

## **A COMPARATIVE STUDY OF THE CONTROL OF EXCLUSION CLAUSES IN CONSUMER CONTRACTS: LESSONS FOR GHANA**

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### **ABSTRACT**

A lot of concerns have been raised over the use of exclusion clauses, especially in respect of transactions involving parties with unequal bargaining power since they are usually not voluntarily subscribed to by the weaker party, but rather imposed on him/her. The problem is compounded by the fact that everyone is a consumer one way or the other, and therefore at risk of the exploitative effects of exclusion clauses. The paper adopts a comparative research methodology in an attempt to evaluate both the judicial and legislative controls of exclusion clauses in consumer contracts under Ghanaian law, as well as those of the United Kingdom (UK) and the Republic of South Africa. The paper reveals that the legislative and judicial controls of exclusion clauses under Ghanaian law are not robust, thereby creating the need for certain reforms to be introduced under Ghanaian law to effectively protect the consumer. The paper concludes by proffering recommendations for legislative interventions which can be introduced to better protect the Ghanaian consumer.

**Keywords:** Exclusion Clauses, Consumer Protection, Consumer Contracts

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## INTRODUCTION

The function of an exclusion or exemption clause as noted by Yates and Hawkins is to delimit the extent of the obligations undertaken by the *proferens* in the contract.<sup>2</sup> Even though exclusion clauses are indispensable in commercial contracts, it also appears that they cannot be allowed to operate unfettered in every situation.<sup>3</sup> The use of exclusion clauses in contracts has therefore been met with protest over the years, especially when it has to do with transactions involving people of unequal bargaining power.

The hostile attitude of the courts towards the use of exclusion clauses is based on the premise that they are not usually agreed upon freely by one party but are usually one-sided and are foisted on the other party, who has no option but to accept the terms, however detrimental they may be to his/her interest. This concern was expressed by Lord Reid in *Suisse Atlantique Societe d'Armarment Maritime SA v. NV Rotterdemsche Kolen Centrale*<sup>4</sup> when he said:

Exemption clauses differ greatly in many respects. Probably the most objectionable are found in complex standard conditions which are now so common. 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 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. Freedom to contract must surely imply some choice or room for bargaining...

The above concern expressed by the court in *Suisse Atlantique*, brings to the fore the need for a critical evaluation of the control of exclusion clauses which are commonly used in consumer contracts. This concern is further heightened by the situation that everyone is a consumer one way or the other, and thus susceptible to the exploitative consequences associated with the usage of exclusion clauses in consumer contracts.

The thesis of this paper is that even though certain measures have been put in place under Ghanaian law to control the use of exclusion clauses to protect the consumer, compared with what pertains in the UK and the Republic of South Africa, the control measures under Ghanaian law are not robust to effectively protect the Ghanaian consumer.

Over the years, and even more recently, the research and publication materials on the research subject area have focused on the extent to which the law and practice of consumer protection in Ghana is effective,<sup>5</sup> a general assessment of how effective the consumer protection statutes in Ghana are,<sup>6</sup> and a discussion of the common law principles in respect of exclusion clauses.<sup>7</sup> For instance, Ansa-Asare's article<sup>8</sup> examines the Price Control Decree of Ghana, 1974 (NRCD 305), among others, as well as some judicial decisions of the Ghanaian courts germane to consumer

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<sup>2</sup> D Yates & AJ Hawkins, *Standard Business Contracts: Exclusion and Related Devices*, (London: Sweet & Maxwell, 1986).

<sup>3</sup> Krish Maharaj, "Limits on the Operation of Exclusion Clauses", (2012) 49(3) *Alberta Law Review*, 635-654.

<sup>4</sup> [1966] 2 WLR 944, 965 (hereinafter referred to as *Suisse Atlantique*) (emphasis added)

<sup>5</sup> K Ansa-Asare, "The Case for a Comprehensive Framework of Consumer Protection in Ghana", (1981-82) 13& 14 RGL 73.

<sup>6</sup> C Dowuona-Hammond, "Protecting the Purchaser of Goods Under Ghanaian Law", (1993-95) RGL 105.

<sup>7</sup> C Dowuona-Hammond, *The Law of Contract in Ghana*, Frontiers Printing and Publishing Company (2011).

<sup>8</sup> See note 5 above.

protection generally in Ghana to ascertain how effective they are. The author, concludes that the consumer protection regime in Ghana is ineffective and thus makes a case for legislative reforms in Ghana to eliminate the anomalies and inconsistencies in the law. On the part of Dowuona-Hammond, her work<sup>9</sup> assesses how effective the statutes in Ghana, such as the Sale of Goods Act, 1962 (Act 137), and Hire Purchase Act, 1974 (NRCD 292), among others, have been in the protection of consumers in Ghana, and whether there are some new areas which require regulation, and if so, what form of regulation is required. The author concludes that the consumer protection regime is not effective and therefore recommends some legislative interventions to deal with the situation. Dowuona-Hammond, again, in another work,<sup>10</sup> discusses some of the principles associated with the control exclusion clauses under the common law. However, none of the aforementioned previous studies on the research subject area entails an in-depth comparative study of the legislative and judicial controls of exclusion clauses under Ghanaian law with other countries with effective consumer protection legal regimes on the research subject matter in a bid to acquire a better understanding of the legal regime in Ghana, as well as to learn and obtain knowledge of the laws of those countries on the control of exclusion clauses. This paper, therefore, aims at bridging the gap in the research subject area, by adopting a comparative research methodology in a bid to comprehensively evaluate both the legislative and judicial controls of exclusion clauses in consumer contracts under Ghanaian law with other countries with strong consumer protection legal regimes in order to further deepen the understanding of the legal regime in Ghana and to also learn and gain knowledge of the laws of those other countries on the control of exclusion clauses.

The paper adopts the comparative research methodology in an attempt to evaluate the judicial and legislative controls of exclusion clauses under Ghanaian law, as well as those of the UK and the Republic of South Africa. The comparative research methodology the paper adopts is a thriving area in the study of the law which has attracted, in the last decades, a growing interest in legal scholarship and legal education.<sup>11</sup> This research methodology is used as an instrument for acquiring a better understanding of one's legal system and also learning and acquiring knowledge of the law elsewhere.<sup>12</sup> Despite the aforementioned benefits associated with comparative research methodology, some of the limitations or constraints associated with that methodology are that it is more difficult, and more time-consuming than research that is not comparative in nature.<sup>13</sup> The comparative research methodology is employed because the paper aims to identify the similarities and differences between the control of exclusion clauses under Ghanaian law and those of the UK and the Republic of South Africa with the view to identifying some possible legal gaps under Ghanaian law, as well as drawing on some useful lessons which can provide the basis for legal reforms under Ghanaian law.

The UK has been chosen as the basis for the comparative study because of its strong history of protecting consumer rights and its reliance on laws that protected purchasers of goods and services, as well as outlawing unfair contract terms even before the European Union acted in that

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<sup>9</sup> See note 6 above.

<sup>10</sup> See note 7 above.

