

Standard Agreements and the Protection of Consumers: A Critical Analysis

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Abstract

In upholding the principle of consumerism, which illustrates the desire to protect or promote the interest of consumers, there is the likelihood that within standard form contracts, the consumer is at a weaker position in terms of bargaining strength and prospects of safeguarding their rights under such contracts. Standard agreements are generally considered to be contracts of adhesion where one party drafts the entire contract and the other party merely accepts or confirms what has been arrived at by the other party. Thus, the aim of this paper is to show how the rights of consumers are sometimes violated with the prevalence of standard form contracts/standard agreements. In achieving the said objective, the content analysis approach was adopted. Our findings reveal that consumers are sometimes at risk when concluding standard agreements with sellers or service providers, since they are hardly conversant with the terms of the contract and given that they have little or no means to make propositions therein before accepting. This gives a lee-way for some authors of such contracts to defraud consumers through the use of excluding and limiting terms. This is mostly compounded by the fact that there is often little or no time given to consumers to acquaint themselves with the terms before contracting. It is therefore submitted inter alia that consumers should be given the latitude or reasonable time to properly read through or get conversant with the terms of these agreements before expressing consent to them.

Keywords: Standard Agreement, Protection, Consumer, Contract, Right, Liability.

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INTRODUCTION

Given that standard agreements or standard form contracts (SFC) [1], are recognized as one of such arrangements that tend to offer some privileges to consumers in terms of their wide scope, cost minimization and time saving character, they however are considered to be contracts with imbalances, generally accruing from the fact that it is just being adhered to by the consumer. This is the case as suppliers continue to exploit consumer weaknesses with their standard form contracts [2]. It has been said that numerous transactions

are governed by standard form contracts. These contracts are used by insurance companies, internet service providers, travel agencies, banks, credit card issuers and even health clubs [3]. These are common examples of standard agreements whereby opportunities for consumers to actual read through their terms is most often far-fetched. One of the defining features of SFCs is that they are assumed to be exempt from negotiation based on their fixed clauses and facilitation of routine transactions [4]. Standard form contracts, often called “fine print” or “boilerplate”, are the most common type

¹ These are agreements that employ standardized, non-negotiated provisions, usually in pre-printed forms. These are sometimes referred to as ‘boilerplate contracts’, ‘contracts of adhesion’, or ‘take it or leave it contracts’.

² Levy Shirly (2023) “Fixing Standard-Form Contracts” *University of Cincinnati Law Review*, Vol. 91, No.3, *Social Science Review Network (SSRN)*, P 3.

³ Becher S. I & Aviram E.U (2010) “The Law of Standard Form Contracts: Misguided Intuition and

Suggestions for Reconstruction” *DePaul Business and Commercial Law Journal*, vol. 8, issue 3, p 201.

⁴ D’ Agostino, E (2015), *Contracts of Adhesion Between Law and Economics: Rethinking the Unconscionability Doctrine*, in Cornelius K.B (2018), *Standard form contracts and a smart contract future*, *Internet Policy Review*, ISSN 2197-6775, Alexander von Humboldt Institute for Internet and Society, Berlin, Vol. 7, Iss. 2, p. 2.

of economic contract [5]. They apply to uphold billions of commercial transactions per year. In a typical scenario, a buyer purchases a good or service and is presented with a preprinted form contract with terms pertaining to dispute resolution, remedies for product failure, and warranties, among others, with little opportunity to negotiate over the terms [6].

The problems caused by the use of standard form contracts in consumer transacts have been long recognized. As early as 1943, Friedrich Kessler had used the term ‘contract of adhesion’ to describe the type of ‘take it or leave it’ contract that had become commonplace in many consumer transactions [7]. According to this author, the increasingly important aspect of these standard contracts was that they were typically used by enterprises with strong bargaining power.

The weaker party, in need of the good or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly or because all competitors use the same clauses. His contractual intention is but subjection, more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all. Thus, standardized contracts are frequently contracts of adhesion; they are ‘prendre ou a laisser.’ [8]. This idea makes it rather daunting for consumers to uphold their rights under such contracts, as there may be implications under the contract that the consumer may not be aware of owing to the fact that he could not realistically read through the terms/policy before accepting. Click-wrap services are mostly illustrative of this fact, since there is a choice on consumers to either accept or deny, which makes it rather difficult for consumers to contribute to the terms of the contract they are concluding. A critical look at these points indicate that there is the necessity to protect the rights of consumers in such contracts, since these contract most often contain limiting or exemption clauses that consumers may not be aware of or that such clauses are hidden or are not brought to the knowledge of the consumer at the time of entering into the contract.

