PROTECTING CONSUMENTS IN THE ONLINE MARKET FROM UNFAIR CONTRACT TERMS: THE NIGERIAN PERSPECTIVE

IHUOMA K. ILOBINSO*

The key principle of contract law is that parties should have autonomy to enter into contracts on terms voluntarily agreed upon without external interferences. This is referred to as the doctrine of freedom of contract. However, the strict application of this doctrine has caused hardship for parties with unequal bargaining powers. This is especially so in Business-to-Consumer e-commerce where consumers enter into contracts by the mere click of a mouse, without truly appreciating the consequences of their actions. Since most consumer contracts are in standard form, consumers are usually exposed to unfair terms which restrict their rights and leave them without remedy in the event of a dispute. Hence, there is need for judicial and legislative interventions which are aimed at protecting consumers from unfair terms. This paper, therefore, evaluates the legal measures for the protection of consumers who engage in electronic commerce from unfair contract terms. It also offers recommendations on how consumers in Nigeria can be provided with optimum protection from unfair terms.

Keywords: Unfair terms, consumer contracts, electronic transactions, standard form contracts.

A. INTRODUCTION

The primary principle of contract law is that parties of equal bargaining power should have autonomy to enter into contracts on terms voluntarily agreed upon without external interferences. This is referred to as the doctrine of freedom/sanctity of contract. In Attorney General of Rivers State v Attorney General of Akwa-Ibom State,¹ the Supreme Court held that:

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*LL.B (Hons) (ABSU); LL.M (Aberdeen) Ph.D. Candidate (ABSU); Lecturer, Department of Commercial and Industrial Law, Faculty of Law, University of Lagos. ihuomakelechi@gmail.com

¹ (2011) 29 WRN 1 (SC), 9.
It is elementary law that where parties have entered into a contract or agreement, they are bound by the provision of the contract or agreement. This is because a party cannot ordinarily rescile from a contract or agreement just because he later found that the conditions of the contract or agreement are not favourable to him. This is the whole essence of the doctrine of sanctity of contract or agreement.

A Contract can only be invalidated if there is no consent between the parties or if there are vitiating elements\(^2\) that make consent defective. However, the doctrine of freedom of contract is based on the traditional paradigm of negotiated contracts and does not reflect the realities of the modern marketplace where standard form contracts are ubiquitous.\(^3\) Standard form contracts are formulated solely by a party to the contract (usually the business) without the input of the other party (usually the consumer). Since it is often drafted solely by a party, it provides that party with the opportunity to include terms which might be very beneficial to the drafter of the term but unconscionable and unfair to the adhering party. The situation is direr with the emergence of information communication technology and the online market where contracts are entered into from a distance with the mere click of a mouse. Hence, there is need to limit the application of the traditional contract law doctrine of freedom/sanctity of contract in consumer contracts so as to ensure that terms which are significantly prejudicial to consumers are not inserted in the contract without their prior knowledge and consent.

This paper examines the use of unfair terms in electronic consumer contracts and the measures employed in protecting consumers from the consequence of its use. It is divided into five Sections. Following the introduction in Section A, Section B analyses the nature of unfair terms in electronic contracts and the resultant issues. Section C examines the response of the judiciary to unfair terms and its contributions to the control of these terms. Section D

\(^2\) Vitiating elements- mistake, misrepresentation, illegality, duress and undue influence.

evaluates the legislative interventions in Nigeria which are aimed at protecting consumers from unfair contract terms. It also analyses the Consumer Contracts (Unfair Terms) Bill 2010 which is still before the National Assembly. This is to determine whether the Bill, when passed into law, will provide robust protection for consumers. Section E concludes the discourse and proffers recommendations on how to better protect consumers from unfair terms.

B. UNFAIR TERMS IN CONSUMER CONTRACTS

Standard form contracts, also referred to as ‘contracts of adhesion’ and ‘boilerplate contracts’ are documents containing terms purporting to be the contract, which have not been negotiated by the parties to the contract but drafted in advance on behalf of a party to the contract (usually a business) and presented to the other party (usually the consumer) on a take-it-or-leave-it basis. Standard form contracts often alter default solutions provided by law. For instance, they may seek to negate an implied term that contract law will otherwise provide. They are the most common type of commercial agreements. Examples of standard form contracts appear everywhere; they range from disclaimer notes found in medicine packets, terms printed on flight reservations, to terms and conditions included in newly purchased electronics or consumer goods. The development of information communication technology has given standard form contracts increased importance as electronic contracts (clickwrap, browsewrap or shrinkwrap contracts) would be highly impractical without them.