<sup>11</sup> E Orucu, *Developing Comparative Law* in E Orucu & D Nelken (eds), *Comparative Law: A Handbook* (Hart 2007), 43

<sup>12</sup> *ibid*

<sup>13</sup> Seyed Mojtaba Miri & Zohreh Dehdashti Shahrokh, "A Short Introduction to Comparative Research" (May 2019). Available at file:///C:/Users/User/Downloads/ComparativeMethod.pdf (accessed on May 13, 2022)

area.<sup>14</sup> The Republic of South Africa has also been chosen for the comparative study by virtue of the various provisions in its Consumer Protection Act of 2008 which make significant inroads into the common-law positions on the control of exclusion clauses to effectively protect the consumer.<sup>15</sup>

The paper is structured as follows. The second section examines the judicial and legislative controls of exclusion clauses in contracts under Ghanaian law. The third and fourth sections examine the judicial and legislative controls of exclusion clauses in contracts under the laws of the UK and the Republic of South Africa, respectively. The fifth section focuses on a comparative study of the use of exclusion clauses under Ghanaian law with those of the UK and the Republic of South Africa. The paper then concludes by proffering useful recommendations on measures that can be put in place under Ghanaian law to better protect the consumer.

## **CONTROL OF EXCLUSION CLAUSES IN CONTRACTS UNDER GHANAIAN LAW**

In Ghana, the mechanisms available in the control of exclusion clauses in consumer contracts are mostly limited to those inherited from the common law as well as some protection offered by some statutes.<sup>16</sup> Thus under Ghanaian law, just like other common law jurisdictions, for the courts to enforce an exclusion clause, the party seeking to rely on the exclusion clause must prove that the said exclusion clause has been properly incorporated into the contract.<sup>17</sup> Also, an interpretation of the exclusion clause must clearly establish that it covers the breach or loss which has transpired.<sup>18</sup>

In addition to the above-stated common law principles applied by the Ghanaian courts, a party seeking to rely on a particular exclusion clause must also establish that the said exclusion clause, depending on the nature of the transaction, is not contrary to specified legislation, such as the Sale of Goods Act, 1962 (Act 137), Contracts Act of Ghana, 1960, (Act 25) and the Hire Purchase Act, 1974 (NRC 292). The focus of the paper on the control of exclusion clauses under Ghanaian law will therefore be on the judicial control of exclusion clauses which is heavily reliant on the common law, as well as the control of exclusion clauses under the aforementioned statutes.

### **A. Judicial Control of Exclusion Clauses in Ghana**

As has already been stated, the judicial control of exclusion clauses under Ghanaian law is largely based on the common law. The courts therefore generally adopt a hostile attitude towards their usage, especially in contracts between parties of unequal bargaining power, and strictly apply common law principles in this regard as follows:

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<sup>14</sup>EU (Withdrawal Bill) Factsheet 9: Consumer Protection, Department for Exiting the European Union. Available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/714380/9.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/714380/9.pdf) (accessed on February 4, 2022)

<sup>15</sup>W Jacobs, PN Stoop & R Van Niekerk, "Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: a Critical Overview and Analysis," (2010) PER Potchefstroom vol.13 n.3 Available at [http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1727-37812010000300009](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812010000300009) (accessed on February 4, 2022)

<sup>16</sup>Dowuona-Hammond, n 6 above

<sup>17</sup>*Parker v. Southern Eastern Railway* [1877] 2 CPD 416

<sup>18</sup>*Canada Steamship Lines v. The King* [1952] AC 192 (Hereinafter referred to as *Canada Steamship*)

## 1. Proper Incorporation of Unsigned Exclusion Clauses in Contracts

The common law rules on this principle vary, depending on whether the said exclusion clause has been signed or not.

### (i) Unsigned Exclusion Clause

For an unsigned exclusion clause to be considered to have been properly incorporated into a contract, the party seeking to rely on it must establish that he took all reasonable measures to bring the said exclusion clause to the attention of the consumer, regardless of whether the said consumer read the terms of the contract.<sup>19</sup>

### (ii) What the Courts Consider as Constituting Reasonable Notice

Where the document containing the exclusion clause is defaced or obliterated, the courts are likely to conclude that reasonable steps have not been taken to bring it to the attention of the consumer.<sup>20</sup> Also, where the exclusion clause in question has far-reaching consequences, a party seeking to rely on it must prove that he took special measures to bring that to the attention of the customer. For example, in *Thornton v Shoe Lane Parking Ltd*,<sup>21</sup> an exclusion clause displayed inside the garage of a car park which purported to exclude the defendant from liability for any damages caused to vehicles parked at that place, as well as any personal injuries partly sustained due to the negligence of the defendants was not enforced by the court. The court held that owing to the exceptionally far-reaching and unusual implications of the said exclusion clause, the defendants should have taken extra measures, by printing it in red ink to make it very legible to the customer and that displaying it in the car garage was not sufficient under the circumstance.

Furthermore, for an exclusion clause to be held to be enforceable, it has to be established that it was brought to the notice of the customer before the contract was entered into and not after the contract has been made.<sup>22</sup> There are however instances where an exclusion clause would be enforced, even when there has not been any actual notice of it given to the other party. This applies only where there has been a consistent course of dealings between the parties concerned in respect of the said exclusion clause. In such a situation, the other party would be deemed to have constructive notice of the said exclusion clause.<sup>23</sup>

### (iii) Signed Documents Containing Exclusion Clauses

Where the document containing the exclusion clause has been signed by the customer, in the absence of fraud or misrepresentation, the customer of full age and understanding is bound by it, regardless of whether he read it or not. Thus, in *Inusah v. DHL Worldwide Express*,<sup>24</sup> a plaintiff who read and signed a receipt containing an exclusion clause limiting the liability of the defendant to \$ 100, was held to be bound by it even though the loss he incurred was far more than that amount. On the contrary, the court will not enforce an exclusion clause, even when it has been

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<sup>19</sup> *Parker v. South Eastern Railway*, n 17 above

<sup>20</sup> *Richardson, Spence & Co v. Rowntree* [1894] AC 217.

<sup>21</sup> [1971] 2 QB 163.

<sup>22</sup> *Olley v. Marlborough Court Ltd* [1949] 1 KB 532.

<sup>23</sup> *McCutcheon v. David Macbrayne Ltd* [1964] 1 WLR 125.

<sup>24</sup> [1992] 1 GLR 267.

signed by a customer, where the effect of the exclusion clause was misrepresented by the defendant to the customer.<sup>25</sup>

## **B. Construction of Exclusion Clauses by the Courts**

The courts have over the years adopted strict rules in respect of the interpretation of exclusion clauses in contracts to protect weaker parties. The courts have thus devised certain principles of interpretation of exclusion clauses in this regard as follows:

### **1. Contra Proferentum Rule**

This rule of construction posits that where there is an ambiguity in the wording of an exclusion clause, it will be construed by the courts against the party seeking to rely on it.<sup>26</sup> The party seeking to rely on the exclusion clause must establish that the words used when construed in their ordinary sense, adequately cover the loss or event which has transpired.