⁵ Yannis B *et al.*, (2014) “Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts” *Journal of Legal Studies*, vol. 43, no. 1, p. 1.>> Examples appear anywhere from safety disclaimers noted on the backs of sporting tickets, warranties packaged with consumer goods, privacy policies and terms of use on websites...

⁶ *Ibid.*

⁷ Gardiner C (2022), Standard form consumer contracts: the background and context, p 9, in *Unfair Contract terms in the Digital Age*, Edward Elgar Publishing Limited, UK.

⁸ Frederick Kessler, ‘Contracts of Adhesion- Some Thoughts about Freedom of Contract’ (1943) 43 *Columbia Law Review* 629.

THE MANIFESTATION OF STANDARD AGREEMENTS AND ITS RELEVANCE IN CONSUMER CONTRACTS

With the evolution of technology, the system of contract formation has effectively changed. The principles of interpretation towards these contracts have evolved with due course of time. SFCs are interpreted differently from general contracts. General contracts are formulated by parties having equal bargaining power, after entering into negotiation [9]. The rule of interpretation applied by many countries is ‘*Contra Proferentum*’. When the contract or the elements of the contract is ambiguous, it must be viewed in a manner that opposes the interest of the parties who provided the wording for the contract. This makes it possible to ensure that the right of the consumer is not trampled upon. Therefore, the manifestation of SFCs and its relevance to consumer contracts is seen below.

Features of Standard Agreements/ Standard Form Contracts

The widespread of standard form contracts shows that although the use of standard form contract has the advantages of saving time, trouble and expense in any bargaining over terms, its practice in market transaction has now become a major problem due to its characteristics [10]. Therefore, there are several features of standard form contracts which make identification of such contracts easy to comprehend. These features go a long way to provide consumers with the opportunity to detect standard practices and hence secure their interest in the transaction. Through this elaboration, consumers are also made to be conscious while concluding contracts having the character of standard form contracts.

Inequality in Bargaining Power

A person’s bargaining power is considered to be that person’s ability to make economic resources serve his/her ends. It follows that a party’s bargaining power is a function of factors both within and outside his/her control and is as much a matter of the parties’ perceptions as it is of reality [11]. Standard agreements or standard form contracts are generally characterized by inequality in bargaining strength. The consumer is at a weaker

⁹ Muralidharam S (2018) “Standard Form Contracts: A Necessary Evil or Exaggerated Medium” *Journal of Legal Studies and Research*, vol. 4, issue 6, p 169, from Mallika A & Shreya A, Standard Form Contracts, in Sairam Bhat (ed), Law of Business Contracts in India (SAGE Publications India Pvt. Ltd, 2009).

¹⁰ Yusoff Sakina S.A *et al.*, (2012) “Standard form contracts in consumer transactions: A comparative study of selected Asian countries” *Malaysian Journal of Consumer and Family Economics*, p 4.

¹¹ Rebecca Stone (2024) “The Inequality of Bargaining Power Principle” *UCLA School of Law, Public Law Research Paper No. 24-2, Research Handbook on the Philosophy of Contract Law*, p 2.

position as far as the bargain of the contract is concerned. This is so because the consumer has little or no knowledge of the inherent terms in such contracts, and as such the consumer might not be fit to make the best of his dealings with the seller or producer, especially when there is the tendency of exploitation on the part of the seller/producer. The practice of standard form contract nowadays does not suit the idea of an ideal competitive marketplace due to the footing of inequality of bargaining power of both parties. This is typical in a perfectly competitive market economy where there are multitude of imbalances between buyers and sellers, in both information and ability to make choices and purchases. Buyers may be disadvantaged in two ways, that is, unstable to make voluntary choice or unstable to make a desired purchase [12]. The consumer in SFCs is therefore vulnerable as this characteristic defines the very nature of such contracts.

