

**JURISPRUDENTIAL ANALYSIS OF THE LEGAL FRAMEWORK
FOR DISCLAIMER CLAUSES IN COMMERCIAL
TRANSACTIONS IN NIGERIA: A CALL FOR FURTHER
DIRECTIONS**

Kemisola Busayo Akanle*

John Femi Oloruntobi**

Abstract

Disclaimer clauses are prevalent in modern contract law and serve as protective mechanisms for parties, especially suppliers, service providers, and commercial entities, seeking to limit or to exclude liability for certain acts, omissions, or contractual failures. Their emergence is rooted in the principle of contractual freedom; however, their enforceability is now tempered by considerations of fairness, consumer protection, and public policy. The paper aims to assess the legal framework governing the validity and enforceability of disclaimer clauses in Nigeria. It examines the statutory and judicial principles regulating such clauses, assesses the extent to which consumer protection laws limit their operation, and evaluates whether the existing legal regime adequately protects consumers and weaker contractual parties. Findings indicate that disclaimer clauses are not inherently illegal under Nigerian law, but their enforceability depends on factors such as whether the clause was effectively brought to the attention

* Senior Lecturer, Department of Business and Industrial Law, Faculty of Law, Ekiti State University, Ado-Ekiti. Email: kemisola.akanle@eksu.edu.ng

** Legal Research Officer, Customary Court of Appeal, Ekiti State, Ado-Ekiti, Ekiti State. Email: johnfemioloruntobi@gmail.com

of the other party, among others. This study takes a doctrinal legal research approach, using statutes as well as relevant Nigerian and foreign case laws drawing sources from secondary sources. The paper found further that, while disclaimer clauses can be useful in managing contractual risk, they can also be used to exploit consumers and weaker parties in standard-form contracts. Judicial interpretation in Nigeria remains an important safeguard against abuse. Nevertheless, the study underscores the need for a more comprehensive statutory regime specifically regulating unfair contractual terms, alongside strengthened regulatory oversight and greater legal awareness, especially in the context of digital transactions.

Keywords: Commercial Transaction, Disclaimer Clauses, E-commerce

1.0 INTRODUCTION

In an era marked by the proliferation of commercial and consumer transactions, contractual provisions have evolved to allocate risks and define responsibilities. Among such provisions, disclaimer clauses have gained prominence as tools used by parties particularly businesses and service providers to limit or exclude liability arising from contractual, tortious, or statutory obligations. These clauses are inserted in a wide variety of transactions, including product purchases, real estate contracts, employment terms, shipping and logistics agreements, and notably, digital platforms and e-commerce transactions.

The rationale for disclaimer clauses is grounded in the principle of freedom of contract, which allows parties to freely define the terms of their agreement. However, the increasing use of standard-form or "take-it-or-leave-it" contracts has created significant concerns about the fairness and

balance of such clauses. In many cases, one party usually the consumer or a party in a weaker bargaining position is compelled to accept terms that significantly limit or eliminate their legal rights or access to remedies in the event of a breach or damage.

As a result, legal systems worldwide, including Nigeria, have developed mechanisms to scrutinize and, where necessary, restrict or invalidate disclaimer clauses. Nigerian courts and statutes attempt to strike a balance between respecting parties' autonomy and protecting public interest and vulnerable parties. The Federal Competition and Consumer Protection Act 2019 (FCCPA), in particular, aims to guard consumers against unfair contractual terms. Similarly, judicial precedents in Nigeria and persuasive decisions from common law jurisdictions emphasize the need for transparency, fairness, and actual notice when enforcing disclaimer clauses. The purpose of this paper is to critically examine the concept, nature, and enforceability of disclaimer clauses within the Nigerian legal context. It explores the legal framework governing such clauses, the attitude of courts, their role in digital contracts, and a comparative analysis with other jurisdictions. The paper also provides a set of recommendations to ensure that disclaimer clauses serve legitimate business purposes without eroding consumer protection and public interest.

2.0 ANALYTICAL CONTENT

2.1 Juristic Foundations and Normative Justification of Disclaimer Clauses

Disclaimer clauses function as contractual devices through which parties allocate risks and define liability boundaries. Their legitimacy traditionally derives from the doctrine of freedom of contract, which permits parties to determine the scope of obligations voluntarily assumed. Under classical

contract theory, courts enforce contractual provisions strictly, including exclusions of liability, on the assumption that parties' bargain from positions of equality.