### **2. Exclusion of Liability for Negligence**

In situations where the exclusion clause is intended to absolve a party from liability for a negligent act, a restrictive approach is adopted by the court in the construction of such clauses. In this sense, the courts will only enforce the said exclusion clause, where its words clearly cover the negligent act. Thus, as a matter of general rule, if the wording of the exclusion clause is not clear in this respect, it will not be interpreted to cover the negligent act which has arisen. The tests to be considered by the courts in assessing whether a clause excludes liability were laid down in *Canada Steamship Lines v. The King*.<sup>27</sup> This may arise in two situations. Firstly, where the clause contains language, which expressly exempts the party relying on the clause from the consequences of negligence, then an effect ought to be given to it. For example, if the word 'negligence' or its synonym is used in the clause as illustrated in *EE Caledonia Ltd v. Orbit Valve Co. plc*<sup>28</sup> where the court held that the clause excluding 'any claim, demand, cause of action, loss, expense or liability from the death of an employee' did not expressly exclude negligence. Secondly, Where the clause does not expressly exclude liability for negligence but excludes damages which would be negligent damage, then effect ought to be given to it, as was illustrated in *Alderslade v. Hendon Laundry Ltd*<sup>29</sup> where an exclusion clause that restricted recovery for lost items to twenty times the laundering charge of the items was given effect to by the court because it covered negligent liability (breach of duty of care for the items).

### **3. Doctrine of Fundamental Breach of Contract and its Subsequent Modification**

This doctrine is premised on the principle that a party to a contract could only be entitled to rely on an exclusion clause, where he is fulfilling his part of the bargain, and not when he has fundamentally breached a term of the contract.<sup>30</sup> The application of the doctrine as a substantive

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<sup>25</sup> *Curtis v. Chemical Cleaning and Dyeing Co.* [1951]1 KB 805.

<sup>26</sup> *Houghton v. Trafalgar Insurance Co. Ltd* [1954] 1 QB 247.

<sup>27</sup> *Canada Steamship*, n 18 above, 208.

<sup>28</sup> [1994] 1 WLR 1515

<sup>29</sup> [1945] 1 KB 189

<sup>30</sup> *Nichol v. Godts* [1854] 10 Exch. 191. Other relevant cases on this point include, *Karsales (Harrow) Ltd v. Wallis* [1956] 2 All ER 866 and *Alexander v. Railway Executive* [1951] 2 K.B 882.

rule however came to an end in *Photo Production v. Securicor Transport*,<sup>31</sup> where the House of Lords held that the doctrine was no longer applicable as substantive law and that in all cases, the issue as to whether and to what extent an exclusion clause under a contract was applicable was something which ought to be applied based on the interpretation of the contract as a whole and that where the parties involved have equal bargaining power, then they are at liberty to allocate risks as they deem fit, based on agreed terms. The doctrine is now replaced by the test of reasonableness laid down in *George Mitchell (Chesterhall) Ltd v. Finney*.<sup>32</sup>

### **C. Control of Exclusion Clauses under Specific Legislation in Ghana**

The discussion under this section will focus on statutes such as the Contracts Act of Ghana, 1960, (Act 25), the Sale of Goods Act, 1962 (Act 137), and the Hire Purchase Act, 1974 (NRCD 292) which are littered with some provisions on exclusion clauses.

#### **1. Regulation of Exclusion Clauses under Act 25**

Section 5 of Act 25 is the relevant provision on the control of exclusion clauses. Section 5(1) of Act 25 makes it possible for a person to rely on or enforce a contract to which he/she is not a party provided such a contract is intended to confer some benefits on that person.<sup>33</sup> Section 5(2)(b) is however quick to state that the provision in section 5(1) does not apply to: 'A provision in a contract purporting to exclude or restrict any liability of a person who is not a party thereto.' The legal implication of section 5(2)(b) of Act 25 is that a person who is not a party to a contract that contains an exclusion clause, but for whose benefit the said exclusion clause has been incorporated in the contract, cannot rely on the said exclusion clause for protection. Therefore, based on section 5(2)(b) of Act 25, a consumer, in the event of a breach can sue the servants or employees who are not parties to the contract for negligence even if there is a clause in the contract expressly purporting to exclude liability of the supplier's employees and servants.<sup>34</sup>

#### **2. Regulation of Exclusion Clauses under Act 137**

The sale of goods transactions in Ghana is governed by Act 137. As a way of restricting the use of exclusion clauses, Act 137 has created several implied duties which must be read into every contract of sale of goods, thereby forbidding a seller in specific cases from inserting an exclusion clause in a contract of that nature, in a bid to evade such implied duties. One of such provisions is section 13. Section 13 has been described to be one of the most innovative legislative achievements in sales law in Ghana.<sup>35</sup> Based on sections 13(1) (a) and (b) of Act 137 there is an implied duty on the part of every seller of goods to ensure that goods supplied are free from defects unknown to the buyer before or at the time when the contract is made; as well as a duty to ensure that goods supplied are reasonably fit for the purpose for which they are required. Because these duties are implied, a breach of any of them amounts to a breach of a fundamental

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<sup>31</sup> [1980] A.C 827 (hereinafter referred to as *Photo Production*).

<sup>32</sup> [1983] 2 A.C 803. The test considers factors, such as whether the contract is a commercial one between parties of equal or unequal bargaining power, such as between an individual and a company; whether there was an opportunity to insure; the level of remuneration received for service; any attempt to allocate risks between the parties and the efficiency of the arrangements.

<sup>33</sup> S.K Date-Bah, "The Enforcement of Third Party Rights in Ghana" (1971) 18 UGLJ 76.

<sup>34</sup> Dowuona-Hammond, n6 above.

<sup>35</sup> Dei-Annang, "Caveat Venditor Ghaniensis," (1967) 90 *University of Ghana Law Journal*, 100-111.

obligation, which gives the buyer the right to reject the goods and recover or refuse to pay the price.<sup>36</sup>

It is however worthy of note that the limitation offered under section 13(1) against the use of exclusion clauses, is not absolute. In other words, there are certain situations where no such implied conditions would be read into a contract for the sale of goods. For instance, where the buyer has examined the goods in respect of defects that ought to have been detected by such examination;<sup>37</sup> and in the case of a sale based on a sample, in respect of defects that could have been detected by a reasonable examination of the sample,<sup>38</sup> and where the goods are not sold by the seller in the ordinary course of his business in respect of defects of which such a seller was not and could not reasonably have been aware.<sup>39</sup>

Under section 13(2) of Act 137, a seller of goods of a particular description can exclude liability for the poor quality of goods supplied provided he proves that before the contract was made, the exclusion clause was brought to the attention of the buyer and its effects made clear to him. This provision, it must be said, undermines the protection given to the consumer concerning the quality of the goods, since it provides the leeway for the seller to evade liability if he proves that he drew the buyer's attention to the said exclusion clause. Also, based on section 13(2), the limitation on the use of exclusion clauses to exclude liability for the poor quality of goods is not applicable in purely private transactions, where the seller does not sell that type of goods in the 'ordinary course of his business'.

The meaning of the phrase 'ordinary course of his business' as used in Act 137 was explained by Ghana's Supreme Court in *Andreas Bschor v. Birim Wood Complex*.<sup>40</sup> In that case, the court held that the purpose of the statutory condition of quality and fitness is to protect buyers who rely on the skills and knowledge of business sellers. The Court thus construed section 13(1) (b) of Act 137 and gave effect to its purpose by including any sale where there is an element of regularity showing that the seller has been selling goods of that description as part of his business, whether it is his main business or not; or where the seller accepted an order from the buyer to supply goods of that description and that where the goods were sold on 'where is' basis the provision is not applicable.