Contract of Adhesion

This is a typical attribute of standard agreements or SFCs which is centered on the fact that it is a contract whereby one party prepares the contract entirely or to a very substantial degree in advance and leaves the other party no option but to take it or leave it with little or no opportunity of changing anything in the contract. An example of this kind of scenario is in insurance contracts where the policy and other essential documents are mass produced in advance by lawyers, representatives of the insurer, or state regulatory bodies and is offered to the insured on a take it or leave it basis. The buyer of insurance merely has to complete details without the possibility of changing any terms in such documents. Consumers therefore with respect to such contracts will find themselves wanting, as they do not have the opportunity to question, contribute or propose terms in the contract. These contracts have therefore posed special difficulties since their initial identification as something other than “ordinary” contracts [13]. Consumers need to beware of such contracts.

No Consensus Ad Idem

Principles on the formation of contract law dictate that the parties to a contract must be of the same mind, that there must be *consensus ad idem*. However, in most instances, standard form contracts do not require meeting of minds which shows an obvious deviation from the basic contract law principles of *consensus ad idem* [14]. This makes the contract quite complex because of the fact that the consumer and the producer/seller may

not be in one accord as far as the terms and conditions of the contract are concerned. The consumer is therefore at risk because any clause which goes contrary to his rights may be initiated against him without him knowing that such terms actually exist.

Limited or No Freedom of Contract

This is yet another identifier for standard agreements or SFCs. Going by the theory of freedom of contract, as advocated by Hanoch Dagan and Michael Heller [15]. They posit that, the parties to a contract have the ability to choose among attractive and well-defined contract types, thereby rejecting the idea that contractual freedom can be coherently grounded solely in negative liberty. Instead, Dagan and Heller show that creation and shaping of contract types is central to contractual freedom, when freedom is understood as an individual's ability to make meaningful choices about her life: “Only a sufficiently rich repertoire of contract types properly facilitates people's ability to choose and revise their various endeavours and interpersonal interactions.” [16]. In the nineteenth century, the freedom of contract¹⁸ theory entailed that the parties were the best judges of their own interests. If they freely and voluntarily entered into a contract the only function of the law was to enforce it. It was immaterial that one party was economically in a stronger bargaining position than the other. This theory has been recognised in judicial decisions. In *Daley v. People's Building, Loan and Savings* [17], Justice Holmes notes:

“... Courts are less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own.... It will be understood that we are speaking of parties standing in an equal position where neither any oppressive advantage nor power has...” Another representative expression of the freedom of contract theory is the ruling in *Ullmann v. May* [18]. It was said that “courts do not relieve a party competent to contract from an improvident agreement in the absence of fraud or bad faith”. Freedom of contract is of little value when one party has no alternative between accepting a set of terms proposed by the other or doing without the goods or services offered. Applying this principle to SFCs, the terms of which have already been prepared by the other party to the contract, consumers are faced with the problem of accepting a contract

¹² Mariner W.K (1998) “Standards of Care and Standard Form Contracts” *Journal of Contemporary Health Law and Policy*, 15.

¹³ J.W Looney & Anita K.P (1999) “Adhesion Contracts, Bad Faith, and Economically Faulty Contracts” *Drake Journal of Agricultural Law*, vol. 4, no. 1, p 178.

¹⁴ Yusoff Sakina S.A *et al.*, (2012), *op. cit*, p 6.

¹⁵ Cited in T., Gutmann, Theories of Contract and The Concept of Autonomy, Preprints and Working Papers of

the Centre for Advanced Study in Bioethics Münster 2013/55, p.17.

¹⁶ *Ibid.*

¹⁸ Chitty, *on Contracts: General Principles* (London: Sweet and Maxwell, 1983, vol.1, 25th ed) pp. 4-6.

¹⁷ Ass'n., 178 Mass. 13, 19-20; 59 N.E. 452, 453(1901).

¹⁸ 147 Ohio St. 468, 72 N.E.2d 63 (1947).

hedged with conditions and warranties against them. This is a challenge to the rights of consumers and goes against fair contract engagement.