Modern commercial realities, however, challenge this assumption. Standard-form contracts, consumer adhesion agreements, and digital transactions often involve disparities in bargaining power. Consequently, the enforceability of disclaimer clauses increasingly engages considerations of fairness, transparency, and public policy. Nigerian courts have therefore adopted a balancing approach that preserves contractual autonomy while preventing injustice and exploitation. This shift reflects a broader jurisprudential movement from rigid formal consent toward substantive fairness and consumer justice.

2.2 Judicial Control of Disclaimer Clauses in Nigeria

Judicial oversight remains the primary mechanism regulating disclaimer clauses in Nigeria. Courts assess enforceability through rules governing incorporation, notice, interpretation, and public policy.

(a) Incorporation and Notice

A disclaimer clause is binding only where it has been properly incorporated into the contract and reasonable steps were taken to bring it to the attention of the other party prior to or at the time of contracting. This protects parties from hidden exclusions. The Supreme Court recognized that consent may be vitiated where a party is misled or unaware of contractual terms in *U.T.C. (Nig.) Ltd v Pamotei*¹. The decision underscores the necessity of informed assent in contractual obligations.

¹ *U.T.C. (Nig.) Ltd v Pamotei* (1989) 2 NWLR (Pt 103) 244 (SC).

(b) Strict Construction and Contra Proferentem

Disclaimers are strictly construed. Where there is ambiguity, the clause is interpreted against the party relying on it. This rule protects weaker parties from ambiguous drafting and avoids unintentional forfeiture of rights. The Court of Appeal stressed the need for clarity in limitation clauses in *Adesanya v Lekki Concession Company Ltd*².

(c) Fraud, Gross Negligence, and Public Policy

Clauses that prohibit liability for fraud, illegality, or gross negligence are unenforceable because they violate public policy. Nigerian courts remain unwilling to allow contractual terms to protect wrongdoing or undermine justice. As a result, public policy imposes an overly broad limitation on contractual freedom.

(d) Digital Commerce and Emerging Standards of Consent

Digital commerce has transformed contractual relationships by enabling transactions to be concluded electronically without physical interaction between parties. In this environment, consent remains the cornerstone of contractual validity. However, the methods through which consent is obtained and evidenced have evolved, prompting courts and regulators to develop standards suited to electronic transactions. In *Carlill v Carbolic Smoke Ball Co*³ the court affirmed that acceptance may be inferred from conduct, a principle that continues to influence electronic contracting where acceptance occurs through digital actions. Courts generally assess the

² *Adesanya v Lekki Concession Co Ltd* (2017) LPELR-43113 (CA).

³ *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 (CA).

clarity and visibility of terms, the method used to obtain assent, whether the user had reasonable notice, and whether acceptance was deliberate.

3.0 LEGAL FRAMEWORK FOR DISCLAIMER CLAUSES AND CONSUMER PROTECTION

Nigeria's legal framework for disclaimer clauses reflects a deliberate effort to strike a balance between contractual freedom and consumer protection. While such clauses are still permissible as mechanisms for allocating commercial risk, legislative intervention and judicial oversight have gradually imposed standards of fairness, transparency, and accountability to prevent their abuse. Exclusion and limitation clauses are recognized by Nigerian law as valid when properly incorporated, clearly expressed, and fairly brought to the attention of the other contracting party. In modern consumer transactions, however, the enforceability of disclaimer clauses is significantly conditioned by statutory safeguards designed to prevent unfair contractual practices.

(a) Federal Competition and Consumer Protection Act 2018

The Federal Competition and Consumer Protection Act represents a major legislative shift toward fairness in consumer contracts. It requires that any term purporting to limit or exclude liability must be adequately disclosed and brought to the consumer's attention prior to the conclusion of the transaction, thereby promoting transparency and informed consent.⁴ The Act further renders void contractual terms that seek to waive liability for defective performance, negligence, or misrepresentation where such exclusions operate unfairly or undermine consumer rights.⁵ Section 128 of

⁴ Federal Competition and Consumer Protection Act 2018, s 128.

⁵ *ibid* s. 129.

the FCCPA requires that any term limiting liability must be brought to the consumer's attention in a clear and conspicuous manner before the transaction is concluded.⁶ Section 129 invalidates terms that purport to waive liability for defective performance, negligence, or misrepresentation where such exclusion is unfair or unjust.⁷ These provisions significantly curtail the abuse of disclaimer clauses in consumer transactions and reinforce transparency obligations.

(b) Sale of Goods Act 1893 and Implied Terms

The Sale of Goods Act implies essential conditions into contracts for the sale of goods, including title, correspondence with description, merchantable quality, and fitness for purpose.⁸ While parties may exclude implied terms, Nigerian courts require clear language and fairness in such exclusions, reflecting a consumer-protective interpretative approach.