The decision in *Andreas Bschor* demonstrates that apart from the element of regularity which must be established to prove that the seller has been selling goods of that description, section 13(1) (b) of Act 137 could also be invoked even in situations where even though there is no element of regularity, the seller accepted to supply the buyer goods of a specific description. However, based on the Court's decision that the purpose of the statutory condition of quality and fitness is to rely on the skills and knowledge of business sellers, it appears the protection will therefore not be afforded under that section to a buyer if because of his occupation, skill, or expertise he is, in fact, more knowledgeable than the seller concerning the nature or efficacy of the goods supplied to him. This is so because, with such a level of expertise on the part of such

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<sup>36</sup> Section 49(1) (b).

<sup>37</sup> Section 13(1)(a)(i).

<sup>38</sup> Section 13(1) (a) (ii).

<sup>39</sup> Section 13(1)(a) (iii).

<sup>40</sup> [2016] 96 GMJ 1 SC (hereinafter referred to as *Andreas Bschor*).



a buyer, he will have a herculean task in demonstrating that he relied on the expertise of the buyer.

### **3. Regulation of Exclusion Clauses under the Hire Purchase Act, 1974, NRCD 292**

Various interventions have also been made under NRCD 292 to regulate exclusion clauses. For example, the Act makes provision for a list of conditions that are prohibited from being included in any hire purchase agreement, failing which the agreement will be deemed to be void. For instance, the owner or seller or anyone authorised by him is forbidden from going into the private property of the buyer to take possession of goods that have been let under a hire purchase agreement or is relieved from liability for such entry or any term in the hire purchase agreement which purports to relieve the owner or seller from liability for the acts or defaults of any person acting on his behalf in respect of the hire purchase agreement.<sup>41</sup> These conditions are prohibited because they are considered to be unconscionable to the buyer.

NRCD 292 also contains several provisions that limit the use of exclusion clauses by implying in every hire purchase agreement conditions in respect of the quality of the goods, fitness, and correspondence with the description or sample by which they are sold.<sup>42</sup> To prevent owners or sellers from avoiding these implied conditions, section 14 of the Act regulates the use of exclusion clauses to avoid the statutory implied terms by stating that any exclusion clause in a contract that purports to exclude liability for breach of these implied terms as to merchantable quality shall not be effective unless it is established that the said exclusion clause was brought to the attention of the buyer or hirer and its effect made clear to him, and where the exclusion or modification is in respect of a defect, it must be brought to the notice of the hirer or buyer.

## **CONTROL OF EXCLUSION CLAUSES UNDER UK LAW**

For an exclusion clause to be binding and operable upon the parties, under United Kingdom (UK) law just like in other common law jurisdictions, the clause must be incorporated into the contract as a term,<sup>43</sup> and must also pass the test of construction.<sup>44</sup> In addition, the clause must not be rendered unenforceable by the statutory provisions in the Unfair Contract Terms Act, 1977 and the Consumer Rights Act, 2015. The focus of the paper at this stage will therefore be on the evaluation of both the judicial and legislative control of exclusion clauses under UK law, as well as the above-stated statutes to ascertain the level of protection afforded the consumer under UK law.

### **A. Judicial Control of Exclusion Clauses under UK law**

Because the judicial control of exclusion clauses under the law of the UK is also largely based on the common law, the courts also tend to develop a hostile attitude towards exclusion clauses, especially in respect of contracts made up of parties of unequal bargaining power, and have formulated several principles on the control of exclusion clauses as follows:

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<sup>41</sup>Section 4.

<sup>42</sup> Sections 13-15.

<sup>43</sup> *Parker v. Southern Eastern Railway*, n 17 above.

<sup>44</sup> *Canada Steamship*, n 18 above

## 1. Restrictive Interpretation of Exclusion Clauses

- (i) **Contra Proferentum Rule**  
The UK courts also apply the contra proferentum rule which allows them to construe an ambiguous exclusion clause against the person seeking to rely on it.<sup>45</sup>
- (ii) **The Exclusion clause when construed must cover the loss or event which has occurred.**  
Based on this principle, the courts will only enforce an exclusion clause where based on an ordinary construction of the clause it applies to the loss or event which has transpired and will not extend it to include the loss or breach which has happened.<sup>46</sup>
- (iii) **Reluctance of the Courts to Enforce Exclusion Clauses Which Exclude Liabilities other than Contractual Matters.**  
The tests to be considered by the courts in assessing whether a clause excludes liability were laid down in *Canada Steamship*.<sup>47</sup>
- (iv) **Exclusions Clauses and the Doctrine of Fundamental Breach of Contract and its Modification**

Just like other common law jurisdictions, this doctrine was also one of the devices adopted by the courts to control the use of exclusion clauses, until it ceased to be applied as a substantive rule following the decision in *Photo Production Ltd v. Securicor Transport Ltd*.<sup>48</sup> The doctrine is now replaced by the test of reasonableness laid down in *George Mitchell (Chesterhall) Ltd v. Finney*.<sup>49</sup>

### a. The Exclusion Clause Must be Properly Incorporated

Where the exclusion clause is included in a contract that has been signed, this will be held as incorporated into the contract even where the party who signed the contract did not peruse the contract.<sup>50</sup> In the case, where the exclusion clause is in a contract not signed, the party seeking to rely on it must prove that he took the necessary steps to bring the said exclusion clause to the attention of the other party.<sup>51</sup> Also, if there has been consistency in dealings between two parties over a certain amount of time, the normal terms of the contract will be considered to be incorporated despite no actual express incorporation, if there are circumstances establishing that the other party ought to have known that the contract was based on those terms and conditions.<sup>52</sup> Furthermore, an exclusion clause can also be held to be incorporated into a contract, where the parties involved both belong to a particular trade, and it can be deduced that both parties are familiar with the fact that the said exclusion clause is generally applicable to the contract entered into between them.<sup>53</sup>

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<sup>45</sup> *Houghton v. Trafalgar Insurance Co. Ltd*, n 25, above.

<sup>46</sup> *Andrews Bros (Bournemouth) Ltd v. Singer & Co. Ltd* (1933) All ER 479

<sup>47</sup> *Canada Steamship*, n 18, above.

<sup>48</sup> *Photo Production*, n 31, above.

<sup>49</sup> *George Mitchell (Chesterhall) Ltd v. Finney*, n 32, above

<sup>50</sup> *L'Estrange v. E. Gracoub Ltd* [1934] 2 KB 394

<sup>51</sup> *Parker v. South Eastern Railway*, n 17, above.

<sup>52</sup> *Mccutcheon v. David Macbrayne Ltd*, n 23, above.

<sup>53</sup> *British Crane Hire Corporation v. Ipswich Plant Hire Ltd* [1975] QB 303

## **b. The Clause Must Not Be Rendered Unenforceable by Statutory Provisions**

Another requirement under UK law for the enforcement of exclusion clauses is that it must follow certain statutes. The statutes which are most relevant in this regard, and which will form the basis of evaluation in this section of the paper are as follows:

1. The Unfair Contract Terms Act, 1977
2. The Consumer Rights Act 2015

### **(B) Control of Exclusion Clauses Under the Unfair Contract Terms Act 1977 (UCTA)**

The UCTA prevents the exclusion of liability in certain circumstances. It applies both to exclusions of contractual and tortious liability in contracts in respect of matters done or to be done in the context of business liability.

