

## **EXCLUSION CLAUSE UNDER THE SALE OF GOODS ACT AND ITS EFFECT ON E-COMMERCE-ONLINE RETAIL IN NIGERIA\***

### **ABSTRACT**

*The paper examines the significance of freedom of contract in the context of contracts for the sale of goods. It acknowledges the parties' liberty to negotiate and include terms, specifically focusing on the exclusion of liability and contractual obligations. Employing the doctrinal research methodology, this study analyzes the Sale of Goods Act of 1893, uncovering its inadequacy in addressing the modern complexities of contractual relationships. The findings underscore the imminent need for a comprehensive review of the legislation to ensure its relevance and effectiveness in the face of evolving business practices.*

**Keywords: Exclusion Clause, Contract of Sale of Goods, E-Commerce**

### **1.0 Introduction**

Since the dawn of recorded history and beyond, commerce, also known as the trading of goods has been a primary incentive for human survival.<sup>1</sup> E-commerce, particularly in the retail market, is a growing sector in Nigerian business. According to the study findings, several factors influence consumers' online shopping behavior, including demographic factors, social factors, consumer online shopping experience, knowledge of using the internet and computer, website design, social media, situational factors, facilitating conditions, product characteristics, sales promotional scheme, payment option, delivery of goods, and after-sales services and recently the COVID-19 pandemic.<sup>2</sup> The popularity of social media platforms in Nigeria has accelerated

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\***Fadilla Abubakar Sodangi** LLB (Hons), B.L., LL.M. (BCU). Ph.D. (NSUK), Legal Practitioner, Senior Lecturer at the Faculty of Law Nile University of Nigeria, Abuja, Nigeria. The author can be contacted via e-mail at fahdeelah@gmail.com or fsodangi.abubakar@nileuniversity.edu.ng

<sup>1</sup> Ritendra Goel, *E-Commerce* (New age International 2007) 2

<sup>2</sup> Mansour Abd Elrhim, Abdullah Elsayed, 'The Effect of COVID-19 Spread on the e-commerce market: The case of the 5 largest e-commerce companies in the world' (2020) <https://deliverypdf.ssrn.com/delivery.php?ID=63809608201312701606500902303109209105303902300402206009611203107200108809101708900510000703200702402601412410507602002800007204500501007905107702409509207102011908802801301600011212308408>

the spread of online retail purchasing, which has also brought contractual obligations under the sale of goods to light.

Exclusion clauses with limiting or total exclusion of liability are commonly included in standard-form sale of goods contracts and limit the other party's liability. This has been widely included in the contractual conditions for the online retail sale of goods. A party entering into a contract of sale has no choice because online dealers' have, by exclusion clauses, limited responsibility or completely exclude terms of contractual sale of goods.

## **2.0 Sale of Good Act.**

The primary legislation in Nigeria that regulates the sale of goods is the Sale of Goods Act of 1893. Although authors such as Yerokun disagreed with the reference to the Sale of Goods Act 1893, he argued that Nigeria had parted ways with the received English law, and as such, the correct position or nomenclature is the Sale of Goods Law or Edict as passed by various states.<sup>3</sup> However, Yerokun also admitted that the uniform sale of goods law accepted by the Federal Government of Nigeria as prepared by the Law Reform Commission is an exact replica of the Sale of Good Act 1893 and it is applicable within the 36 states of the federal republic of Nigeria.<sup>4</sup> Uchechukwu blames the Nigerian National Assembly for the continued use of the 18-century law.<sup>5</sup>

While the Sale of Goods Act is the primary law governing the trade of goods in Nigeria, it is pertinent to mention that Nigeria has customary or native laws peculiar to indigenous communities. These are acceptable norms as described in the case of *Owoniyi v. Omotosho*<sup>6</sup> in addition to the Sale of goods Act and customary law, Nigeria also has in existence Islamic laws on sale of goods contact, formulated based on religious beliefs through the Quran, Sunnah, ijimah and qiyas. The argument that Islamic law in Nigeria fall under