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1. **Rationale for Protecting Consumers**

It is understandable that the standard form contract is the most efficient and practical way of dealing with large quantity/small value distance sales contracts, and is therefore inevitable in the modern market where goods are produced and distributed in large quantities. It reduces transactions cost and uncertainty that would have arisen from individually negotiating each contract. However, its use creates certain challenges, especially for consumers.

According to Mindy Chen-Wishart, ‘standard form contracting does not involve ‘bargain’, ‘negotiation’, or ‘consent’ in any meaningful sense.’ Autonomy is not guaranteed because the party on the receiving end of the contract does not properly evaluate or balance the consequences of the transaction before entering into it. Although consumers often ‘agree’ to the transaction, sometimes by the mere click of a mouse, some are usually not aware of the existence of ‘terms and conditions’ of the contract or when aware, may not understand the implications of such terms. Studies have shown that very few consumers take time to read the terms and conditions they agree to. Some of the reasons for this are- that consumers are not always aware that they are entering into a legally binding contract; those that are aware, are discouraged from reading the terms because they are always too long, complex and in small prints and will simply take too much time and effort to read and interpret; The rest of the ratio cannot just be bothered by the terms in tiny prints. They focus on the core and easily accessible terms like the price, the description of the product etc. This is especially as most consumer contracts are of small value and are hinged on a take-it-or-

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leave-it basis, which means that reading it serves no significant purpose. A study by Bakos, Marotta-Wurgler and Trossen which tracked the online behaviour of 48,154 visitors to 90 online businesses found that only one or two out of every one thousand retail software shoppers choose to access the licence agreement, and most of those who chose to access them, spent too little time to have read more than a tiny portion of the text. Besides, consumers who actually read the terms before acceptance are often made by social construct to feel, and would actually be thought of as, eccentrics and paranoids.

Studies have also shown that the few consumers who might take time to read the terms of a standard form contract are unable to understand them. Some misinterpret them due to over optimism and various other biases. Additionally, the lack of legal and financial literacy hinders the rest from understanding them. Besides, it takes a lot of effort to negotiate with the seller for fairer terms or even shop for better ones where the seller is uncooperative. This is especially as choice in the marketplace is often unavailable because businesses in given industries often use similar one-sided terms in their transactions. The less costly alternative to studying and haggling over individual terms is to merely accept the terms without even reading them. As Lord Reid in Suisse Atlantique Société Armement Maritime SA v Rotterdamsche Kolen Centrale, rightly stated that:

In the ordinary way the customer has no time to read them, and if he did read them he would probably not understand them. And if he did understand and object

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10See Chen-Wisham, supra n 3.
12Ibid.
14 Chen-Wisham, supra n 3.
15 Alan et al., supra n 11.
to any of them, he would generally be told he could take it or leave it. And if he then went to another supplier the result would be the same.\textsuperscript{16}

Besides, these standard form contracts are usually sprung on the consumers at the very last moment, after they have already decided to transact based on the core terms of the contract and have invested time and effort into making the necessary arrangements. This makes it difficult for them to withdraw from the contract when confronted with terms that they considered unfair.\textsuperscript{17} Repeatedly, users of standard form contracts exploit consumers’ lack of knowledge, time, bargaining skill and choice by inserting terms that serve their own interests at the detriment of the consumers.\textsuperscript{18}

Furthermore, the nature of the online market makes it normal for consumers to enter into electronic contracts without reading or negotiating the standard terms. This has resulted in most businesses acting like ‘private legislators’ who impose their will on consumers, rather than parties to the contract who agree on mutually beneficial terms.\textsuperscript{19} Therefore, the primary rationale for controlling unfair terms is the imbalance in bargaining power between the consumer and the supplier and the inability of the consumer to influence the terms of the contract or even shop for better ones because the terms used in most industries are very similar.

\textbf{C. CONTROL OF UNFAIR TERMS IN CONSUMER CONTRACTS}

There have been numerous calls to the judiciary and the legislature to control the application of unfair terms, especially exclusion clauses, in non-negotiated contracts involving parties with weaker bargaining powers, for instance- consumers.