#### **1. Relevant Sections of UCTA on Exclusion Clauses**

##### **(i) Liability for Negligence Under UCTA**

Negligence in the context of the Act refers to the obligation to take reasonable care or exercise reasonable skill in relation to the express or implied terms of a contract.<sup>54</sup> Section 2(1) stipulates that any exclusion clause which entirely excludes or limits liability for death or personal injury arising from negligence will be unenforceable. Section 2(2) also states that clauses which provide exclusion of limitation for liability for any other loss or damage arising from negligence may be enforceable if the term in question meets the test of reasonableness requirement.

##### **(ii) Contractual liability and limitations under UCTA**

Section 6 of UCTA applies to provisions that attempt to exempt liability for terms that are implied by statute into contracts for the sale or supply of goods. Examples here include the implied terms as to the satisfactory quality, fitness for purpose, and correspondence with samples;<sup>55</sup> implied terms that the seller has title to the goods and the right to sell them.<sup>56</sup> The implied terms as to Section 6(1) (a) of UCTA prevents exclusion of this term, regardless of whether the seller is dealing as a consumer or during business. It is however instructive to note that whether these terms can be excluded under a contract depends on whether the contract is made in the course of business or as a consumer. If one party is dealing as a consumer, liability for these breaches may not be excluded.<sup>57</sup> Where however the party seeking to enforce liability is not a consumer, the exclusion clause may be valid only if it is reasonable.<sup>58</sup>

##### **(iii) The Reasonableness Test Under UCTA**

The reasonableness test which forms the basis of most of the provisions can be found under section 11 of UCTA, which defines the test, as to whether the term is a fair and reasonable one to have included in the contract, considering all circumstances known (and ought to be known) at the time of contracting. Thus, any information that was discovered following the making of the

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<sup>54</sup> Section 1(1) of UCTA

<sup>55</sup> Sections 13-15 of the Sale of Goods Act of the UK, 1979.

<sup>56</sup> Section 12 of the Sale of Goods Act of the UK, 1979.

<sup>57</sup> Section 6(2)(a).

<sup>58</sup> Section 6(3).

contract would be irrelevant. Section 11(5) states that the burden of proving this reasonableness relies on the party seeking to rely on the exclusion clause. The factors to assess reasonableness are factors identified by legislation and factors identified by courts as follows:

(iv) Factors to Assess Reasonableness identified by legislation.

Section 11(2) points to Schedule 2 of UCTA for some guidelines which must be considered in assessing reasonableness:

- Bargaining positions of the parties.
- Was agreement to the exemption clause because of inducement?
- Could any condition for the enforcement of liability be complied with?
- Were the goods made specifically at the request of the buyer?
- Was the contracting party aware of the existence and extent of the term, irrespective of any rules of incorporation such as notice or signature?

(v) The Effect of Finding Unreasonableness in The Clause

Where it is established that the exclusion clause is unreasonable, the clause in question will not be enforceable.<sup>59</sup> However, where the unreasonable term is part of a composite term, which includes different types of exclusion clauses, it has been held that the courts, in such a situation should separate the unreasonable parts of the composite term and treat the remaining reasonable terms as valid.<sup>60</sup>

### **(C) Control of Exclusion Clauses under the Consumer Rights Act 2015 (CRA)**

The UK CRA is a consolidation of various statutes such as the Sale of Goods Act 1979, Unfair Contract Terms Act 1977, Unfair Terms in Consumer Contracts Regulations 1999, and the Supply of Goods and Services Act 1982.<sup>61</sup> The consolidation of these various laws, without a doubt, provides the basis for better reference and brings about consistency to the laws on consumer protection in the UK which were hitherto littered in various legislations. The Act applies to contracts between a consumer and a trader.<sup>62</sup> The CRA defines a consumer notice as a notice that relates to rights or obligations between a trader and a consumer or where the trader is seeking to restrict liability.<sup>63</sup> This definition of consumer notice, therefore, deals with exclusion clauses.

#### **1. Fairness of an Exclusion Clause**

Under the Act, an exclusion clause is subjected to the 'fairness test' to ascertain whether it is fair to the consumer. A breach of the 'fairness test' will render the said clause unenforceable.<sup>64</sup> The 'fairness test' which generally applies to all consumer notices (including exclusion clauses) not specifically mentioned in the UK CRA, operates alongside other specific exclusion clauses which

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<sup>59</sup> *Phoenix Interior Design Limited v. Henley Homes plc* [2021] EWHC 15.

<sup>60</sup> *J Murphy & Sons Ltd v. Johnston Precast Ltd* [2008] EWHC 3024 TCC.

<sup>61</sup> The Consumer Rights Act: Consolidating UK Consumer Protection Laws. Available at <https://www.out-law.com/en/topics/commercial/consumer-protection/the-consumer-rights-act-consolidating-uk-consumer-protection-laws/> (accessed on March 23, 2021)

<sup>62</sup> Section 1(1)

<sup>63</sup> Section 61(4).

<sup>64</sup> Section 62(2).

are prohibited under the UK CRA.<sup>65</sup> Section 62(4) of the CRA defines a term as unfair if it 'creates a significant imbalance in the rights of the parties under the contract to the detriment of the consumer'. To evaluate this, the courts will take account of the subject matter of the clause and all the relevant circumstances.

Even though such an unfair exclusion clause is not binding on the consumer, the said consumer can rely on it if he decides to do so.<sup>66</sup> The courts can also on their own raise an issue concerning the fairness of exclusion, even where the parties have not raised that issue, where the court has enough legal and factual basis to do so.<sup>67</sup> The effect of this provision is that sellers or traders must be prepared to answer questions in respect of the fairness of consumer exclusion clauses, even where it has not been raised by the consumer in his pleadings before the court.

There is however an exception to the application of the fairness test. Thus the test does not apply where the exclusion clause is transparent and prominent.<sup>68</sup> For purposes of the Act, a term is transparent if it is in a plain and intelligible language and it is legible.<sup>69</sup> A term is also prominent if it is brought to the attention of consumers in such a way that an average consumer would be aware of it.<sup>70</sup> An average consumer is reasonably well informed, observant and circumspect.<sup>71</sup> It can be gleaned from this exception to the fairness test that the drafters wish to strike a balance between protecting the interests of both the consumer and the seller. Therefore, a well-informed consumer of a prominent and transparent term of a contract enters such contract at his/her peril.

## **(2) Exclusion of Negligence Liability**

Section 65(1) of the CRA is akin to Section 2(1) of UCTA, rendering all clauses attempting to exclude or restrict liability for personal injury void and of no legal effect. Section 65(1) also excludes the restriction or exclusion of liability for any other loss or damage arising from negligence. Under UCTA, this term is excluded only if it passes the test of reasonableness. However, under the CRA, if the clause is fair under the fairness test of Section 62, such a clause will be held to be valid. Both sections are relevant, as UCTA still applies to business-to-business contracts, whereas the CRA applies to contracts involving a consumer.

## **(3) Blacklisted Terms Under the CRA**

This refers to terms and consumer notices (including exclusion clauses) prohibited under the UK CRA. Examples of these blacklisted terms are terms that purport to exclude or limit trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader, excluding, or limiting the legal rights of the consumer to the trader or another party in the event of total or partial non-performance or inadequate performance by the trader.<sup>72</sup> These non-exhaustive terms have been couched in general terms to make them applicable to all manner of transactions. The blacklisted terms also cover very crucial aspects of the relationship between the trader and consumer and are intended to ensure that the consumer is not exploited by the trader under any circumstances.