(c) Evidence Act 2011 and Proof of Contractual Terms

The Evidence Act governs proof of contractual terms and also plays a procedural role by requiring that contractual terms, including disclaimer clauses, be proved through documentary evidence where the contract is reduced into writing.⁹ This ensures certainty and prevents reliance on undisclosed or ambiguously communicated limitations of liability.

Judicial decisions reinforce these statutory safeguards by insisting on informed consent and fairness in contractual dealings. In *U.T.C. (Nig.) Ltd*

⁶ Ibid s. 128

⁷ Ibid s. 129

⁸ Sale of Goods Act 1893 ss 12–15.

⁹ Evidence Act 2011, ss 128–131.

*v Pamotei*¹⁰, the Supreme Court emphasised that contractual obligations may be invalidated where consent is vitiated by misrepresentation or lack of informed assent. Likewise, in *Adesanya v Lekki Concession Company Ltd*¹¹, the Court of Appeal underscored the necessity for clarity and fairness in limitation clauses before they can be enforced.¹²

Taken together, this evolving legal framework demonstrates a transition from strict contractual autonomy towards a consumer-centred regulatory approach. Disclaimer clauses remain lawful, but their enforceability is now conditioned upon transparency, fairness, proper incorporation, and consistency with public policy and consumer protection objectives.

Where a contract is reduced to writing, its contents must be proved by the document itself, and oral evidence cannot contradict its terms.¹³ A party relying on a disclaimer clause must therefore prove incorporation, consent, and scope, ensuring reliability and preventing reliance on undisclosed limitations.

4.0 Disclaimer Clauses and Tortious Liability

Although parties may allocate risk contractually, attempts to exclude liability in negligence are strictly scrutinized. Nigerian courts examine whether: The negligence is expressly covered, the clause is clear and unambiguous, whether its enforcement would violate public policy and lastly whether personal injury or serious harm is involved. Courts are particularly reluctant to enforce clauses that would permit avoidance of responsibility for serious wrongdoing.

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *Adesanya v Lekki Concession Co Ltd* (n 2).

¹³ Evidence Act 2011 (n 9).

5. Digital Commerce and Emerging Standards of Consent

E-commerce has revolutionized the global marketplace, enabling consumers to shop, compare, and transact digitally with unprecedented convenience. However, the extensive collection, storage, and processing of personal data by online platforms has raised significant legal, ethical, and regulatory concerns. Personal data ranging from names, addresses, and financial information to behavioral and locational data has become a critical asset for digital businesses, driving targeted marketing, personalized services, and analytics. Yet, the very practices that enable these benefits pose threats to individual privacy, autonomy, and consumer rights¹⁴.

Consent sits at the heart of data privacy in today's digital economy. In the context of e-commerce, where large volumes of personal information are gathered, analyzed, and shared among different actors, obtaining valid permission from users is essential. The Digital Personal Data Protection Act¹⁵ underscores this requirement by mandating that consent must be clear, informed, specific, and given freely. These standard forms both the legal basis and ethical justification for processing personal data. Online retail platforms are especially impacted because their business models depend heavily on personalized advertising, recommendation systems, and behavioral targeting. As a result, they must design consent processes that genuinely inform users and allow meaningful choice. Implementing effective consent mechanisms is not only necessary for legal compliance; it

¹⁴ 'Consumer Protection and Disclaimer Clauses in Commercial Transactions' (2025) 11(10) *International Journal of Applied Research* 388.

¹⁵ H Kaur and R Verma, 'Consumer Rights in Digital Transactions: A Critical Appraisal of DPDPA' (2023) 7(4) *Journal of Information Security and Privacy* 88.

also helps build consumer confidence, protect brand integrity, and ensure long-term regulatory stability.

5.1 General Forms of Online Consents:

- A. Click-wrap agreements, requires users to Tap “I agree,” are generally enforceable due to its explicit consent. These agreements are widely enforceable because they provide clear evidence of assent. In *Specht v Netscape Communications Corp*¹⁶ the court emphasized that enforceability depends on clear notice and unambiguous manifestation of assent. it should be further noted that enforceability depends solely on reasonable notice and enforceability of assent.¹⁷ Although Nigerian jurisprudence in this area is still developing, principles of transparency, accessibility, and meaningful consent remain decisive.