\textsuperscript{16}Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale (1967) 1 AC 361, 406.
\textsuperscript{17}Naude, \textit{supra} n 6.
\textsuperscript{18}Ibid.
\textsuperscript{19}Chen-Wishart, \textit{supra} n 3; Naude, \textit{supra} n 6.
1. Judicial Contributions in the Control of Unfair Contract Terms

Generally, courts are very reluctant to interfere in the bargain and choices of parties in disregard of the principle of freedom of contract. They have been insistent on staying within the bounds of their roles as enforcers of agreements which have all the elements of a valid contract. However, the pervasiveness of standard form contracts and the rise in the exploitation of weaker parties have caused it to reconsider its stance. Hence, courts now protect parties from the effect of unfair terms, particularly exclusion clauses by:

(a) Deciding that the terms were never part of the contract\(^\text{20}\) either because the terms were not contained in a ‘contractual’ document; the terms were not sufficiently brought to the notice of the adhering party; or because notice of the term was brought to the party’s attention after the contract had been concluded

(b) Interpreting the unfair terms against the party who seeks to rely on it, and in favour of the adhering party where there are ambiguities- *Contra Proferentem* rule\(^\text{21}\) or

(c) Simply refusing to enforce a term which seeks to override the fundamental obligations of the contract- the doctrine of fundamental breach.

The Nigerian judiciary has risen to the defence of consumers and businesses alike through the application of the doctrine of fundamental breach in a number of cases.\(^\text{22}\) For

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\(^{20}\)Odenyi v Zard & Co (1972) 2 UILR 34; Parker v South Eastern Ry. Co. (1877) 2 CPD 416; Chapelton v Barry U. D.C. (1940) 1 KB 532 CA; Thornton v Shoe Lane Parking (1971) 2 QB 163; Olley v Marlborough Court (1949) 1 KB 532;  

\(^{21}\)Baldry v Marshall (1925) 1 KB 260; Andrews v Singer (1934) 1 KB 17; Houghton v Trafalgar Insurance (1953) 2 All ER 1409.  

\(^{22}\)Adejoke Oyewumi and Abiola Sanni, “Challenges for the Development of Unfair Contract Terms Law in Nigeria” (2013-2014) 37 University of Western Australia Law Review 86.
instance, the case of *Adel Boshali v Allied Commercial Exporters Ltd*\(^{23}\) where the Judicial Committee of the Privy Council held that there was a breach of contract as the clothes supplied were not in conformity with description. They further held that an exemption clause can only avail a party who performs the contract and that a breach which goes to the root of a contract disentitles the defaulting party from relying on the exemption clause.

Similarly, the courts also applied the fundamental breach doctrine to preclude the application of exclusion clauses in *Ogwu v Leventis Motors*,\(^{24}\) *Niger Insurance v Abed Brother*,\(^{25}\) *CFAO v Animotu*,\(^{26}\) etc. where the breach by the parties seeking to rely on exemption clauses go to the root of the contract.\(^{27}\)

However, following the decision of the House of Lords in *Photo Productions Ltd v Securicor Transport Ltd*,\(^{28}\) where the English court was reluctant to apply the doctrine of fundamental breach as usual, the Supreme Court of Nigeria in its *obiter dicta* in three consecutive cases (*Akinsanya v UBA*,\(^{29}\) *AG Bendel State v UBA*\(^{30}\) and *Naruamal v Niger Benue Transport*\(^{31}\)) also rejected the usual protection of the doctrine of fundamental breach used in controlling unfair terms. This attracted a lot of criticism from academic commentators.\(^{32}\) C. K. Agomo\(^{33}\) and Ajai\(^{34}\) were of the opinion that the recent leanings of the Supreme Court was a setback to consumer protection in Nigeria and that the *obiter* were not

\(^{23}\) (1961) 1 All NLR 917.  
\(^{24}\) [1963] NNLR 115.  
\(^{26}\) (1966) 1 ALR Commercial 289.  
\(^{27}\) Oyewunmi and Sanni, *supra* n 21.  
\(^{28}\) (1980) 1 All E.R. 556.  
\(^{29}\) (1986) 4 NWLR (Pt. 35) 273.  
\(^{30}\) (1986) 4 NWLR (Pt. 547) 730.  
\(^{31}\) (1989) 2 NWLR (Pt. 108) 739.  
\(^{34}\) Ajai, *op. cit.*
in consonance with the reality of the Nigerian system where there is no comprehensive legal framework which aims to provide extensive protection to consumers from unfair contract terms unlike the United Kingdom (UK) where the enactment of the Unfair Contract Terms Act in 1977 led to the reduction in the degree of strictness in which common law principles were applied.