Benefits of Standard Agreements to Consumer Contracts

In spite the features of standard form contracts; such contracts are however seen to be of some benefit to consumer contracts. The rapid rise of the standardized mass contract was an inevitable response to mass production that had accompanied the industrialization of the nineteenth and twentieth centuries and was largely driven by economic efficiency [19]. This therefore instigated the development of standard form contracts which were seen to offer consumers with some benefits;

Reduced Transaction Cost

It is noteworthy that one prominent benefit of standard form contract is that it reduces transaction cost in a typical consumer contract. By using a standardized contract, there is no need to make customized contracts for every transaction, thereby reducing the per transaction cost for both the contracting parties. With this, the consumer will not need to spend more than what he envisaged. This makes it possible for the consumer to limit his/her expense which goes a long way to instil a certain level of confidence in realising the contract. As compared to some ordinary contracts whereby there is the likelihood of increase in the cost of transaction, with SFCs this is not the case because consumers get to benefit from reductions in transaction cost since it eases up the process of contracting.

Expedient Contract Formation Process

Another benefit of standard agreements to consumers is that it speeds up the process of contracting. Unlike the ordinary contract, SFCs enable a swift mode of arriving at a binding contract since the parties, most especially the consumer may not wish to waste time in reaching his own bargain in the contract. This is very much prevalent in transport contracts where consumers of such contracts do not need any waste of time in getting their tickets ready for the voyage, and thereby giving way for others to procure theirs. Commercial buyers also fall within this view as they do not need to waste time negotiating deals owing to the fact that they usually have little or no time for delays as business men. This goes a long way to facilitate commercial transactions not just for consumers/buyers but also for the producers, sellers or service providers.

Encourages Consumer Awareness

These contracts are also seen to offer some kind of awareness to consumers before contracting. Bearing in mind that such contracts are drafted solely by one

party, it creates the possibility for the consumer to be conscious of what he/she concludes as regards the contract. This is why some of these contracts provide clauses to consumers requiring them to acquaint themselves with the terms and conditions before assenting. An example is where in such contracts there is sometimes a clause/indication written either in bold, red or any other captivating sign requiring the consumer/buyer/reader to beware of what he accepts/confirms. These contracts equally provide clauses like 'Please read the terms and conditions carefully before validation' which places some degree of caution in consumers while expressing their assent to the contract.

Some Common Consumer Rights to be observed in Standard Agreements/SFCs

Indeed, we cannot talk of enforcing or protecting consumer rights without having to know what these rights are in consumer contracts, mostly with respect to standard agreements. These rights are considered to be relevant when concluding standard agreements, and as such authors to such agreements must be made to take into account these rights at every level of the transaction.

Right to Be Informed

This right is looked at to be one of the most fundamental rights of the consumer in typically consumer contracts. It entails full disclosure to consumers of the terms, conditions and any other related aspect necessary for the conclusion and realization of the contract. Consumers have to be informed at the initial or pre-contractual stage or even any other stage of the contract on what is expected of them, the stakes of the contract and implications if any derivative of such contracts before they express their acceptance. In conformity with this right, the Cameroon Consumer Protection Law stipulates that consumers have the right to access to information to enable them to make an informed choice during any transaction concerning the supply of technology, goods and services [20]. Also, the Law mentions that standard agreements or adhesion contracts must be drafted in English and English in characters that are visible and legible at first glance by anyone with normal vision. The contract must also contain terms that are clear and easy for the public to understand, without making reference to other contracts, rules, practices, instruments and documents unknown to the public or not put at its disposal before or during the execution of such contracts [21]. This idea equally adds to the consumer's right to be informed which places responsibilities on the sellers, producers or service providers to furnish the consumer with necessary information in well drafted, legible, concise and understandable terms needed for a fulfilled contract.

¹⁹ Gardiner C (2022), *op. cit*, p 10

²⁰ Section 3(c) of Law no 2011/012 of 06 May 2011 on the Framework on Consumer Protection in Cameroon.

²¹ *Ibid*, section 6(1)

It equally follows that consumers have the right to be informed about the quantity, quality, purity, standard or grade and price of the goods or service available so that they can make proper choice before buying any product or service. Also, where necessary, the consumer must be informed about the safety precautions to be taken while using the product to avoid loss or injury. The consumer must therefore be assured and furnished with relevant details and information by the seller or service provider that the good or service is worth the purchase by presenting to the consumer all matters pertaining to the good or service. This will enable the consumer make informed choices and will equally strengthen his bargaining power. This right is therefore a correlation to the seller's or service provider's obligation to inform which must be exercised in due regard of this right.