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<sup>65</sup> Section 62(8).

<sup>66</sup> Section 62(3)

<sup>67</sup> Section 72(2) & (3)

<sup>68</sup> Section 64(2)

<sup>69</sup> Section 64(3)

<sup>70</sup> Section 64(4)

<sup>71</sup> Section 64(5)

<sup>72</sup> See Part 1 Schedule 2 of the UK CRA for detailed list of blacklisted terms.

#### **(4) Requirements for transparency of consumer notices or exclusion clauses under UK CRA**

The Act makes it mandatory for a trader to ensure that a written term of a consumer notice, which includes an exclusion clause is expressed in plain and intelligible language and is legible.<sup>73</sup> Also, the Act codifies the contra proferentum rule, by stipulating that any ambiguous consumer notice will be construed in favour of the consumer.<sup>74</sup>

#### **CONTROL OF EXCLUSION CLAUSES IN CONTRACTS UNDER THE LAW IN THE REPUBLIC OF SOUTH AFRICA**

The Republic of South Africa has put in place some judicial control measures based largely on the common law, which are akin to the situations under both Ghanaian and UK laws. Apart from the judicial control measures, certain statutes have been passed to regulate the use of exclusion clauses.<sup>75</sup> Thus, under the law of the Republic of South Africa, for an exclusion clause to be valid, just like in other common law jurisdictions, it must have been properly incorporated into the contract,<sup>76</sup> and the construction of the exclusion clause must clearly establish that it covers the breach or loss which has transpired.<sup>77</sup> Also, the said exclusion clause, depending on the nature of the transaction, must not be contrary to specified legislation, such as the Consumer Protection Act 68 of 2008.

##### **A. Judicial Control of Exclusion Clauses under South African Law**

Being a common law jurisdiction, various formulations of common law principles on judicial control of the use of exclusion clauses have been upheld by the South African courts as follows.

##### **1. Exclusion Clause to Absolve a Party from Liability for Fundamental Breach of Contract**

For instance, the fall of the common law doctrine of fundamental breach of contract as a substantive law, which prevents a party who has not fulfilled his part of the bargain from relying on an exclusion clause, following the landmark decision in *Photo Production v. Securicor*<sup>78</sup> has been adopted by the South African court. Thus, in *Elgin Brown and Hamer (Pty) Ltd v. Industrial Machinery Suppliers (Pty) Ltd*,<sup>79</sup> the court reasoned that the doctrine of fundamental breach of contract is a question that goes to the root of the contract and whether a party to a contract can rescind it and that the doctrine no longer has an influence on how exclusion clauses are interpreted by the courts. This decision has led to the irresistible conclusion that under South African law, no law proscribes the use of an exclusion clause to exclude the consequences of a fundamental breach.<sup>80</sup>

##### **2. An Exclusion Clause to Absolve a Party from Liability for Negligence**

Under South African law, a party can rely on an exclusion clause against liability for negligence, provided the said exclusion clause when construed in its ordinary meaning covers the breach or

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<sup>73</sup> Section 68(2)

<sup>74</sup> Section 69(1)

<sup>75</sup> The main statute is the Consumer Protection Act 68 of 2008.

<sup>76</sup> *Mercurius Motors v. Lopez* 2008 (3) SA 514

<sup>77</sup> *Afrox Healthcare Bpk v. Strydom* 2002 (6) SA 21 (SCA)

<sup>78</sup> *Photo Production*, n 31, above.

<sup>79</sup> 1993 (3) SA 424 (A) 4301-J.

<sup>80</sup> RH Christie, *The Law of Contract in South Africa*, 6<sup>th</sup> edn. (Durban: Lexis Nexis, 2011), 193.

the loss which has occurred. Therefore, in *Afrox Healthcare Bpk v. Strydom*,<sup>81</sup> the court upheld an exclusion clause that absolved a private hospital from liability for negligence, which had led to harm occasioned to some patients at the hospital. The court in *Johannesburg Country Club v. Stott*<sup>82</sup> however suggested that it was unlikely for the court to absolve a party from liability, based on an exclusion clause purporting to exclude liability for the death of another person since that would be contrary to public policy.

### 3. Restrictive Construction of Exclusion Clauses

The courts generally adopt a hostile attitude towards the use of exclusion clauses, especially in contracts between parties of unequal bargaining power, and thus, strictly apply common law principles in the construction of exclusion clauses. The courts will also interpret an ambiguous exclusion clause against the party seeking to rely on it, based on the common law *contra proferentum* rule. Therefore, in *Drifters Adventure Tours v. Hircock*,<sup>83</sup> the court held that in the case where an exclusion clause is capable of more than one meaning, the meaning given to the clause must be against the party seeking to rely on it.

### 4. The Common Law Incorporation Rules

Under South African law, an exclusion clause will be enforced where it has been agreed upon by the parties<sup>84</sup> and generally where the party seeking to rely on it has brought the said exclusion clause to the attention of the other party. Thus, in *Mercurius Motors v. Lopez*<sup>85</sup> the court held that a clause that could not reasonably be contemplated as forming part of the contract ought to be brought to the notice of the other contracting party.

## B. Control of Exclusion clauses under the Consumer Protection Act 68 of 2008 (CPA) of the Republic of South Africa

This Act which has incorporated some common law principles applies to all transactions which take place in South Africa, unless otherwise expressly exempted.<sup>86</sup> It applies to all transactions involving the supply of goods and services and the promotion of such goods and services unless expressly excluded.<sup>87</sup>

### 1. Incorporation Exclusion Clauses in Contracts under the CPA

Per section 49 of the Act, a supplier who seeks to incorporate exclusion clauses in a contract must ensure that certain conditions are met as follows:

- The clause must be written in plain language.
- The customer must be made aware of the implications of the clause, that is the manner and form that is likely to draw the attention of the consumer under the circumstances and should be done before the contract is performed<sup>88</sup> and

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<sup>81</sup> *Afrox Healthcare Bpk v Strydom*, n 74, above

<sup>82</sup> 2004 (5) SA 511 (SCA), 518-519.

<sup>83</sup> 2007 (92) SA 83 (CSA), 87E-G.

<sup>84</sup> *D & H Piping system (Pty) Ltd v. Trans Hex Group Ltd & Another* 2006 (3) SA 593 (SCA), paragraph 33.