The Nigerian Court, however, appears to have recently returned to the use of the doctrine of fundamental breach as a tool for the protection of parties from unfair contract terms. Although this indirect mode of protection by the judiciary remains useful, it is nonetheless inadequate. There is therefore need to provide the courts with legal basis, in the form of a statute, for a more direct form of consumer protection in Nigeria. Without which courts will remain reluctant to limit the doctrine of freedom of contract so as to protect weaker parties from offensive and unconscionable terms. Besides, control by the courts for the protection of consumers is limited in scope because the courts can only act on cases brought before them and consumers are usually very reluctant to institute court actions because of the high cost (time and money) of litigation. This is especially as consumer contracts are usually of small value making it illogical to access justice through the courts. The Nigerian courts are more willing to control the use of unfair terms by applying the doctrine of fundamental breach. Consequently, only very flagrant abuses of the freedom of the contract principle are likely to be pronounced invalid by the courts, while the more subtle abuses might scale through without consequences.


\[36\] Julia Hornle, Cross Border Internet Dispute Resolution (United Kingdom, Cambridge University Press, 2009).
2. Legislative Efforts for the Control of Unfair Contract Terms

The injustice caused by the use of unfair terms, especially in consumer contracts, has attracted the attention of legislators in modern legal systems. This has resulted in the enactment of statutes which control the use of certain terms in non-negotiated/standard form consumer contracts.\(^{37}\) There are three different legislative control mechanisms used in standard form contracts. They are termed ‘incorporation control’, ‘content control’ and ‘interpretation control. Incorporation control is concerned with the threshold requirements that are used in determining whether a term should be part of the contract in the first place or not, for instance, are the terms legible and comprehensible? Was the attention of the consumer drawn to the existence and use of the terms? Content control, on the other hand, deals with the question of whether a term should be subject to overt control or not.\(^{38}\) It gives the court power to invalidate unfair term. Finally, the interpretation control allows the court to interpret certain term in favour of the adhering party and against the party on whose behalf the standard term was drafted.

In some countries, for instance, the Republic of South Africa, all of these techniques are adopted in the provisions of the Consumer Protection Act that deal with unfair terms.\(^{39}\) In some other countries like the USA, both incorporation control and content control are found in the relevant sections of the Uniform Commercial Code and must be present before a court can invalidate a term on grounds of unfairness (this imposes a higher hurdle on a party


seeking to invalidate a term perceived to be unfair).\textsuperscript{40} Whereas, in other countries like the UK, the Unfair Terms in Consumer Contract Regulation adopts only the content control and interpretation control.

In Nigeria there are fragments of statutory provisions that seek to prevent the use of unfair terms. Some of which are found in the Hire Purchase Act,\textsuperscript{41} Sale of Goods Act, Contract Law of Anambra State 1863(Section 198-190) etc. These provisions are by no means sufficient. They do not provide adequate protection to consumers who are usually the victims of unfair terms. In recognition of the need for a comprehensive legal framework for the protection of consumers, the Unfair Contract Terms Bill was brought before the National Assembly in 2010.

\textit{(a) The Consumer Contract (Unfair Terms) Bill, 2010 (the Bill)}

The Bill seeks to provide a direct form of consumer protection against unfair contract terms. It promises to reduce the judiciary’s need to resort to indirect form of controlling the use of unfair contract terms. When enacted, the courts will be able to hear cases on whether a contract term is fair and make decisions on the enforceability of the terms. The Bill does not just aim to invalidate unfair terms found in consumer contracts but also to prevent the continuous use of these unfair terms. This is evidenced in section 9 which empowers the Director of Fair Trade at the Consumer Protection Council (CPC) and qualifying bodies to apply for injunction prohibiting the continued use of an unfair term.

The Bill is made up of 13 sections and 4 schedules. The first schedule contains a list of contracts and specific terms which are excluded from the scope of the Act. They are: contracts relating to employment, succession rights, rights under family law, the

\textsuperscript{40} Maxeiner, \textit{opt cit}, n 37.

incorporation and organization of companies or partnerships; terms incorporated in order to comply with or which reflects statutory or regulatory provisions of the Federal Republic of Nigeria or provisions or principles of international conventions to which Nigeria is a party. The second schedule states factors which must be regarded when making an assessment of good faith. The third schedule contains a list of qualifying bodies to which consumers can make complaints.\textsuperscript{42} The fourth schedule provides a non-exhaustive list of terms which may be regarded as unfair. This list is only indicative and illustrative. In other words, terms mentioned in this schedule are not automatically deemed unfair but are subject to assessment.