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<sup>3</sup> Olusegun Yerokun, *Casebook on Commercial Law: Comments and Cases* (Princeton Publishing 2015) 231

<sup>4</sup> Ibid

<sup>5</sup> Uchechukwu Nwosu, (2017), *Business Law in Nigeria: Contemporary Issues and Concepts*” <https://www.researchgate.net/publication/333220012> accessed 20th May 2022

<sup>6</sup> Unreported, See Olusegun Yerokun (n 3) 231

customary law was refuted by justice Niki Tobo in the case of **Mandara v. Halilu**.<sup>7</sup> Distinguishing between the essential elements of contract of sale under the Sale of Goods Act and those of Islamic law, the Court of Appeal in the case of **Bishi v. Apaka**<sup>8</sup> held that while consideration is an essential requirement for contract of sale of goods under the Sale of Goods Act, it is not a requirement for validity of sale; rather, what is essential is a declaration of consent by parties to the contract of sale.

Section 1 of the Sale of Goods Act 1893<sup>9</sup> defined a contract of sale of goods “as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price” this was affirmed by the Supreme Court in the case of **Afrotee Technical Service (Nig) Ltd. V. M.I.A & Sons Ltd. & Anor**<sup>10</sup> stating also that a contract of sale can be absolute or conditional, inferred from the definition above. Property within the concept of the above definition has been equated to ownership and/or interest in the goods, ownership having been more superior to interest.<sup>11</sup> A sale will constitute the transfer of ownership in the good from the buyer to the seller or an agreement to transfer the ownership from the buyer to the seller at a later date.

### **2.0.1 Goods**

Goods are the subject matter of the sale of goods contract. It holds the potency of the property or ownership that has been transferred or is to be transferred in a sale of goods. The definition of goods under the Sale of Goods Act 1893 is arguable constrained in today’s e-commerce and global trade. The Black’s Law Dictionary<sup>12</sup> defined goods as

*Tangible or movable personal property other than money, especially articles of trade or items of merchandize. It includes all things which are moveable at the time of identification to the contract for sale*

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<sup>7</sup> [2002] FWLR 333

<sup>8</sup> [1973] NSNLR 24

<sup>9</sup> Part of the received Laws now, Uniform Sale of Goods Act.

<sup>10</sup> [2000] 15 NWLR 730

<sup>11</sup> Matthew Enya Nwocha, ‘Law of Sale of Goods in Nigeria: Interrogating Key Elements of the Sale of Goods Act Relating to the Rights of Parties to a Sale of Goods Contract’ Beijing Law Review (Vol.9 No.2, June 2018)<https://www.scirp.org/journal/paperinformation.aspx?paperid=85138> accessed 18<sup>th</sup> May 2023

<sup>12</sup> Garner, B.A., Black’s Law Dictionary, (18th edition), USA: West Publishing Co., 2004

*other than the money in which the price is to be paid, investment securities, and things in action*

Section 62(1) of the Sale of Goods Act 1893 defines goods

*To include all chattels personal other than things in action and money goods includes emblements such as industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.<sup>13</sup>*

See also section 2(1) of the Sale of Goods Laws, Cap 143, Laws of Kwara State, which has a replica of the above definition. Criticism of the definition of the old age Sale of Goods Act has been that it does not encompass the modern reality of goods. Items such as computer software, stock and shares are excluded from the definition in the Act. Subject of e-commerce in online trade has been seen to include electricity, computer software and some have argued for biological things such as blood. Apart from the confined definition of Goods in the sale of goods Act 1893, there are terms that the Act failed to define. The absence of these definitions has been argued to be detrimental to the contact of sale of goods.<sup>14</sup> There is a failure of the Act to provide explicit definitions for its terms and conditions. In the case of *Chave NV v. Bremer Handels Gasellschaft*,<sup>15</sup> the court, affirming its previous ruling in *Hong Kong Fir Shipping Co. Ltd. vs. Kawasaki Kisen Kaisha*,<sup>16</sup> determined that the Act's definitions were not exhaustive in dividing terms, conditions, and warranties.<sup>17</sup> Although there is a claim that the Sale of Goods Act across Nigeria are uniform, there are some states Law on sale of goods that made effort to define pivotal terms such as conditions. The Sale of Goods Law in Kaduna State, Northern Nigeria offers a helpful definition for the term "condition." It defines it as follows:

*A term which directly pertains to the substance of the contract for the sale of goods and is essential to its nature. Its non-performance may be considered by the other party as a significant failure to fulfill*

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<sup>13</sup> Sale of Goods Act 1893

<sup>14</sup> Olukayode Olalekan Aguda, 'The Legal Framework for Sale of Goods in Nigeria: A Critical Analysis' 2019 (NAJCPL)102

<sup>15</sup> [1975] 3 All E.R 739

<sup>16</sup> [1962] 1 All E.R. 474

<sup>17</sup> Ibid 103

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the contract, allowing them the right to repudiate the contract, reject  
the goods, and seek damages.*<sup>18</sup>

For the definition for the term "consumer." Consequently, courts have relied on Black's Law Dictionary<sup>19</sup>, which defines a "consumer" as an individual who purchases goods or services for personal, family, or household use, without any intention of resale. It refers to a natural person who uses products for personal purposes rather than business purposes. Additionally, the Nigerian Consumer Protection Council Act<sup>20</sup> defines a consumer as an individual who purchases, uses, maintains, or disposes of products or services.

The Sale of Goods Act classified goods into existing future, specific ascertained, unascertained. To understand the position of exclusion clauses in relation to online sale of goods, it is pertinent to this paper to discuss these classifications of goods according to the Sale of Goods Act.

a. Existing/Specific Goods

Existing goods are goods that the seller owns and possesses at the time the contract is formed. Section 62 defined specific goods to “mean goods identified and agreed upon at the time a contract of sale is made”<sup>21</sup> These goods are physically present and available for immediate delivery. They can be either specific ascertained or unascertained. Specific existing goods are those that have been identified and agreed upon by both the buyer and the seller at the time of the sale. For example, if a seller agrees to sell a specific car with a particular engine number and chassis number, those goods would be considered specific existing goods. In the case of *Berende v. Usanm& Anor*<sup>22</sup> held that “chattels... they belong immediately to the person of man” When a seller offers existing goods, it implies that the buyer can inspect and take possession of the goods immediately after the contract is formed. This provides certainty to both parties regarding the availability and condition of the goods. It also ensures that the buyer receives the exact goods they intended

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<sup>18</sup> Section 3 (1)

<sup>19</sup> See (n 12)

<sup>20</sup> Section 32 of the Consumer Protection Council Act Cap C25, LFN 2004. Section 32 of the Consumer Protection

Council Act Cap C25, LFN 2004

<sup>21</sup> Sale of Goods Act 1893

<sup>22</sup> {2005] 14 NWLR 1

to purchase. Specific existing goods are particularly advantageous in transactions where the buyer has specific requirements or preferences. In cases of online sale, specifications are in form of information provided for by the seller. These information arguably constitute terms of contract and are conditions to the contract of sale of goods. The case of *Kursell v. Timber Operators & Contractors Ltd*<sup>23</sup> explains specific, ascertained and when ownership can pass to the buyer. Section 17 allows parties to determine when property will pass to the seller, while section 18 rules 1-5 provides for instances when parties to contract of sale of goods have failed to by express or implication made known their intention. Specific existing goods provide more certainty for both the buyer and the seller in an online sale of goods since the goods are identified and agreed upon before the contract is formed. On the other hand, unascertained/existing goods refer to goods that are present in the seller's possession but have not yet been identified or agreed upon at the time of the contract. These goods are part of the seller's inventory but have not been allocated to any specific buyer. The buyer, in this case, purchases goods from the seller's general stock, rather than specific items. See the case of *Kursell*<sup>24</sup>