<sup>85</sup> *Mercurius Motors v. Lopez*, n 76 above

<sup>86</sup> Section 5(1)(a)

<sup>87</sup> Section 5(1)(b)

<sup>88</sup> Section 49(4)

- The consumer should be given an adequate opportunity in the circumstances to fully understand the clause.<sup>89</sup>

The effect of section 49 of the Act is that a consumer would not be bound by an exclusion clause unless its nature and effect are specifically brought to his notice in a required manner and was given ample opportunity to comprehend it.<sup>90</sup> Also where an exclusion clause concerns activity in respect of which risk is not usually contemplated or could result in death or serious injury,<sup>91</sup> such exclusion clause must specifically be brought to the attention of the consumer, and its nature and potential effect explained to the consumer in a manner prescribed under section 49, and also to make the consumer initial it or act in a manner which is consistent with him being aware of such exclusion clause.<sup>92</sup>

It is pertinent to note that, even though section 49 of the Act codifies common law principles, it goes beyond the requirements under the common law, which requires just a signature as grounds for liability. Section 49 of the Act additionally requires the supplier or seller to bring the nature and effect of the exclusion clause to the attention of the consumer, as well as afford the consumer an ample opportunity to understand the clause. Without these additional requirements, the exclusion clause will not be enforced. It has therefore been noted that section 49, has equipped the courts in South Africa with additional weapons, which enable them to refuse to enforce an exclusion clause if the duty to draw the other party's attention to the nature and effect of the clause has not been met.<sup>93</sup>

## **2. Exclusion Clauses Forbidden Under the CPA**

Section 51 of the Act proscribes some types of exclusion clauses. The effect of section 51 is that a contract that includes any such forbidden terms would be void and of no effect. For instance, section 51 of the Act proscribes a provision that misleads or deceives the consumer or which subjects the consumer to fraudulent conduct; a provision which directly or indirectly purports to (i) waive or deprive a consumer of a right in terms of the Act (ii) evade a supplier's obligation or duty under the Act; and a provision which requires the consumer to forfeit any money to the supplier (i) if the consumer exercises any rights in terms of the Act (ii) to which the supplier is not entitled in terms of the Act or any other law.

Regulations have also been passed under South African law in addition to the forbidden clauses under section 51 of the Act to introduce some flexibility in the application of the law. These clauses are presumed to be unfair unless otherwise proven by the party seeking to rely on them.<sup>94</sup> For instance, Regulation 44(3) introduces certain clauses which are deemed to be unfair.<sup>95</sup> Examples of those clauses include, excluding or limiting the liability of a supplier for the death of, or the

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<sup>89</sup> Section 49(5)

<sup>90</sup> *ibid.*

<sup>91</sup> Section 49(2) (c)

<sup>92</sup> *ibid.*

<sup>93</sup> CJ Pretorius, "Exemption Clauses and Mistake: *Mercurius Motors v. Lopez* 2008 (3) SA 572 (SCA)", (2010) 73 *THRHR* 500

<sup>94</sup> JC Kanamugire & TV Chimuka, "The Current Status of Exemption clauses in the South African Law of Contract," (2014) Vol.5 no. 9, *Mediterranean Journal of Social Sciences*.

<sup>95</sup> Regulation 44(3) of the Consumer Protection Act 68 of 2008 Government Gazette No. 34180.



personal injury caused to a consumer through an act or omission of that supplier;<sup>96</sup> etc. The inclusion of these regulations in addition to the forbidden provisions under section 51 of the Act has been heralded as a major improvement of the common law position, where there are no specific terms to indicate unfair exclusion clauses, as well as an extension of the list to cater for situations which may occur at a later stage but not contemplated by the legislature at the time of drafting the Consumer Protection Act and the regulations.<sup>97</sup>

### **3. Adjudication of Exclusion Clauses under the CPA**

Per section 52(4) of the Act, the courts have the power in any matter between the supplier and the consumer as to whether or not an exclusion clause is void within the meaning and intendment of the Act to make an order severing any part of the agreement or where possible modify the said provision to make it conform with the Act, where it is reasonable to do so.<sup>98</sup> The court also has the power to declare as invalid the whole agreement, provision, or notice from the date it takes effect;<sup>99</sup> as well as to make other orders reasonable under the circumstances of the agreement.<sup>100</sup> The Act also makes it mandatory for the courts to invalidate an exclusion clause that has not been properly incorporated into a contract.<sup>101</sup> Also under the Act, where a provision is ambiguous, the courts are enjoined to subscribe to a meaning which promotes the aim and spirit of the Act.<sup>102</sup>

### **4. Unfair, Unjust, and Unreasonable Terms and Transactions under the CPA**

This is provided for under section 48 of the Act. Under this section, certain specific terms of contract and transactions are deemed unfair and unreasonable. For instance, a supplier must not offer to supply goods or services at a price that is unfair, unreasonable, or unjust; on terms which are unfair, unreasonable, or unjust, intends to supply goods materially different from those contracted for.<sup>103</sup> Closely connected to section 48 is section 52 of the Act, which empowers the court to ensure fair and unjust conduct, terms and conditions, and sets out guidelines the court must take into account in achieving that aim, such as the fair value of the goods or services in question; the conduct of the parties to the transaction; the nature of the parties, their relationship to each other and their relative capacity, education, experience, sophistication, and bargaining power, etc.

## **COMPARATIVE ANALYSES OF THE CONTROL OF EXCLUSION CLAUSES UNDER THE LAWS OF GHANA, THE UK, AND THE REPUBLIC OF SOUTH AFRICA.**

This section of the paper will focus on the comparative study of the control of exclusion clauses under the laws of Ghana, the UK, and South Africa, by outlining the key similarities and differences between these jurisdictions. As earlier stated, the comparative analyses aim to identify some possible legal gaps under Ghanaian law, as well as draw on some useful lessons which can provide the basis for legal reforms under Ghanaian law.

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<sup>96</sup> Regulation 44(3) of the Consumer Protection Act 68 of 2008 Government Gazette No. 34180. This must be read together with section 61 of the Act.

<sup>97</sup> JC Kanamugire & TV Chimuka, n 94, above.

<sup>98</sup> Section 52(4)(a)(i)(aa)

<sup>99</sup> Section 52(4)(a)(i)(bb)

<sup>100</sup> Section 52(4)(b)

<sup>101</sup> Section 49

<sup>102</sup> Section 4(3)

<sup>103</sup> See section 48 for the detailed list.

### **A. Key Similarities on the Judicial and Legislative Controls of Exclusion Clauses Under the Laws of Ghana, the UK, and the Republic of South Africa.**

1. A common feature is the adoption and application of common law rules by all three jurisdictions. Thus, in all the three jurisdictions the conditions precedent for the enforceability of exclusion clauses includes the proper incorporation of the said exclusion clause; the rule that construction of the exclusion clause must clearly establish that it covers the breach or loss which has transpired and its related principles of construction, such as the *contra proferentum* rule, etc.

2. Also, apart from reliance on the common law principles on the control of exclusion clauses, the three jurisdictions have all introduced some legislative interventions to fill in the gaps. The degree and extent of such legislative interventions will however form the basis of the subsequent discussion on the key differences between the three jurisdictions.

### **B. Key Differences on the Judicial and Legislative Controls of Exclusion Clauses under the laws in Ghana, the UK, and the Republic of South Africa.**

1. Under the UK CRA, exclusion clauses are subjected to the 'fairness test', where the courts will look at the said exclusion clause to ascertain whether or not it is fair to the consumer, even if neither party raises fairness as an issue and a breach of the 'fairness test' will render the said notice unenforceable.<sup>104</sup> The fairness test, to an appreciable degree, also finds expression under Section 48 of the CPA of South Africa which enumerates terms and transactions deemed to be unfair, such as any transaction where a supplier offers to supply goods or services at a price or based on terms which are unfair and unreasonable, etc.<sup>105</sup> However while under UK CRA the fairness test applies to even terms not specifically provided for under the Act, under the South African CPA, it applies only to the specific transactions and terms stated in the Act. Also, although there is an exception to the fairness test under the UK CRA, the conditions of transparency and prominence of the term which must be satisfied before the exception becomes applicable also inure to the benefit of the consumer. Even though under Ghanaian law, some exclusion clauses deemed unfair are proscribed, such as those which purport to exclude liability to ensure that goods supplied are reasonably fit for the purpose for which they are required,<sup>106</sup> there is no statutory expression of the fairness test, which applies to even transactions or terms not expressly stated in the legislation.