Right to Consumer Education

It is another right of the consumer to seek or be instilled with consumer education as a requirement under the market system. This is particularly useful when it comes to SFCs where sometimes consumers get implicated in the course of executing such contracts, either because of ignorance or because of their unwillingness to acquaint themselves with the terms. To prevent market malpractices and exploitation of consumers, consumer awareness and education are essentially required. For this purpose, consumer associations, educational institutions and Government policy makers are expected to enable consumers to be informed and educated about the relevant laws which are aimed at preventing unfair trade practice, the ways in which dishonest traders and producers may try to manipulate market practices to deceive consumers, how consumers can protect their own interest and lastly on the procedure to be adopted by consumers while making complaints. This is why the Cameroon Consumer Protection Law stipulates that consumers shall have the right and freedom to form voluntary, autonomous and independent consumer associations or organizations with well-defined domains and areas of intervention [22]. This is to enable consumer protection and enable fair dealings in consumer contracts.

Right to Fair, Non-Discriminatory Treatment by Suppliers of Technology, Goods and Services

Considering that most consumer contracts are plagued with some kind of malpractices, there is every need to ensure that such practices do not prevail against the consumer. It is therefore the consumer's right to be placed in a position where he/she could make the best of his bargains which will go a long way to provide such a consumer with what is needed to realize the contract objective. The consumer must not in any way be discriminated upon in standard agreements, where favours could be granted to particular customers over

others. It is expected that the consumer needs a secured medium through which he can exercise his entitlements under the contract without any form of deprivation tilted to unfair or discriminatory treatment.

Right to Safety

Consumers also have the right to be protected against marketing of goods, service or technology which are injurious to health, life and property. The consumer must be conscious of this right and should also endeavour take necessary precautions to prevent the injury, or if injury is caused in spite of precaution, then the consumer has the right to complain against the dealer and even claim compensation. This right is considered sacrosanct because it guarantees the well-being of the consumer/purchaser, and it is therefore incumbent on producers, sellers or dealers to beware of the goods or services they sell or offer to consumers so as to maintain safe margins between the consumer and the seller. This is why the Cameroon Consumer Protection law of 2011 expresses that 'any locally produced or imported technology or good must be inspected, tested and measured by the relevant authorities to ensure that it is safe for consumption and complies with national and international environmental, health and safety standards' [23]. This idea must therefore be taking into account under standard agreements, especially at the contracting face of such an engagement.

Right to Seek Redress

The consumer also has the right to seek redress when a certain term of the contract is not respected or where the contract does not seem to guarantee his rights. If and when any consumer has a complaint or grievance due to unfair trade practices like charging higher prices, selling of inferior quality or unsafe products, lack of regularity in supply of service or if he has suffered loss or injury due to defective or adulterated products, he has the right to seek remedies. He has a right to get the defective goods replaced or money refunded by the seller or dealer. He also has the right to seek legal remedies in the appropriate courts of law. Through this right, the consumer are assured that their complaints will receive due attention. This right also provides for due compensation to consumers if they have suffered a loss or are put to inconvenience due to the fault of the supplier or manufacturer. This is why the consumer protection law of Cameroon provides that consumers have the right to full compensation for wrongs or losses suffered which according to this law or other regulations shall be attributable to suppliers or providers [24]. This therefore means that the consumer has a tool to use against sellers, producers or dealers in SFCs where there exist irregularities in the contract or where they suffer any form of loss or damage as result of the actions of the dealer.

²² *Ibid*, section 21.

²³ *Ibid*, section 16(1).

²⁴ *Ibid*, section 3(e).

INTRICACIES OF STANDARD FORM CONTRACTS AND THE NECESSITY TO PROTECT THE CONSUMER

Amidst the glaring traits and benefits of standard form contracts, there exist a couple of intricacies that tend to affect the rights of consumers to such contracts. These contracts might be inefficient if they place the risk of a negative outcome, such as defective manufacturing, on the buyer who is not in the best position to take precautions. However, there are a number of reasons why such terms might be accepted which acts as some of the shortcomings of SFCs to consumers.