b. Future Goods

Future goods are goods that do not yet exist at the time the contract is formed. In *H.R. & S. Sainsbury Ltd v. Street*<sup>25</sup> the court held the contract of sale of specific crops to be grown are subject to an implied term that party be excused if there was no default on the part of the seller. Future goods may also include goods that exist but have not yet been acquired by the seller. In other words, the seller has yet to acquire or manufacture the goods after entering into the contract. For example, if a buyer agrees to purchase the next iPhone model that will be manufactured by Apple, it would be considered a sale of future goods. The sale of future goods can be beneficial for both buyers and sellers in online sale of goods. Buyers often have the opportunity to secure goods in advance, ensuring that they will be among the first to receive the goods once they become available. This can be particularly important for products with high demand or limited availability. Sellers, on the other hand, can secure orders and generate revenue before the goods are even produced or acquired.

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<sup>23</sup> [1929] 1 KB 574

<sup>24</sup> *Ibid*

<sup>25</sup> [1970] H. No 10887

However, the sale of future goods also comes with certain risks. See **H. R. & S. Sainsbury Ltd v. Street**. Both parties must trust that the goods will be delivered as promised and that they will meet the buyer's expectations. This is a genuine concern in any online sale of goods. If the seller fails to acquire or manufacture the goods as agreed, it can lead to disputes and a potential breach of contract. It is worth noting that future goods can also be specific goods if they are sufficiently identified in the contract, even though they do not yet exist. An example of this is the sale of 200 tons of potatoes to be grown on a specific piece of land. Although the potatoes were not existing goods at the time of the contract, they are considered specific goods because they are clearly identified in the agreement.

### **3.0 Exclusion/Exemption Clause**

Exemption or exclusion clauses play a crucial role in contract law by limiting or excluding a party's liability for a breach of contract. These clauses act in a contract of sale of goods as allocating contractual obligations allocating risks and promoting commercial efficacy. To be enforceable, these clauses must meet certain requirements, including incorporation in to the contact of sale of goods and construction on same. Section 55 of the Sale of Goods Act 1893 state that;

*Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negative or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract*

Exemption Clauses are predicated on the principle of freedom of contract. These clauses might initially seem counterintuitive in a contract of sale of goods, as they appear to exclude a party's liability for a promise they have made.<sup>26</sup> However, they serve as essential tools for allocating risks between parties and facilitating mutually beneficial agreements.

In the case of **Couchman v. Hill**<sup>27</sup> the plaintiff purchased at an auction a heifer belonging to the defendant, which was described in the sale catalogue as

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<sup>26</sup> Ibid

<sup>27</sup> [1947] 1 KB 508

"unserved." The catalogue stated that the sale would be subject to the auctioneers' usual conditions and that all lots must be taken subject to all faults or errors of description; and the conditions of sale, which were exhibited at the auction, stated that the lots were sold "with all faults, imperfections and errors of description." At the sale, the plaintiff asked both the defendant and the auctioneer whether they could confirm that the heifer in question was unserved and received the answer "Yes." Later, the heifer was found to be in calf and died as a result of carrying a calf at too young an age. In an action in the county court for damages for breach of warranty, the county court judge held that the value of the confirmation by the defendant and the auctioneer that the heifer was unserved was destroyed by the conditions of sale and gave judgment for the defendant. Although in appeal, statements of the defendant were regarded as an offer of warranty overriding the condition of sale, the court holds that exclusion clauses are conditions of a contract of sale.

The courts generally uphold the use of exclusion clauses, recognizing that to restrict them would undermine the freedom of parties to contract on their own terms. However, the law does intervene in certain forms of contracts, which will be explored further in this paper. Unless subject to legal interference, the common law does not provide a rule declaring an exclusion clause unenforceable on the grounds of unfairness or unreasonableness. In the case of *Photo Production Ltd v. Securicor Transport Ltd.*<sup>28</sup> The House of Lords held:

*There was no rule of law by which an exception clause in a contract could be eliminated from a consideration of the parties' position when there was a breach of contract (whether fundamental or not) or by which an exception clause could be deprived of effect regardless of the terms of the contract, because the parties were free to agree to whatever exclusion or modification of their obligations they chose and therefore the question whether an exception clause applied when there was a fundamental breach, breach of a fundamental term or any other breach, turned on the construction of the whole of the contract, including any exception clauses, and because (per Lord Diplock) the parties were free to reject or modify by express words both their primary obligations to do that which they had promised and also any secondary obligations to pay damages arising on breach of a primary obligation*

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<sup>28</sup> [1980] 1 All ER 556



The consideration of exclusion clauses are found in various e-commerce, generally, exclusion clauses are of the following types;

- 1.) Clauses that limit liability for contractual commitments: These clauses are designed to restrict or cap the liability of one or both parties for breaching their contractual obligations. For instance, a contract may include a provision stating that one party will not be liable for any damages exceeding a specified amount or that they will not be responsible for certain types of losses or damages. See **Henry Stephens Eng. Co. Ltd. v. Complete Home Ent. Nig. Ltd.**<sup>29</sup>
- 2.) Clauses that limit liability for consequential damages: Consequential damages refer to losses or damages that are not directly caused by a breach of contract but rather arise as a consequence of the breach. An exclusion clause may be used to limit or exclude liability for such consequential damages. This type of clause is commonly seen in contracts where potential financial losses or indirect damages could occur due to a breach.
- 3.) Clauses that limit remedies available to the aggrieved party: These clauses restrict or modify the remedies that the aggrieved party can seek in the event of a breach of contract. They may either exclude certain remedies altogether or limit their availability or duration. For example, a contract may include a provision stating that the aggrieved party can only seek specific types of remedies, such as repair or replacement of a defective product, and not monetary compensation. In **Photo Production Ltd v. Securicor Transport Ltd**<sup>30</sup> the defendant relied on an exception clause in the contract that state

*“Under no circumstances...be responsible for any injurious act or default by any employee...unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the defendants”*<sup>31</sup>

It's important to note that while exclusion clauses are generally allowed in contract law, there are legal limitations on their enforceability. Courts may

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<sup>29</sup> [1987] 1 NWLR 40

<sup>30</sup> Supra (n 23)

<sup>31</sup> Olusegun (n) 428

closely scrutinize such clauses to ensure they are clear, reasonable, and do not contravene public policy or any relevant legislation. Unfair or unreasonable exclusion clauses may be deemed unenforceable, particularly if they seek to exclude liability for personal injury or death caused by negligence.

### **3.0.1 Requirements for an Exclusion Clause to Be Upheld**

**Incorporation:** Incorporation is a critical aspect of including a term of contract such as an exclusion clause, into a contract. Three methods of incorporation are recognized:

1. **Signature:** If the exclusion clause is included in a contract that has been signed, it is considered incorporated into the contract.
2. **Notice:** If a term is included in a document where contractual terms are typically found, and there is notice of the existence of these terms before or at the time of contracting, the term will be incorporated.
3. **Previous course of dealings:** If consistent dealings between two parties over a certain period of time establish a pattern of contractual terms, those terms will be considered incorporated, even without explicit agreement. Section

**Construction:** The construction requirement refers to the interpretation of the exclusion clause to determine its coverage of the loss that has occurred. Generally, an exclusion clause should be construed according to its natural and ordinary meaning. However, the courts employ various interpretation rules to ensure fairness, particularly in consumer and commercial relationships. These rules include:

1. The courts will not imply a greater exclusion than what is explicitly present in the exclusion clause.
2. Exclusion clauses are interpreted "contra proferentum," meaning they are construed against the party seeking to rely on the clause.
3. Exclusion clauses will be limited to matters covered by the contract.
4. Limitation clauses are interpreted more favorably.

5. Inconsistency with an oral agreement may render an exclusion clause inapplicable.

Lord Denning in *White v Blackmore*,<sup>32</sup>

*"the court must be satisfied that the particular document relied on as containing notice of the excluding or limiting term is in truth an integral part of the contract"*

This has meant that documents or any writing must have been intended to be contractual rather than, serve as a merely receipts and should function as part of a contract, signify a recognition of one.<sup>33</sup>In the instance of the sale of goods online, to construe any terms, parties have to prove that such terms, whether stated on line or on a website, constitute a contractual clause, in this case an exception to liability.