2. Under both Part 1 Schedule 2 of the UK CRA and section 2 of UCTA, as well as section 51 and Regulations 44(3) of the South African CPA, certain terms have been expressly blacklisted. Examples are terms that purport to exclude or limit a trader's liability in the event of the death of or personal injury to the consumer resulting from an act or omission of the trader. Under the UK CRA, these non-exhaustive terms, have been couched in general terms to make them applicable to all manner of transactions. Under the South African CPA, these terms although they cover specific situations, touch on very crucial aspects of the relationship between the trader and

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<sup>104</sup> Section 62(2)

<sup>105</sup> See section 48 of the Act for detailed provisions deemed unfair, unjust, and unreasonable.

<sup>106</sup> See section 13 of Act 137 of Ghana.

consumer and are intended to ensure that the consumer is not exploited by the trader under any circumstances. An attempt has also been made under Ghanaian law, albeit in a limited sense, to provide a list of conditions prohibited in every hire purchase agreement and contract for the sale of goods. For example, exclusion clauses that purport to exclude liability for merchantable quality are prohibited, unless the said clause has been brought to the attention of the customer.<sup>107</sup> Also, exclusion clauses that purport to exclude liability for failure to deliver specific goods agreed upon or to match description or sample are prohibited.<sup>108</sup>

3. Also, a key difference worth noting is the innovation under section 49 of the South African CPA, where a supplier who seeks to incorporate exclusion clauses in a contract must ensure that the clause is written in plain language, easily understood, with the customer informed of its implications and given adequate time to fully understand it before the contract is performed. As stated earlier, this provision goes beyond the common law principle which accepts signature as awareness of the exclusion clause. The UK CRA also contains a similar provision under section 68, which makes it compulsory for all exclusion clauses in consumer contracts to be transparent by being legible and in plain and easily understood language. Sections 49 of the South African CPA and section 68 of the UK CRA, provide the consumer with considerable protection to ensure that they are not exploited. A crucial provision of this ilk does not however find statutory expression under Ghanaian law.

4. Another pertinent difference is the wide adjudicatory powers given to the South African courts to make orders severing any part of the agreement or where possible modify the said provision to comply with section 52 of the Act in any matter between the supplier and the consumer as to whether an exclusion clause is void within the meaning and intendment of the Act.<sup>109</sup> The courts even have the power to invalidate an exclusion clause that has not been properly incorporated into a contract,<sup>110</sup> which is also a departure from the common law position, where such power is discretionary. Also, under the UK CRA, the courts can on their own raise an issue of the fairness of an exclusion clause, where it is justifiable to do so.<sup>111</sup> A provision of this nature, which is key in the fight against unfair and unconscionable exclusion clauses, cannot however be found under Ghanaian law.

5. The codification of the guidelines in assessing whether a term or transaction is reasonable under section 11(2) of the UK UCTA, as well as under section 52(2) of the South African CPA, which unfortunately cannot be found under Ghanaian law is also worth pointing out.

## CONCLUSION AND RECOMMENDATIONS

Concerns have been raised over the use of exclusion clauses in consumer contracts, especially in respect of transactions involving parties with unequal bargaining power due to their exploitative effects. The situation is compounded by the fact that everyone is a consumer one way or the other, and therefore susceptible to the exploitative consequences associated with the usage of exclusion clauses in consumer contracts. It is against this background that this paper has adopted a comparative research methodology in an attempt to evaluate both the judicial and

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<sup>107</sup> Section 14 of NRCD 292.

<sup>108</sup> Section 8 of Act 137.

<sup>109</sup> Section 52(4)(a)(i) (aa) of CPA

<sup>110</sup> Section 49 of CPA

<sup>111</sup> Section 72(2) & (3)

legislative controls of exclusion clauses in consumer contracts under Ghanaian law, as well as those of the United Kingdom (UK) and the Republic of South Africa to identify the similarities and differences between the control of exclusion clauses under Ghanaian law and those two countries aimed at identifying some possible legal gaps under Ghanaian law, as well as drawing on some useful lessons which can provide the basis for legal reforms under Ghanaian law. The paper reveals that even though certain measures have been put in place under Ghanaian law to protect the consumer against the use of exclusion clauses, the said protection afforded under Ghanaian law compared with the situations under the laws in the UK and the Republic of South Africa is not robust for effective consumer protection. From the foregoing, the paper makes the following legislative recommendations to bolster the legal regime for the control of exclusion clauses in Ghana for effective consumer protection.

First, there is the need for a codification of the common law principles on the control of exclusion clauses. This codification process has been defined as the systematic collection or formulation of the law, by reducing it from a disparate mass into an accessible statement that is given legislative rather than merely judicial or academic authority.<sup>112</sup> Codification of the law has several advantages. For instance, it helps in the simplification of the law by making it more accessible and manageable, which has been noted to assist in overcoming the complexities associated with the examination of 'tons of verbal pulp... to obtain an ounce of pure judicial law.'<sup>113</sup> Furthermore, it helps in clarifying grey areas of the law in the form of gap-filling or reform, with associated benefits such as clearer, more certain, and more predictable law.<sup>114</sup> Finally, codification assists in the elimination of the exercise of unnecessary discretionary powers by judges owing to the certainty and predictability qualities associated with it.

Second, a consolidation of all the scattered pieces of statutes on the control of exclusion clauses in contracts in Ghana is necessary. Such consolidation will provide for consistency, better reference, and enforcement of the law.

Third, there is the need to strengthen legislative regulation of the use of exclusion clauses in consumer contracts by providing for a blacklist of unconscionable exclusion clauses which cut across various facets of transactions between consumers and sellers or manufacturers, and not the very few specific terms currently provided for under Ghanaian law.

Fourth, the introduction of a statutory provision that compulsorily subjects all exclusion clauses to the 'fairness test', would also go a long way in filling the huge lacuna under Ghanaian law by ensuring that prohibited exclusion clauses not specifically mentioned under the law would also be subjected to the 'fairness test' to ascertain whether they meet the interests and aspirations of the consumer.

Fifth, there is the need for the introduction of a statutory provision under Ghanaian law that will make it mandatory for sellers or suppliers to ensure that exclusion clauses are written in plain language customers can understand and their implications brought to the customers' attention as is the case under the UK CRA and South African CPA. The introduction of such statutory provision is necessary, especially considering the high illiteracy level in Ghana.

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<sup>112</sup> B Donald, "Codification in Common Law Systems", (1973) 47, *The Australian Law Journal* 160, 161.

<sup>113</sup> A L Diamond, "Codification of the Law of Contract", (1968) 31 *Modern Law Review*, 361, 362.

<sup>114</sup> D Svantesson, "Codifying Australia's Contract Law-Time for a Stocktake in the Common Law Factory", (2008) *volume 20 Bond Law Review*, Issue 2, Article 5.

Finally, there is also the need for legislative intervention vesting the courts in Ghana with broad adjudicatory powers to deal with exclusion clauses and to even depart from the discretionary position under the common law by making it compulsory for them to invalidate exclusion clauses not properly incorporated. This law can also empower the courts to raise the issue of fairness of an exclusion clause *suo motu*, where it is justifiable to do so as is the case under sections 72(2) and (3) of the UK CRA.

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