Subject to the provisions of schedule 1, the Bill proposes to apply only to consumer contracts which have not been individually negotiated, in other words, term which were drafted in advance and the consumer had not been able to influence the substance of the term—Standard form contracts.\textsuperscript{43} Where some parts of the contract have been individually negotiated, the Bill shall apply to those parts that have not been individually negotiated.\textsuperscript{44} It excludes from assessment any term that defines the main subject matter of the contract or concerns the adequacy of the price or remuneration, as long as such terms are in plain intelligible language.\textsuperscript{45} This has been reasoned to be because contractual parties, even in non-negotiated contracts, always agree on fundamental terms like the price and specification of the goods, while leaving the responsibility of providing other ancillary terms to the seller and so are usually aware of the existence of those core terms.\textsuperscript{46} Therefore, to ensure that the

\textsuperscript{42} The qualifying bodies are the Electronic and Data Protection Registrar in Nigeria; the Managing Director, Power Holding Company of Nigeria (PHCN); the Executive Directors, All Communication Networks operating in Nigeria; the Director-General, All States Water Boards; the Managing Director, Nigerian Railway Regulator; Every Weights and Measures authority in Nigeria; the Chief Executive Officers, SMEDAN; and the Chief Executives of Associations, Department of Petroleum and Gas Resources in Nigeria.

\textsuperscript{43} Consumer Contract (Unfair Terms) Bill, 2010, s 3.

\textsuperscript{44} Ibid, s 3(4).

\textsuperscript{45} Ibid, s 3(2).

\textsuperscript{46} Maxeiner, supra n 37.
control of unfair terms does not interfere with the free market and private autonomy, terms which directly result from the contractual freedom of the parties are excluded from control.\footnote{47}{The Law Commission and the Scottish Law Commission, \textit{Unfair Terms in Consumer Contracts: A New Approach?} (July 2012).}

The Bill places the burden of showing that a contract was individually negotiated on the seller who asserts that the contract was individually negotiated.\footnote{48}{Consumer Contract (Unfair Terms) Bill, 2010, s. 3(5).} However, it is silent on which party has the burden to prove that the contract is fair. This is unlike the UK’s Unfair Contract Terms Act which places the burden of showing that a term is fair explicitly on the party claiming that it is fair (the business).\footnote{49}{\textit{Unfair Contract Terms Act,} 1977, s. 11(2).} Without such an allocation of burden of proof, the burden will naturally fall on the party alleging unfairness-the consumer.\footnote{50}{The Law Commission and Scottish Law Commission, \textit{supra} n 46.} It is therefore proposed that the Bill should include a provision on the allocation of burden of proof for fairness and that it should be placed on the business who is often the party with more resources.

The Bill does not contain an express provision that denotes the incorporation control mechanism. This is unlike legal systems like South Africa where section 49 of the Consumer Protection Act provides that certain types of terms\footnote{51}{For instance exemption/exclusion clauses, indemnity clauses, clauses that impose risk and liability on consumers, indemnity clauses, etc.} must be written in plain language; brought to the attention of the consumer (this must be done at the earliest time possible, most probably before the consumer enters into the contract); and the consumer must be given adequate opportunity to review the terms. The Act also provides that the court may make an order severing the provision or notice from the agreement, or declaring it to have no force or effect with respect to the transaction.\footnote{52}{\textit{Consumer Protection Act,} 2008 (South Africa), s 52(4).} It has been argued by academic commentators that the consequence of non-compliance with the incorporation control provision is inadequate as it does not take into consideration ‘the severe limitations of judicial control in the consumer...
context, particularly in view of the cost, risk and effort of litigation to consumers’.\textsuperscript{53} It was suggested that the consequence that would have been more effective is that non-compliance results in the term being rendered void and of no effect. In that case, the consumer would only need to approach a court in the event of a dispute as to whether the supplier did indeed comply with Section 49.\textsuperscript{54}

Although the incorporation control rules are used by some countries which aim to provide better consumer protection against the use of unfair terms, it however creates more difficulty for the consumer who might be deprived of protection merely because an unfair term was placed in a conspicuous place where he supposedly should have taken notice of. It serves as another formality which does not necessarily ensure that the consumer reads and understands the contract before signing.\textsuperscript{55} It could very easily be abused by sellers/suppliers who prefer to spring notice on the consumer after all arrangements have been made.