- B. Browse-wrap agreements, which rely on passive notice, are enforceable only where adequate notice and informed consent are established¹⁸. Courts enforce browse-wrap agreements only where users had actual or constructive notice. In *Nguyen v Barnes & Noble Inc.*,¹⁹ the court refused enforcement because the website failed to provide conspicuous notice of the terms.

6. Socio-Economic Implications and Power Imbalance

Disclaimer clauses are a common feature in modern commercial transactions. They are designed to allocate risk, limit liability, and reduce

¹⁶ *Specht v Netscape Communications Corp* 306 F3d 17 (2d Cir 2002).

¹⁷ *ibid.*

¹⁸ *ProCD Inc v Zeidenberg* 86 F3d 1447 (7th Cir 1996).

¹⁹ *Nguyen v Barnes & Noble Inc* 763 F3d 1171 (9th Cir 2014).

operational costs. Previously, their practical operation frequently reflected deeper socioeconomic inequalities between businesses and customers. Where bargaining power is unequal, such clauses may serve as mechanisms to shield stronger parties from accountability rather than legitimate risk allocation tools. The Nigerian Supreme Court has acknowledged the risks of unequal bargaining power. In *Sonnar (Nig.) Ltd v Nordwind*²⁰, the Court emphasized that contractual clauses should not be enforced where they operate unjustly or oppressively.

Disclaimer clauses often transfer operational and financial risks to consumers who lack the capacity to evaluate or absorb them. Instances include clauses stating that services are provided “at owner’s risk” or that companies bear no responsibility for service interruptions. Courts have been hesitant to enforce such clauses if they are unreasonable or contrary to public policy. In *Olley v Marlborough Court Ltd*,²¹ an exclusion clause was held ineffective because adequate notice was not provided before contract formation.

In Nigeria, the principle of notice and fairness was affirmed in *Niger Insurance Co Ltd v Abed Brothers Ltd*,²² where the court stressed that exclusion clauses must be clearly communicated.

Disclaimer clauses limit consumers’ ability to seek compensation for losses arising from negligence or poor service delivery often caused by suppliers or manufacturers. The Supreme Court in *A.-G., Bendel State v United Bank*

²⁰ *Sonnar (Nig.) Ltd v Nordwind* (1987) 4 NWLR (Pt 66) 520 (SC).

²¹ *Olley v Marlborough Court Ltd* [1949] 1 KB 532 (CA).

²² *Niger Insurance Co Ltd v Abed Brothers Ltd* (1976) 1 All NLR 141.

for Africa Ltd.²³ recognized that contractual provisions cannot be used to evade liability where negligence or statutory duties are involved.

Statutorily, the Federal Competition and Consumer Protection Act²⁴ (FCCPA) protects consumers from unfair, unjust, or unreasonable contract terms. Section 120 prohibits unfair contract terms, and Section 130 empowers courts to invalidate terms that are excessively one-sided. These provisions strengthen consumer access to remedies and counterbalance restrictive disclaimers.

7.0 MEANING AND LEGAL CHARACTER OF DISCLAIMER CLAUSES

Disclaimer clauses are contractual provisions that deny, limit, or qualify a party's legal liability in the event of a breach, negligence, or failure to fulfill a contractual term. They may seek to exclude:

- i. Liability for defective goods or services
- ii. Liability for negligence or omission
- iii. Responsibility for failure to meet expectations or warranties

These clauses are legal, but their validity is not guaranteed. Courts will consider the clarity of the clause, its prominence in the contract, and whether the other party provided informed consent. A classic example is a notice that reads, "The management will not be responsible for any loss or damage to vehicles parked on these premises." Such clauses are common in parking lots, warehouses, hotels, and online marketplaces.

²³ Attorney-General Bendel State v United Bank for Africa Ltd (1986) 4 NWLR (Pt 37) 547 (SC).

²⁴ Federal Competition and Consumer Protection Act 2018 ss 120, 130.

7.1 HISTORICAL DEVELOPMENT OF DISCLAIMER CLAUSES

The historical roots of disclaimer clauses can be traced to the evolution of contract law in common law jurisdictions, particularly in England, from where Nigeria inherited much of its legal system. In classical contract theory, parties were considered to be on equal footing, capable of negotiating terms and bearing the consequences of their agreements. The courts, during the 19th and early 20th centuries, upheld the sanctity of contract doctrine that favoured the enforcement of all terms, including clauses excluding or limiting liability.

During the Industrial Revolution, the rapid growth of mass production and commercial transactions led to the rise of standard form contracts. These contracts often included boilerplate clauses, among them disclaimers that were drafted by stronger parties and presented to consumers and employees on a non-negotiable basis. Courts initially enforced these clauses strictly, as seen in early cases like *L'Estrange v Graucob*²⁵, where the court held that a party who signs a document is bound by its terms, even if they have not read it.