Standard form Contracts are Rarely Read

One of the predominant shortcomings of standard form contracts to consumers is that such contracts are rarely read by the consumer. Lengthy boilerplate terms are often in fine print and written in complicated legal language which often seems irrelevant and makes it rather complex for consumers to assuredly express their assent to the terms and conditions. The prospects of a consumer/buyer finding any useful information from reading such terms are correspondingly low. Even if such information is discovered, the buyer is no position to bargain as the contract is presented on a “take it or leave it” basis. Coupled with the often large amount of time needed to read the terms, the expected pay-off from reading the contract is low and few people would be expected to read it.

Access to Full Terms May Be Difficult or Impossible Before Acceptance

Often, the document being signed is not the full contract; the purchaser is told that the rest of the terms are in another location. This reduces the likelihood of the terms being read and in some situations, can be read after they have become notionally accepted by purchasing the good/service and opening the box. These contracts are typically not enforced, since common law dictates that all terms of a contract must be disclosed before the contract is executed.

Boilerplate Terms are Not Salient

The most important terms to consumers/purchasers of a good or service are generally the price and the quality, which are generally understood before the contract of adhesion is signed. Terms relating to events which have very small probabilities of occurring or which refer to particular statutes or legal rules do not seem important to the consumer. This further lowers the chance of such terms being read and also

means they are likely to be ignored even if they are read and have implications therein.

There May Be Social Pressure to Sign

SFCs or standard agreements are signed at a point when the main details of the transaction have either been negotiated or explained. The consumer might have already furnished consideration (such as payment of the price) even before signing the terms of the contract. Social pressure to conclude the bargain at that point may come from a number of sources. The salesperson may imply that the purchaser is being unreasonable if they read or question the terms, saying that they are “just something the lawyers want us to do” or that they are wasting their time reading them. If the consumer is at the front of a queue there is additional pressure to sign quickly. Finally, if there has been negotiation over price or particular details, then concessions given by the salesperson may be seen as a gift which socially obliges, the consumer/purchaser to respond by co-operative and concluding the transaction.

Standard form Contracts May Exploit Unequal Relations

If the good or service is being sold or provided using a contract of adhesion is one which is essential or in a very high demand, the consumer or commercial buyer might feel they have no choice but to accept the terms. Sellers or service providers might therefore take advantage of this fact to exploit the consumer who has little or no knowledge of the intricacies inherent in such contracts. This problem may be mitigated if there are many suppliers of the good or service who can potentially offer different terms.

PROTECTING CONSUMERS IN STANDARD AGREEMENTS/SFCs

After having examined the features and shortcomings of standard form contracts, it will equally be of interest to also look at how consumers can be protected in standard agreements where their rights are sometimes trampled upon.

A. The Rule of Incorporation in protecting consumers in standard agreements

Unfair terms in standard form contracts are one of Contract Law’s most notorious and enduring problems [25]. The rule incorporation comes in to water down the excesses of standard agreements. It equally guides the courts in deciding cases pertaining to breach of contractual provisions. This is why in the recent case of *Allen Fabrications Ltd v ASD Ltd* [26], the High Court considered the incorporation of standard terms and conditions into a contract between two parties [27]. In

standard terms, such as making sure that they are printed on the back of, or referred to in all, proposals.

²⁷<https://www.inhouselawyer.co.uk/legal-briefing/better-the-devil-you-know-the-incorporation-of-standard-terms/>, accessed 07/03/24.

²⁵ Moore Marcus (2022) “Controlling Fairness in Standard Form Contracts: What Can Courts Do, and What Should They Do?” UBC Law Review, p 547.

²⁶ [2012] EWHC 2213 (TCC). In this case, the High Court stated a reminder that businesses should be consistent in the way in which they incorporate their

consumer contracts, additional consideration may be required in order to incorporate terms validly, fairly and reasonably, because most consumers do not understand their baseline legal rights even if the terms are written clearly [28]. It is equally worth noting that where the incorporation of standard terms have been expressly agreed upon by the parties, no problem arises, but quite often the incorporation of the standard terms takes place by mere reference in an oral communication or written communication to the inclusion of such terms [29]. At this point therefore, incorporation here will take three dimensions; incorporation by signature, by nature of document, by notice and by reference.