The courts adopt a strict approach when interpreting exclusion clauses, as demonstrated in the case of *Andrews Bros (Bournemouth) Ltd v Singer & Co Ltd*<sup>34</sup>. In this case, the exclusion clause sought to absolve the defendant from liability for selling a car that was not new, despite the contract stating otherwise. However, the courts ruled that the clause did not apply because it only excluded liability for implied terms, while the breached term was an express term. Therefore, the courts concluded that the exclusion clause was not operable.

When it comes to interpreting exclusion clauses, the *contra proferentum* rule comes into play. This rule states that when a term of a contract is uncertain or ambiguous, it should be construed against the party seeking to rely on the clause. In relation to exclusion clauses, this means that the clause would be deemed inapplicable. Further, in the case of sale of goods contract, it would mean that the contract was not perfumed.

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<sup>32</sup> [1972] 3 All E.R. 158 at 167

<sup>33</sup> Richard Lawson Exclusion Clause and Unfair Contract Terms (10<sup>th</sup> Edition 2011 Sweet & Maxwell)1

<sup>34</sup> [1934] 1 KB 17

An illustrative example of the strictness in interpreting exclusion clauses can be seen in the case of *Houghton v Trafalgar Insurance Co. Ltd*<sup>35</sup>. In this case, an insurance policy excluded damage occurring when the car was carrying a load exceeding its capacity. The claimant had six people in the car at the time of the damage, even though the car was only designed to carry five people. The courts determined that the term 'load' in the clause was ambiguous, and therefore interpreted it in favor of the claimants. They held that 'load' referred to the total weight the car could carry, not the number of people. As a result, the insurance claim was considered valid, and the exclusion clause could not be relied upon.

#### **4.0 E-Commerce**

E-commerce is a fast growing sector in Nigeria today, although the traditional trade of buying and selling is still prevalent, purchasing power, earning, the improvement of internet connection and payment-methods have facilitated for the popularity of online shopping. To elaborate on the concept of e-commerce, it involves a broad spectrum of online business activities related to the buying and selling of products and services. It encompasses any form of business transaction where the parties involved interact electronically rather than through physical exchanges or direct contact.<sup>36</sup>

The term "e-commerce" is commonly associated with transactions conducted over the Internet, but it also includes other computer-mediated networks like mobile devices, social media platforms, and electronic payment systems. E-commerce platforms provide a virtual marketplace where businesses and consumers can engage in various activities, such as browsing and selecting products, making purchases, and facilitating the transfer of ownership or rights to use goods or services.<sup>37</sup>E-commerce has revolutionized the way business is conducted, offering numerous benefits to both businesses and consumers. For businesses, e-commerce provides an opportunity to reach a global customer base, reduce operational costs, and streamline processes. It enables businesses

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<sup>35</sup> [1954] 1 QB 247

<sup>36</sup> Anjali Gupta, "E-Commerce: Role of E-Commerce in Today's Business" (2014) *International Journal of Computing and Corporate Research*, 1

<sup>37</sup> *Ibid* 2

to establish online storefronts, manage inventory, process payments, and offer customer support, among other functions.<sup>38</sup>

On the consumer side, e-commerce offers convenience, a wide range of product choices, competitive pricing, and the ability to compare products and read reviews. It allows consumers to shop from anywhere and at any time, eliminating geographical barriers. Moreover, e-commerce has facilitated the rise of various business models, such as dropshipping<sup>39</sup>, subscription services, and online marketplaces, further expanding options for both businesses and consumers.<sup>40</sup>E-commerce has become an integral part of the modern economy, reshaping traditional business models and opening up new avenues for commerce. Its continuous growth and evolution are driven by advancements in technology, changing consumer preferences, and the increasing interconnectedness of the global marketplace.<sup>41</sup>

