile communication, focusing on the Nigerian environment and selected jurisdictions. The research conducted in this study contributes to the existing literature on consumer protection, contract law, and the regulation of mobile communication services. It underscores the importance of statutory control in addressing the power imbalance between service providers and consumers and ensuring fair and transparent contractual relationships. Moving forward, policymakers in Nigeria should consider implementing clearer and more specific regulations governing exclusion clauses in mobile communication contracts. Additionally, efforts should be made to enhance consumer awareness and education regarding their rights and the implications of contractual terms. The comparative analysis presented in this article highlights the importance of a balanced legal framework that effectively protects consumer rights while supporting the growth and development of the mobile communication industry in Nigeria.

REFERENCES
2. Ibid
3. Lebara is a mobile communications giant in Australia
7. [1988] 1 All ER 847.
8. The term in question was the implied term as to fitness-to-purpose pursuant to the Sale of Goods Act 1979, s. 14(3).
11. With subscription base of 155 million subscribers.
12. With subscription base of 107 million subscribers
13. With subscription base of 55.6 million subscribers.
14. With subscription base of 43 million subscribers.
15. With subscription base of 23.23 million subscribers.
16. With subscription base of 5.8 million subscribers.
17. With subscription base of 5.3 million subscribers.

22. According to the contra proferentem rule the words of written documents are construed more forcibly against the party using them. In other words, any ambiguity or uncertainty, in the meaning and scope of an exclusion clause will be resolved against the person inserting it in the contract. I. E. Sagay, *Nigerian Law of Contract*, (Ibadan: Spectrum Books Ltd., 2000), p. 172.

23. [1989] 1 SCR 426


25. The three members of the Court of Appeal and the four dissenting judges in the Supreme Court.

26. The trial judges and five judges in the Supreme Court

27. 2007 ONCA 573 (CanLII).