Incorporation by Signature

In ensuring the protection of consumers, the incorporation of standard terms must appear to be part of the contract, and must not be drafted in such a way as to deceive or mislead the consumer into signing it. Consent of the incorporated terms by the consumer is also required under this rule, for any party who signs a contract without actually consenting to it as a result of deceit by the other party might have a course of action against the originator of the contract. It is based on this rule that a person is only bound by a rule of which he has notice, whether express or implied. It follows that incorporation will be inferred from the signature of the contract by the weaker party [30].

However, this signature rule will not lie where the other party was misled into signing the contract which he could barely comprehend. This was seen in the case of *Harvey v Ventilatorenfabrik Oelde GmbH* [31], where the signature rule was discarded. The contract in question consisted of two documents one of which was in English and the other containing the contested clause was in German. The document in German was nevertheless signed by the plaintiff and the question was whether the terms in German formed part of the contract.

²⁸ Wang F.F (2015) "The Incorporation of terms into commercial contracts: a reassessment in the digital age" *Journal of Business Law*, p 1.

²⁹ Eiselen S (2011) "The Requirements for the Inclusion of Standard Terms in International Sales Contracts" *Potchefstroom Electronic Law Journal*, vol. 14, no 1, p 3.

³⁰ This was the position in the case of *L'Estrange v Graucob Ltd [1934] 2KB 394*, where the dictum of Scrutton L.J was that when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

³¹ [1988] 8 Tr. LR 138.

³² Another case which illustrates this fact is in *Curtis v Chemical Cleaning & Dying Co [1951] 1KB 805*, where the plaintiff had taken a dress for cleaning where she was asked to sign a receipt which included a widely worded exemption clause. On querying this, she was told by the

assistant that the clause meant that the defendants would not accept liability for damage to the beads and sequins with which the dress was trimmed. When the dress was returned there was a stain on it. The defendants relied on the exclusion clause but the court of Appeal held that the misrepresentation by the assistant of the scope of the clause overrode the fact that the plaintiff has signed the document.

Incorporation by Nature of Document

It is equally cardinal that the standard terms must contain contractual terms. This means that in order for a clause to be considered a term in the contract, it must be referenced in a contractual document which incorporates the entire arrangement agreed between the parties. The nature of the term or clause (document) in question must be of contractual value and the consumer must have recognized such document as binding on him/her. This is because there are some documents that may not constitute part of a contract. Tickets are the most common types of documents that contain excluding or limiting terms. They are generally considered and held as constituting mere vouchers or receipts for money rather than contractual documents [33]. For a document such as a ticket or receipt to constitute part of the contract, it is necessary for it to contain terms that form part of the contract. Hence the fact that a document is called a receipt is not conclusive for the fact that is non-contractual. Secondly, the time of making the contract appears to be important since a document can constitute part of a contract if it is delivered before or at the time of contract [34]. It can therefore be submitted that standard terms should be made up of clauses that form part of the contract or contractual document, rather than just mere documents tending to support the execution of the contract.

Incorporation by Notice

Notice has been taken to be very instrumental in standard agreements and particularly to the protection of consumers in such contracts. Courts have been

assistant that the clause meant that the defendants would not accept liability for damage to the beads and sequins with which the dress was trimmed. When the dress was returned there was a stain on it. The defendants relied on the exclusion clause but the court of Appeal held that the misrepresentation by the assistant of the scope of the clause overrode the fact that the plaintiff has signed the document.

³³ This was the position in the case of *Chapelton v Barry UDC [1940] 1KB 532*.

³⁴ It is however recognized that some documents merely record the performance of an existing contractual obligation rather than forming part of the making of the contract and evidencing its terms. Such documents are not regarded as contractual documents, essentially because the contract has already been made. In *Grogan v Robin Meredith Plant Hire [1996] CLC 1127*, it was stated that invoices, time sheets or statements of accounts are not normally documents forming part of the making of a contract.

concerned about this requirement of notice and sought to establish the basis for its assessment. It follows that when a document is established to be contractual, the next question will be if the existence of the terms was brought to the attention of the other party (consumer). When a document contains a term, which is not the usual type of term expected in such contracts, notice cannot simply be inferred something positive must be done to show that its existence has been brought to the attention of the other party. This is because in most standard agreements, excluding or limiting clauses may not be written clearly or physical catchy to the view of the consumer. This is why Lord Denning in *Spurling v Brandshaw* [35], stated that “some exclusion clauses I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient”. However, upon fulfilling this requirement, no account will be taken of the fact that the individual claimant is illiterate or unable to understand the language in which the terms are written.