However, as the imbalance of bargaining power between parties became more evident, courts began to evolve doctrines to mitigate the harshness of disclaimer clauses. The principle of reasonable notice was introduced, as in *Parker v South Eastern Railway Co*²⁶, where the court held that a party could only be bound by a disclaimer clause if reasonable steps were taken

²⁵ *ibid.*

²⁶ *Parker v South Eastern Railway Co* (1877) 2 CPD 416 (CA).

to bring it to their attention. Similarly, the development of the contra proferentem rule interpreting ambiguous clauses against the party relying on them served to protect weaker parties.

In Nigeria, the development of disclaimer clauses followed the same trajectory, largely influenced by English common law. The Sale of Goods Act 1893 (applicable in Nigeria) and judicial decisions have incorporated and adapted these principles. In *Okwejiminor v Gbakeji*²⁷, the Nigerian Court of Appeal emphasized the need for transparency and fairness in contractual terms, especially those limiting liability.

In more recent years, statutory interventions such as the Federal Competition and Consumer Protection Act 2018 have further shifted the legal landscape. These interventions seek to codify protections against unfair contract terms and make the legal framework more consumer-oriented. Additionally, the growth of digital contracts has necessitated new interpretations of what constitutes notice and consent in the context of disclaimer clauses.²⁸

Hitherto, the historical development of disclaimer clauses reflects a broader trend in contract law: a gradual shift from rigid enforcement of formalistic terms toward a more balanced approach that considers equity, consumer rights, and public policy.

²⁷ *Okwejiminor v Gbakeji* (2008) 5 NWLR (Pt 1079) 172 (CA).

²⁸ J Beatson, *Anson's Law of Contract* (29th edn, OUP 2010).

7.2 TYPES OF DISCLAIMER CLAUSES

Disclaimer clauses can be classified into several categories based on their intended purpose and scope. Understanding these classifications helps in assessing their legal effect and enforceability:

- a. **Exclusion Clauses:** These are clauses that completely exclude a party's liability for certain types of loss or damage. For instance, a courier service may include a clause stating it will not be liable for any loss arising from delay in delivery. However, courts often scrutinize such clauses closely, particularly where they attempt to exclude liability for negligence. In *Canada Steamship Lines v. The King*²⁹, the Privy Council laid down guidelines for interpreting exclusion clauses and held that such clauses must be clearly expressed if they are to cover negligence³⁰.
- b. **Limitation Clauses:** These clauses do not wholly exclude liability but place a cap on the amount payable in case of a breach. For example, a warehouse agreement may limit liability to a specific sum per kilogram of goods lost or damaged. Nigerian courts have generally upheld such clauses provided they are reasonable and brought to the other party's attention.
- c. **Time Limitation Clauses:** These stipulate a specific time frame within which claims must be brought. They are commonly found in insurance contracts or transportation agreements. In *National Insurance Corp. of Nigeria v Power and Industrial Engineering Co. Ltd*³¹, the court recognized the validity of such clauses as long as they do not contravene statutory limitation periods.

²⁹ *Canada Steamship Lines v. The King* [1952] AC 192.

³⁰ *ibid*

³¹ *National Insurance Corporation of Nigeria (NICON) v. Power & Industrial Engineering Co. Ltd* (1986) 1 NWLR (Pt. 14) 1.

- d. **Disclaimer of Implied Terms:** These clauses exclude the operation of terms implied by law, such as fitness for purpose or merchantable quality under the Sale of Goods Act. For example, a seller may disclaim any implied warranty as to the condition of the goods sold. However, under the FCCPA and judicial decisions like *Okwejiminor v Gbakeji*, such disclaimers may be struck down if found to be unfair or unconscionable.
- e. **Disclaimer of Liability for Third Parties:** These disclaimers attempt to exclude liability for acts done by third parties, including subcontractors or agents. Their enforceability depends on whether the principal can legally shift such responsibilities and whether the disclaimer was clearly communicated.³²
- f. **Disclaimers in Digital Contracts:** With the rise of e-commerce, disclaimers are now embedded in terms of service on websites and applications. Click-wrap agreements require users to affirmatively agree to the terms (and disclaimers), while browse-wrap agreements do not. Courts generally enforce click-wrap agreements if consent is explicit³³. Nigerian courts have yet to fully develop precedent in this area, but decisions in the U.S., such as *Specht v Netscape Communications Corp.*³⁴, illustrate the high threshold for enforceability of browse-wrap terms. The enforceability of each of these types of disclaimer clauses depends on multiple factors including clarity, notice, voluntariness, and compliance with consumer protection laws.