## **5.0 Implied Terms and Online Sale of Goods**

### **5.0.1 Goods Sold by Sample and Description**

Goods sold by description are goods that are not specifically identified or agreed upon at the time of the contract but are included in a particular class or category of goods. Instead of referring to specific individual items, the contract describes the goods in general terms. For example, if a buyer agrees to purchase "mahogany wood" without specifying the exact pieces or quantities or size. While sale by sample presupposes that the buyer has seen the sample of the goods, which the bulk must correspond to. Section 14 provides that

*where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it*

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<sup>38</sup> Ibid

<sup>39</sup> This is a business model in sale of goods that allows the seller sell goods online without having or owning a physical store. It excludes inventories

<sup>40</sup> Kirby-Hawkins. E, Birkin M. and Clarke G. "An investigation into the geography of corporate e-commerce sales in the UK grocery market" *Environment and Planning B: Analytics and City Science*, (2019) 46 (4). pp. 1148-1164. ISSN 2399-8083 <https://doi.org/10.1177/2399808318755147> accessed 20 July 2022

<sup>41</sup> Ibid

*is not sufficient that the bulk of the goods corresponds' with the sample if the goods do not also correspond with the description.*

The sale of goods by description often occurs when the buyer has not had the opportunity to physically inspect the goods before making the purchase. This could be due to distance, time constraints, or the nature of the goods themselves. In such cases, the buyer relies on the description provided by the seller to make an informed decision. One of the challenges with the sale of goods by description is ensuring that the buyer receives goods that match the description provided. The buyer relies on the seller's expertise and integrity to accurately describe the goods. If the goods received do not match the description, the buyer may have a right to reject them or seek remedies for breach of contract.

Sale by sample, on the other hand, involves providing a physical sample of the goods to the buyer for inspection and approval before completing the purchase. In the context of online sales, this is often done by uploading pictures or videos of the sample goods alongside their description. The sample serves as a representation of the entire batch or lot of goods, demonstrating their quality, appearance, and characteristics. When a buyer relies on a sample provided by the online vendor, the goods delivered must be consistent with the sample in terms of quality, appearance, and other relevant aspects. If the goods received deviate significantly from the sample, the buyer may have grounds to reject the goods or seek appropriate remedies

To mitigate the risk of mismatched goods, it is common for contracts involving goods sold by description or sample to include clauses that allow the buyer to inspect and approve the goods upon delivery. This provides an opportunity for the buyer to ensure that the goods meet the description before accepting them.

Section 15 provide that;

*15 (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.*

*(2) In the case of a contract for sale by sample-*

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- a) *There is an implied condition that the bulk shall correspond with the sample in quality:*
- b) *There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:*
- c) *There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.*

In the context of online sales, the concepts of "sale by description" and "sale by sample" play a crucial role in determining the rights and obligations of both the buyer and the seller. These instances serve as methods of identifying and describing goods to ensure that the buyer receives the intended product from the online sale. In online sale of goods, this commonly involves providing a written description of the goods, such as dimensions, specifications, features, and other relevant details. The description serves as a representation of the goods being offered for sale, and the buyer relies on this description when making a purchasing decision. Any reliance on the expertise of the vendor inevitably places liability for implied warranty of fitness of the purpose of the sale.<sup>42</sup>This was the position of the court in *Frost v. The Aylesbury Dairy Co. Ltd*<sup>43</sup>

The description provided by the online vendor becomes an essential element of the contract, and the buyer has the right to expect that the goods will correspond to that description. If the goods received do not match the description, the buyer may have a legal basis to reject the goods or seek remedies for breach of contract. For online vendors, it is common practice to combine both sales by description and sales by sample. The vendor typically provides a detailed description of the goods, accompanied by visual representations such as photographs or videos that serve as samples. This approach aims to provide the buyer with as much information as possible to make an informed decision.

