

# Understanding Contractual Exclusion Clauses; Giving Clear Direction



## **1. Introduction**

Law is a considerably diverse field. I realized this while reading one of the landmark contract law cases during my first year of law school. The idea that a seller could get away with delivering defective products on the basis of a term included in an agreement was perplexing. Such a term, as I was to learn, is what is referred to as an exclusion clause.

Exclusion clauses are in common use despite people not being aware of them. It is easy to see such a clause and not pay attention. They are usually included in contracts but can also be found at the entrance of buildings, parking lots, supermarkets and such other spaces. They are phrased in different ways. At a parking lot, such a clause would state that 'car parked at your own risk' or its equivalent. In a supermarket, it would be 'goods once sold not returnable.' Understanding such clauses is important as a way to protect oneself at the point of entering into a contract and in case of breach.

## **2. What is an exclusion clause?**

An exclusion clause is a term in a contract that seeks to limit or exclude the liability of a party. A party includes an exclusion clause in a contract to protect themselves in case they default. Anyone seeking to enter into a contract should be keen on identifying such exclusion clauses. They are commonly set out in standard form contracts.

A standard form contract is a uniform contract which is used by a large organisation in all its dealings with customers. For instance, the terms of use of SafeBoda mention that the company is not liable for any damages arising out of its use. Exclusion clauses can also be included in individually negotiated contracts.

## **3. Types of exclusion clauses.**

The term exclusion clauses is generally used to refer to all clauses that affect the extent of liability. However, there are two types of clauses that affect liability: exclusion and limitation. Exclusion clauses totally exclude the liability of a party while limitation clauses merely limit the extent of the liability. It is on that basis that courts find limitation clauses more acceptable. Noteworthy is that the two terms are used interchangeably and are sometimes taken to be the same.

## **4. Inclusion of exclusion clauses.**

An exclusion clause which forms part of a signed contract is usually valid and enforceable. This is premised on the freedom of parties to contract which enables them to agree on the extent of liability. However, there are circumstances where an exclusion clause in a signed contract is not enforceable. One such circumstance is if the signature of a party, who does not seek to benefit from the clause, was not freely obtained.

Generally, an exclusion clause included in an unsigned contract is invalid. However, in certain instances such a clause may be enforceable. One such instance is where an exclusion clause is brought to the attention of the party who it does not seek to protect. In some situations, how parties have dealt with each other previously suffices to show that a party was aware of an exclusion clause.

## 5. Interpretation.

While exclusion clauses are easy to include in a contract, they are difficult to enforce. Clauses that seek to exclude the total liability of a party are frowned upon by courts. Courts are often suspicious of such clauses and, unless they are written correctly, can be easily overturned. Exclusion clauses need to be clear and reasonable to be enforced by a court of law.

## 6. The law on exclusion clauses.

The legal basis for inclusion of exclusion clauses in contracts flows from freedom of parties to contract. The Contracts Act is the primary law that is applicable to contracts. The freedom to contract enables parties to agree to the extent of the liability of a party in breach. On that basis, courts will usually not interfere if the signature was given freely.

However, in contracts involving sale of goods and supply of services, exclusion clauses are not applicable. The Sale of Goods and Supply of Services Act of 2017 negated the enforceability of exclusion clauses in such contracts. For instance, in a contract for the sale of 500 kilograms of beans, a seller is precluded from including a term to the effect that they are not liable if the beans are damaged or with blemish.

## 7. Conclusion.

In the making of a contract, liability is a serious concern. That is why parties seek to include exclusion clauses. In the event of default, a party who included an exclusion clause may be protected. It is therefore important that a party who seeks to enter into a contract reads the contract before signing to determine whether such a clause is included.

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## Contacts for this Publication

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**Lilian Arinda**

Author

*larinda@crystaladvocates.com*

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Lilian is a Legal Trainee under the firm's Graduate Trainee Program. She holds a Bachelor of Laws Degree from Makerere University. She is finalizing her studies at the Law Development Centre for the award of a Post Graduate Diploma in Legal Practice. ■



**Denis Yekoyasi Kakembo**

*dkakembo@crystaladvocates.com*

+256 751 834 168

Denis is the Managing Partner at Cristal Advocates where he also leads the energy and tax practice. He is qualified both as a Lawyer and Chartered Accountant with vast experience serving various industries in Sub Saharan Africa. Before joining Cristal Advocates, he had worked for close to 10 years with Deloitte and Touche where he started his career and rose to senior managerial positions.

At Deloitte, he lived and worked in Uganda, Kenya, Tanzania and the United Kingdom for over 6 years and subsequently became the firm's chief of staff for the Energy and Resources Industry Group seeing him play a lead advisory role in Uganda, Kenya, Tanzania, Mozambique, South Sudan, Somalia and Ethiopia.

Denis is widely published and a regular commentator in the local, regional and international media and speaker at various forums regarding the taxation and financing of energy projects as well as the protection of large capital projects within the framework of international investment law.

He holds a Master of Laws degree in Petroleum Taxation and Finance from the University of Dundee in the United Kingdom, a Post Graduate Diploma in Legal Practice and a Bachelor of Laws degree from Makerere University. ■



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Contact us

**Cristal Advocates**  
32 Lumumba Avenue  
4th Floor, Padre Pio House  
Lumumba Avenue

P.O. Box 1769 Kampala, Uganda  
Tel: +256 (414) 671 274  
Email: [admin@cristaladvocates.com](mailto:admin@cristaladvocates.com)  
[www.cristaladvocates.com](http://www.cristaladvocates.com)