³² I Sagay, *Nigerian Law of Contract* (2nd edn, Spectrum Books 2000) 495–517.

³³ *ibid*

³⁴ *Specht v Netscape Communications Corp* (n 16).

7.3 FORMATION AND INCORPORATION OF DISCLAIMER CLAUSES

The enforceability of a disclaimer clause largely depends on whether it was properly formed and incorporated into the contract. Under Nigerian law, which adopts the common law tradition, there are specific principles governing the incorporation of contractual terms, including disclaimer clauses. The legitimacy of such clauses often hinges on whether the party against whom it is being enforced had adequate notice of it and consented to it.

i. Incorporation by Signature:

The general principle is that a person who signs a contractual document is bound by its terms, including any disclaimer clauses, regardless of whether they read or understood them. This was the position of the English Court of Appeal in *L'Estrange v Graucob*³⁵, a case consistently followed in Nigerian jurisprudence. In this case, the court held that a party who signs a written contract is deemed to have agreed to all its terms.

However, courts may depart from this rule if there is evidence of fraud, misrepresentation, or non-est factum. For example, in *U.T.C. (Nig.) Ltd. v. Pamotei*³⁶, the Supreme Court of Nigeria acknowledged that a contract may be set aside if the consent to the terms was vitiated by misrepresentation or mistake.

ii. Incorporation by Notice:

Where a contract is not signed, disclaimer clauses can still be valid if reasonable notice of their existence was given to the other party before or

³⁵ *L'Estrange v Graucob* [1934] 2 KB 394 (CA).

³⁶ *U.T.C. (Nig.) Ltd v Pamotei* (n 1).

at the time of contract formation. This is particularly relevant in standard-form contracts, tickets, or receipts. In *Parker v South Eastern Railway Co.*³⁷, the court ruled that for a disclaimer clause to be valid, the party must have had actual or constructive notice.

Nigerian courts also recognize this principle. In *Olley v Marlborough Court Ltd*³⁸, it was held that a notice displayed in a hotel room, purporting to exclude liability for stolen property, was ineffective because it was brought to the customer's attention after the contract had been formed at the reception desk.

iii. Incorporation by Course of Dealing:

Where parties have had prior dealings in which a particular disclaimer clause was consistently included, courts may infer incorporation from the established course of dealing. In *McCutcheon v David MacBrayne Ltd*³⁹, the House of Lords emphasized that consistency is required in previous transactions for this rule to apply. In Nigeria, this principle is also acknowledged. For instance, in *I.T.B. Plc v. Adebisi*⁴⁰, the Court of Appeal considered past dealings between parties in determining the inclusion of terms.

iv. Incorporation in Online Contracts:

With the emergence of e-commerce, Nigerian courts are beginning to deal with issues of incorporation in digital agreements. Click-wrap agreements (where users must click "I agree") are generally seen as valid if the terms,

³⁷ *Parker v South Eastern Railway Co* (n 26).

³⁸ *Olley v Marlborough Court Ltd* (n 21).

³⁹ *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125 (HL).

⁴⁰ *ITB Plc v Adebisi* (2000) 4 NWLR (Pt 651) 74 (CA).

including disclaimer clauses, are clearly presented. However, browse-wrap agreements (where terms are merely posted on a website) are more contentious, especially where the user is not required to take affirmative action⁴¹.

Although Nigerian case law is limited in this area, comparative jurisdictions such as the United States⁴² have ruled that failure to adequately notify users of disclaimer clauses renders them unenforceable. Nigerian courts are expected to follow similar reasoning based on fair notice and assent principles.⁴³

v. Role of the Contra Proferentem Rule:

Where there is ambiguity in the wording of a disclaimer clause, courts apply the contra proferentem rule, interpreting the clause against the party that drafted it.⁴⁴ This doctrine, affirmed in cases like *Canada Steamship Lines Ltd. V. The King*⁴⁵, is a safeguard against exploitative drafting and helps ensure that only clearly stated and fairly agreed-upon clauses are enforced. In Nigeria, courts have similarly shown reluctance to enforce vague or obscure disclaimer clauses. In *Adesanya v. Lekki Concession Co. Ltd*⁴⁶, the Court of Appeal emphasized the need for clarity and fairness in interpreting limitation clauses.