However, it is important to note that the accuracy of the visual representation may vary depending on factors such as lighting, image quality, and the buyer's device display. These have resulted in discrepancies between the visual image

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<sup>42</sup> Section 14 (1) Sale of Goods Act 1893

<sup>43</sup> [1902] 1 KB 608

of goods and the actual goods in reality. On social media platforms, there is a phrase for this "what I ordered versus what I got".<sup>44</sup>

### **6.0 Application of Exclusion clause in an online sale of goods in Nigeria.**

Uchechukwu, in his opinion, highlights the deficiency of adequate laws in addressing disputes arising in the realm of e-commerce. Although efforts have been made to bridge this gap through the application of the Uniform Commercial Law Code in the United States, its effectiveness remains limited.<sup>45</sup> In Nigeria, vendors have adopted a cunning approach to avoid liability by incorporating exclusion clauses on their websites, aiming to evade responsibilities associated with selling goods. These exclusionary phrases, such as "no return, no refund," "no exchange," and "not liable for damage or goods," have been deemed illegal in certain jurisdictions, while others have implemented strict regulations regarding their usage.

The antiquated Sale of Goods Act, currently in effect in Nigeria, is in dire need of being reenacted to keep pace with the rapidly evolving landscape of e-commerce. Consequently, consumers seeking recourse for grievances are compelled to seek alternative avenues for redress. Ogunlana and Adeola-Bello<sup>46</sup> assert that the Consumer Protection Act may offer some degree of protection for consumers. However, they caution that this legislation inadvertently falls short of effectively addressing issues of fraud and misrepresentation prevalent in the online sale of goods.

In essence, the absence of comprehensive legislation specifically tailored to address e-commerce disputes poses a significant challenge globally. While attempts have been made, such as the Uniform Commercial Law Code in the United States, the emergence of exclusion clauses employed by vendors in Nigeria further highlights the need for more robust and adaptable legal frameworks. Revisiting and revitalizing existing legislation, like the Sale of Goods Act, as well as enacting new legislation that specifically addresses the

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<sup>44</sup> Ogunlana, Oluwatosin and Adeola - Bello, Halima, What I Ordered vs What I Got: Beyond the Jokes & Memes to Assessing Consumer Protection in Nigeria (January 5, 2022). Available at SSRN: <https://ssrn.com/abstract=4001497> or <http://dx.doi.org/10.2139/ssrn.4001497> accessed 7th May 2023

<sup>45</sup> Uchechukwu (n 5) 110

<sup>46</sup> Ibid n 44



complexities of e-commerce, are crucial steps toward safeguarding consumer rights and promoting fair trade in the digital marketplace.

## **7.0 Conclusion**

This paper delves into the significance of exemption clauses in contracts for the sale of goods, specifically within the context of e-commerce and online trade. Exemption clauses play a pivotal role in allocating risks and promoting efficiency in contractual agreements. The courts generally uphold the validity of exclusion clauses, recognizing the parties' freedom to negotiate and contract on their own terms. The study examines various types of exclusion clauses, highlighting their ability to absolve liability for contractual obligations, limit remedies, and exclude consequential losses. In addition, the paper explores the requirements for incorporating exclusion clauses into contracts, including considerations such as signature, notice, and previous course of dealings. The importance of meeting these incorporation criteria is emphasized to ensure the enforceability of the clause. Furthermore, the construction requirement of exclusion clauses is discussed, highlighting the general principle of interpreting such clauses based on their natural and ordinary meaning. Specific interpretation rules are also addressed to ensure fairness in the contractual relationship.

Overall, a comprehensive understanding of exemption clauses and their associated requirements is crucial for parties engaged in contractual agreements, particularly in the sale of goods. The paper also touches upon the categorization of goods within a contract of sale, recognizing its significance as a fundamental element. Additionally, the analysis delves into the shortcomings of the current definition of goods, while exploring the concept of implied terms in the context of the sale of goods. By thoroughly examining these aspects, the paper aims to provide readers with a comprehensive understanding of exemption clauses, the requirements for their incorporation, and the broader framework surrounding the sale of goods. This knowledge equips individuals and businesses with the necessary tools to navigate contractual agreements effectively and mitigate potential risks in the realm of e-commerce and online trade.