The Bill proposes to utilise the content control and interpretation control as legislative mechanisms for the protection of consumers against unfair terms. Section 4 contains the content control provisions. It states that a term is unfair if it is contrary to the requirement of good faith and causes a significant imbalance in the parties’ rights and obligations under the contract, to the detriment of the consumer. It further provides that to assess the unfair nature of a term, the nature of the goods or services for which the contract was concluded and referring as at the time of the conclusion of the contract; all circumstances attending the conclusion of the contract; all the other terms of the contract or of another contract on which it is dependent shall be considered.\textsuperscript{56} In determining whether a term satisfies the requirement

\textsuperscript{53} See “Consumers’ Right”, supra n 38.
\textsuperscript{54} Ibid.
\textsuperscript{55} Ibid.
\textsuperscript{56} See Consumer Contract (Unfair Terms) Bill, 2010, s 4(2). This provision was also repeated in Section 6 of the Bill.
of good faith, regard shall be had to the matters specified in the Second Schedule.\textsuperscript{57} The second schedule provides that when making an assessment of good faith, the following factors should be considered: the strength of the bargaining positions of the parties; whether the consumer was induced to accept the term; whether the goods or services were sold or supplied to the special order of the consumer; and the extent to which the seller had dealt fairly with the consumer. Section 5 states that an unfair term in a consumer contract shall not be binding on the consumer. However, a contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term.\textsuperscript{58} As stated earlier, the fourth schedule contains a non-exhaustive list of unfair terms. These terms are only indicative in nature. They are not automatically adjudged unfair: the final decision on whether they are unfair or not depend on the circumstances of a particular case. This is unlike the approach in some countries like Germany\textsuperscript{59} which has multiple lists - the grey list (this includes terms that are subject to assessment) and Blacklist (this includes terms that are automatically prohibited). According to the EU commission report the exclusion clause (item b of the fourth schedule) is the most litigated term on the list.\textsuperscript{60} Item (i) of the fourth schedule of the Bill, which provides that terms which have the object or effect of ‘irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract’ should be evaluated for unfairness, is particularly significant in connection with shrink-wrap and click-wrap electronic contracts.\textsuperscript{61} Some of the items on the schedule 4 list should be completely prohibited. This is especially as the consumer contracts that fall within the scope of the Bill are non-negotiated contracts.\textsuperscript{62} It is therefore proposed

\textsuperscript{57}Ibid, s 4(3).
\textsuperscript{58}Ibid, s 5(2). The provisions of section 5 are also repeated in Section 8.
\textsuperscript{59}See “Consumers’ Right”, supra n 38.
\textsuperscript{61}Maxeiner, supra n 37.
\textsuperscript{62}Terms like those that limit or exclude the liability of the seller in the event of death, personal injury, non-performance or inadequate performance (items (a) and (b)), terms that exclude or hinder the consumer’s right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes
that the Bill should be amended to include a list of terms which are prohibited (black list) in addition to the list of terms which are subject to assessment (grey list).

Section 7 provides that a seller shall ensure that any written term of a contract is expressed in plain readable, intelligible language, and if there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail. This interpretation control mechanism serves as an additional layer of protection for consumers although some commentators feel this provision is unnecessary.63

Section 9 provides that it is the duty of the Director of Fair Trading in the Consumer Protection Council (CPC) to consider any complaint made to him that any contract term drawn up for general use is unfair. However, the Director of Fair Trade does not have to perform this duty if the complaint appears, in his opinion, to be frivolous or vexations or if a qualifying body has notified the Director of its decision to consider the complaint.

To prevent the continued use of an unfair term, the Director or any qualifying body may apply for an injunction (including an interim injunction) against any person who appears to be using or recommending the use of an unfair term drawn up for general use in contracts concluded with consumers.64 In deciding whether or not to apply for an injunction in respect of a term which the Director considers to be unfair, he may, if he considers it appropriate to do so, have regard to any undertakings given to him by or on behalf of any person as to the continued use of such a term in contracts concluded with consumers.65 When applying for the injunction, the Director shall give reasons for his decision to apply or not to apply.66

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63 See “Consumers’ Right”, supra n 38.
65 Ibid, s 9(3).
66 Ibid, s. 9(2).
11 also provides the Minister in charge of commerce with similar duties as that of the Director of Fair Trade CPC, except that he cannot bring an action for an injunction but can refer the matter to the Attorney General of the Federation who may apply for an injunction. The Court on an application under this Act may grant an injunction on such terms as it thinks fit. The injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any person.  