⁴¹ Cybercrimes (Prohibition, Prevention, etc.) Act, 2015

⁴² *ibid.*

⁴³ E. Malemi, *Law of Contract*, 3rd edn (Lagos: Princeton Publishing Co., 2013)

⁴⁴ *ibid.*

⁴⁵ *Canada Steamship Lines v. The King* (n 29).

⁴⁶ *Adesanya v Lekki Concession Co Ltd* (2019) LPELR-CA/L/488/2015.

The formation and incorporation of disclaimer clauses involve strict requirements to ensure fairness and transparency. Nigerian courts examine how such clauses are presented, the timing of notice, and the manner of assent to determine enforceability. Whether incorporated through signature, notice, prior dealings, or digital interaction, the focus remains on whether the affected party was reasonably aware of the clause and consented to it under just terms.⁴⁷

8.0 LEGAL FRAMEWORK FOR DISCLAIMER CLAUSES IN NIGERIA

i. Sale of Goods Act 1893

The Sale of Goods Act is a principal statute governing contracts for the sale of goods in Nigeria and contains important implied terms that protect buyers. The Act implies specific conditions such as title, description, quality, and fitness for purpose into every contract for the sale of goods.⁴⁸ Traditionally, under common law and within the Act, parties were free to vary or exclude implied terms by express contractual provision, subject to the parties' freedom of contract.

However, Nigerian courts have increasingly interpreted implied terms and exclusion clauses with caution, especially where consumer interests are at stake. While the Act does not expressly prohibit all exclusion of implied terms, it is generally recognized that exclusion clauses must be clearly and unambiguously incorporated into the contract. Courts often employ strict rules of construction and the *contra proferentem* rule, resolving ambiguities

⁴⁷ N Tobi, *Cases and Materials on Nigerian Law of Contract* (CIDJAP Press 1996)

⁴⁸ Sale of Goods Act 1893 (n 8).

against the party seeking to rely on the clause.⁴⁹ Thus, although the Sale of Goods Act does not expressly bar all exclusion of implied terms, the statutory protection of buyers and judicial scrutiny of ambiguity act as substantive constraints on the enforceability of disclaimer clauses in contracts for the sale of goods.

One of the central functions of the Sale of Goods Act 1893 (applicable in Nigeria as a statute of general application) is to regulate contracts for the sale of goods by implying certain fundamental terms into such contracts. These implied terms operate as statutory safeguards for buyers and ensure fairness in commercial transactions. However, the Act also recognizes the principle of freedom of contract, allowing parties to exclude or vary some of these implied terms, subject to legal limitations such as good faith, reasonableness, and judicial control. It also allows exclusion of implied terms, subject to good faith and reasonableness.⁵⁰

ii. Federal Competition and Consumer Protection Act 2019:

The Federal Competition and Consumer Protection Act 2019 (FCCPA) represents a significant legislative intervention in Nigerian contract law aimed at protecting consumers from unfair contractual terms and practices. Under Part XV of the FCCPA, consumers enjoy a statutory right to reasonable and fair contract **terms** in the supply of goods and services.⁵¹

Specifically, Sections 128 and 129 of the Act address contractual clauses that seek to limit, exclude, or waive liability. It is important to note that

⁴⁹ National Insurance Corporation of Nigeria (NICON) v. Power & Industrial Engineering Co. Ltd (n 31).

⁵⁰ Sale of Goods Act 1893 s 55.

⁵¹ Federal Competition and Consumer Protection Act 2018 pt XV.

Section 128 requires that any term purporting to limit, exclude, or waive liability, impose indemnity obligations, or otherwise alter the relative obligations of the parties must be brought to the consumer's attention before the conclusion of the transaction.⁵² Moreover, Section 129 goes further by deeming prohibited any contract term that attempts to limit, exclude, or waive liability for defective performance, misrepresentation, negligence, or implied obligations where such limitation or exclusion would harm consumer interests.⁵³

These provisions affirm that in consumer contracts, particularly those involving disclaimer or limitation clauses, the law scrutinizes such terms for fairness, openness, and disclosure. Terms found to be unfair, unreasonable, or adverse to the consumer are considered void and of no effect.⁵⁴

This statutory framework reflects *academic commentary* that recognizes the FCCPA as significantly curtailing freedom of contract when exclusion clauses would otherwise leave consumers with little protection in standard form contracts⁵⁵ and also prohibit unfair terms causing significant imbalance against consumers.⁵⁶

⁵² *ibid* s 128.

⁵³ *ibid* s 129.

⁵⁴ *ibid*.

⁵⁵ I Olowosulu, 'Freedom of Contract, Exclusion Clauses and the Prohibition of Unfair Contract Terms under the FCCPA' (2024) SSRN.