Incorporation by Reference

Incorporation can equally be made from reference to other documents in the contract. This will enable the consumer not to be faced with mixed up ideas as to the terms of contract. This equally saves the stress of having to deal with many crucial terms in a single document. Making reference to delicate and complex terms of the contract to other documents will help facilitate the consumer’s understanding of the contract, and hence reduce the chances of conflict arising from terms which were not clearly elaborate to the consumer. The doctrine of incorporation by reference [36], alleviates this complexity by allowing a reference to incorporate into the agreement extrinsic materials which are given equal weight with provisions directly contained therein [37].

A term may be incorporated by reference to another document if there is an express or implied agreement to that effect, provided the term is not inconsistent with the contract into which it is alleged to have been incorporated [38]. It is therefore clear that terms can be incorporated by reference to another document in which they can be found. This was the case in the Thomson’s case, where the face value of the ticket said ‘see back’ and on the back it stated that the ticket was issued subject to conditions set out in the timetable, available for purchase. Another position was seen in the case of *O’Brien v MGN Ltd* [39], where the Court of

Appeal held that the newspaper’s rules governing scratch card games were incorporated in to the contract although these rules had not been published in full in the newspaper’s offices. It is common to make reference to the existence of full terms and conditions contained in a separate document and obtainable on request.

B. The Requirement of Consumer Vigilance in Standard Agreements

As a protective measure, it is equally expected of the consumer to be vigilant in ensuring that what he/she signs, confirms, accepts or endorses in standard agreements is within safe margins. Consumers are therefore called upon to be aware and mindful of such arrangements that bear attributes of boilerplate terms. The consumer must equally ensure that he is abreast with the terms and conditions of the contract before assenting to it. If the consumer agrees to a contract, and later realises that it is not what he expected, the consumer can be bound by the terms he agreed upon, and hence no action may lie. So it is necessary for the consumer to carefully read through terms and conditions before manifesting their acceptance. They should be assured that the terms are within their reach and that the contract can possibly be executed by following their own part of the bargain. This will go a long way to protect them in standard agreements.

CONCLUSION

Consumers are at the backbone or centre of every commercial activity, for there can be no sales or commercial activities without the presence of consumers who are willing to transact at any given point in time. They are therefore instrumental to the success of every commercial venture. Considering the contributions of consumers to the growth and development of commerce, their role cannot be underestimated nor overemphasized. Standard agreements are one of those contracts that are seen to offer consumers with several opportunities and benefits. In as much as these benefits or advantages exist in standard agreements, there is always the necessity to protect consumers who engage in such contracts because of their vulnerability and inexperience in commercial dealings with businessmen; economic operators, producers, sellers, service providers, among others. These commercial operators must take into consideration the rights of consumers when drafting their standard agreements and even during the execution of the contract. This will go a long way to maintain pacific

³⁵ [1956] 2 All ER 121. This position was equally followed in the case of *Thornton v Shoe Lane Parking Ltd* [1971] 1 All ER 686, where a clause displayed on a notice inside a car park, containing extensive exclusions was held not to be incorporated into a contract which was made by the purchase of a ticket from a machine.

³⁶ This refers to an act of including an additional document within a contract by naming the additional

document rather than including the full text or full version of the additional document.

³⁷ Whiteman Robert (1961) “Incorporation by Reference in Commercial Contracts” *Maryland Law Review*, vol. 21, issue 1, p 1.

³⁸ Richard Manly S.C (2007) “Incorporation by Reference” The Victorian Bar Continuing Legal Education Program, Melbourne TEC Council, p 2.

³⁹ [2001] EWCA CiV 1279, [2002] CLC 33.

relationship between the consumer and the commercial operator, and hence favour consumer protection.

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