As has been rightly suggested by some academics, the Bill should also have provisions which state who the complainants should be. The Complainants should include the consumers and consumer agencies. If the laying of complaints is left only to the consumers, the statute might never achieve its full potential, as consumers might not be incentivised to complain when faced with an unfair term. Studies have shown that consumers will rather exit the market or stop patronising a particular seller than to pursue the enforcement of their rights. This is primarily because the high cost of money and time expended in the enforcement of these rights often outweigh the value of their claim. Therefore, consumer associations should also be allowed to make complaints about the use of unfair terms and also be authorised to bring actions for injunction in court against sellers collectively, with the consent of the Director of Fair Trade CPC, to prevent the use of certain unfair terms.

The provisions of the Bill are a replica of the United Kingdom’s Unfair Terms in Consumer Contract Regulation 1999 which implements the European Union Directive on Unfair Terms in Consumer Contracts 1993. However, the Bill does not contain a provision

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67 Ibid, s 10(3)(4).
68 Oyewumi and Sanni, supra n 21.
70 SI 1999/2083.
71 93/13/EEC.
similar to Regulation 15 which confers the Director with the duty to arrange for the publication, in such form and manner as he considers appropriate, of details of his undertakings; to provide information on the details of his undertaking to any person who requests for it; and to arrange for the dissemination, in such form and manner as he considers appropriate, of such information and advice concerning the operation of the Regulations as may appear to him to be expedient to give to the public and to all persons likely to be affected by the Regulations.\textsuperscript{72} This provision should also be included in the Bill as this will help provide the much needed information and guidance to consumers and other stakeholders on actions that have been taken to prevent the use of unfair terms in consumer contracts.

\textbf{D. CONCLUSION AND RECOMMENDATIONS}

The use of standard form contracts in electronic consumer transactions cannot be eradicated without stifling the growth of the online market. However, there is need to protect consumers from the abuse of the doctrine of freedom of contract by businesses. This need is based on the belief that most consumer do not read the terms of standard form contracts before acceptance; and the ones who make out time to read the terms, do not always understand the implication of the terms because they are often complex and in small prints. There is also the argument that even where the consumer is unsatisfied with the terms of the contract, he will usually not have much choice but to accept what has been offered because of the high cost of scouting for better terms. Besides, sellers in the same industry often use similar contract terms.

It is generally accepted that legislative interventions are necessary to provide adequate protection to consumers from unfair contract terms. Unfortunately, there is currently no statute in Nigeria which specifically protects consumers from unfair terms.

In response to this problem, the Consumer Contract (Unfair Terms) Bill was brought before the National Assembly for enactment in 2010 and has remained there without making much

progress. Nevertheless, this study examined the Bill with the aim of ascertaining whether, when passed eventually, it will provide consumers with robust protection. It found that the drafting of the Bill is a step in the right direction; however there is need for some modifications. This paper therefore proposes that the Bill be redrafted to provide for the following:

- The allocation of burden of proof for fairness- It is proposed that the Bill should include a provision on the allocation of burden of proof for fairness and that it should be placed on the business who is often the party with more resources.

- The creation of a list of terms which are prohibited without evaluation (black list) in addition to the list of indicative terms (grey terms). The black list should be made up of terms that limit the liability for death, personal injury, gross negligence or non-performance; terms that restrict the consumers right to fair hearing; terms that exclude implied terms as to quality and fitness of purpose, etc;

- The empowerment of registered consumer associations to apply for injunction to prevent the use of unfair terms in consumer contracts;

- The encouragement of qualifying bodies to use the ‘warning procedure’ where letters are first sent to users of terms which are perceived to be unfair, demanding that they immediately stop using the unfair term and they should also undertake to treat such terms as invalid;

- The imposition of penalty for any business that intentionally uses a term which has been pronounced as unfair;

- The imposition of duty on the Director of Fair Trade and other qualifying bodies to provide information to consumers, businesses and the general public on their activities with regards the prevention of the use of unfair terms.