⁵⁶ Federal Competition and Consumer Protection Act 2018 ss 120–124.

iii. Evidence Act 2011:

While not a contract statute, the Evidence Act 2011 influences the enforceability of disclaimer clauses by governing how contractual terms may be proved in court. Under Parts VI and VII of the Act, the terms of a contract reduced to writing must be proved by the document itself; oral evidence cannot be admitted to vary, add to, or contradict an existing contract.⁵⁷ This has implications for disclaimer clauses, since a party seeking to rely on such a clause must prove that:

1. The term was incorporated into the contract; and
2. The parties consented to the clause.

The Act requires that documentary evidence of the agreement, including any exclusion or disclaimer clause, be presented to the court to prove its existence and scope.⁵⁸ Failure to comply with the statutory requirements for proof of documentary terms may prevent a party from successfully relying on a disclaimer clause.

Judicial decisions reinforce these statutory safeguards by insisting on informed consent and fairness in contractual dealings. In *U.T.C. (Nig.) Ltd v Pamotei*⁵⁹, the Supreme Court emphasised that contractual obligations may be invalidated where consent is vitiated by misrepresentation or lack of informed assent.⁶⁰ Likewise, in *Adesanya v Lekki Concession Company*

⁵⁷ Evidence Act 2011 ss 128–130.

⁵⁸ *Ibid*

⁵⁹ *ibid*.

⁶⁰ *U.T.C. (Nig.) Ltd v Pamotei* (n 1).

*Ltd*⁶¹, the Court of Appeal underscored the necessity for clarity and fairness in limitation clauses before they can be enforced.⁶²

Furthermore, although the Evidence Act does not itself assess the *validity* of disclaimer clauses, it ensures that contractual terms can be reliably established during litigation, which is foundational to determining enforceability.

9.0 JUDICIAL ATTITUDE TOWARDS DISCLAIMER CLAUSES IN NIGERIA

Nigerian courts uphold valid disclaimer clauses unless:

- a. They are not brought to the attention of the other party
- b. They exclude liability for gross negligence or fraud
- c. They violate public policy

In *Karsan v PHCN Plc*⁶³, the court refused to enforce a disclaimer for wrongful disconnection. Also, in *Canada Steamship Lines Ltd v The King*⁶⁴, the court set guidelines for interpreting exclusion clauses, emphasizing the *contra proferentem* rule.

9.1 Disclaimer Clauses and Tortious Liability

While parties may contractually exclude liability in negligence, courts limit such clauses where:

- a. The disclaimer is ambiguous
- b. It relates to death or personal injury

⁶¹ *Sibid.*

⁶² *Adesanya v Lekki Concession Co Ltd* (n 2).

⁶³ *Karsan v PHCN Plc* (2012) LPELR-8488 (CA).

⁶⁴ *Canada Steamship Lines v. The King* (n 29)

c. The disclaimer is against public policy⁶⁵

In *Photo Production Ltd v Securicor Transport Ltd*⁶⁶, the court upheld an exclusion clause despite a fundamental breach, reaffirming contractual freedom.

CRITICISMS OF DISCLAIMER CLAUSES

- a. Power Imbalance: Often used in standard contracts where weaker parties cannot negotiate.
- b. Ambiguity: Legalese may obscure meaning.
- c. Lack of Consent: Particularly in online and informal settings.
- d. Curtailment of Redress: Denies rightful remedies to affected parties.⁶⁷

CONCLUSION

Disclaimer clauses serve legitimate functions in commercial practice, particularly in risk management. However, their potential to foster unfairness necessitates robust legal safeguards. Nigerian law recognizes such clauses but subjects them to tests of reasonableness, clarity, and consent. Courts and policymakers must continue to refine the balance between contractual freedom and consumer protection.

⁶⁵ E.O.Akanki (ed), *Commercial Law in Nigeria*, (Lagos: University of Lagos Press, 2007)

⁶⁶ *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).

⁶⁷ Malemi (n 43).

RECOMMENDATIONS

- a. Enactment of a dedicated Unfair Contract Terms statute.
- b. Strictly mandate the utilization of plain language and clarity in contracts: This is to prevent the maker of the clauses from being as direct as possible to enable the consumer to have a clear leeway on the contract they are going into.
- c. Effectively strengthen the FCCPC's statutory regulations and ensure consumer education.
- d. Encourage judicial scrutiny of digital disclaimers.
- e. Require regulatory vetting of standard-form agreements in key industries.⁶⁸

⁶⁸ *ibid*