

Analysis of the Law of Contract (Amendment) Bill, 2025

Kenya moves to curb exclusion clauses: what the proposed contract law reforms mean for your business

Introduction

The National Assembly has introduced the Law of Contract (Amendment) Bill, 2025, proposing far-reaching reforms to the Law of Contract Act.

If enacted, the Bill will significantly restrict the use of exclusion and limitation of liability clauses – particularly in consumer contracts and in cases involving negligence.

For many businesses, this could mean a fundamental rethink of standard terms, risk allocation models, and insurance arrangements.

Why this matters

For decades, Kenyan contract law has largely upheld the principle of freedom of contract – allowing parties to allocate risk as they see fit.

The proposed amendments introduce a statutory fairness control mechanism. In practical terms:

- Some exclusion clauses will automatically be void.
- Others will only survive if they pass a reasonableness test.
- Consumer contracts will face heightened scrutiny.
- This marks a clear policy shift toward stronger consumer protection.

Key Proposed Changes

a. Introduction of a statutory “reasonableness” test

Currently, Kenyan contract law largely allows parties to agree on exclusion clauses, and courts generally enforce them unless they are illegal or contrary to public policy. There is no clear statutory test for determining whether an exclusion clause is fair.

The Bill introduces two important concepts into the statute:

- A formal definition of negligence in contractual performance.
- A statutory requirement of reasonableness, meaning certain exclusion clauses will only be valid if they are fair and reasonable in light of the circumstances at the time the contract was made.

Implication:

Courts will no longer simply enforce exclusion clauses because the parties agreed to them. They will now assess whether the clause was objectively reasonable.

b. Absolute ban on excluding liability for death caused by negligence

Under current practice, contracts sometimes attempt to exclude liability broadly, including for serious harm.

The Bill introduces an absolute prohibition:

A party cannot exclude or restrict liability for death resulting from negligence under any circumstances.

Implication:

Any clause attempting to avoid liability for death caused by negligence will automatically be void. There is no flexibility or reasonableness exception here.

c. Limiting exclusion of liability for loss or damage

At present, many contracts include broad limitation or exclusion clauses for loss or damage, and these are often enforceable.

Under the Bill, liability for loss or damage caused by negligence may only be excluded if the clause satisfies the statutory reasonableness test.

In addition, simply signing the contract will not automatically mean that a party accepted the risk.

Implication:

Standard “we are not liable for any loss” clauses will no longer be automatically enforceable. Businesses may need to justify why such limitations are fair and reasonable.

d. Stronger protection for consumers

The current law does not contain comprehensive statutory restrictions on exclusion clauses specifically targeting consumer contracts within the Law of Contract Act.

The Bill introduces special protection where one party is dealing as a consumer. In such cases, a supplier cannot:

- Exclude liability for breach of contract,
- Provide performance that is substantially different from what was promised, or
- Avoid performing contractual obligations entirely.

Some exclusions may still be allowed, but only if they meet the reasonableness threshold.

Implication:

Consumer contracts will face much stricter scrutiny. Businesses dealing with consumers will have reduced ability to rely on protective boilerplate clauses.

e. Protection of statutory warranties in sale and hire purchase transactions

Under the current framework, parties sometimes attempt to contract out of statutory implied terms under the Sale of Goods Act and Hire Purchase Act.

The Bill strengthens protection of these statutory warranties. In consumer transactions, liability for breach of implied terms relating to quality, fitness for purpose, and correspondence with description cannot be excluded at all.

In non-consumer (commercial) transactions, exclusion is only permitted if reasonable.

Implication:

Manufacturers, retailers, and suppliers will have significantly less flexibility to disclaim responsibility for defective goods in consumer sales.

f. Broader application to other property agreements

Previously, restrictions largely focused on traditional sale or hire purchase contracts.

The Bill seeks to extend similar protections to other agreements involving transfer of goods. Liability relating to:

- Title,
- Quiet possession,
- Quality, and
- Fitness for purpose,

cannot be excluded in consumer dealings, and in commercial dealings only if reasonable.

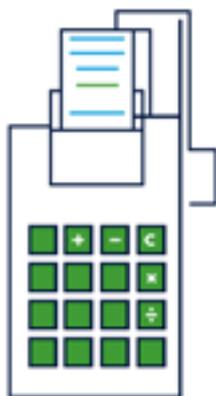
Implication:

The reform goes beyond classic sale contracts and captures a wider range of commercial arrangements. Businesses cannot avoid responsibility for fundamental ownership and quality issues through sweeping exclusion clauses.

Overall change in direction

Kenyan contract law is moving from a system where exclusion clauses are generally enforceable because parties agreed to them, to one where many exclusion clauses must pass a statutory fairness and reasonableness test — and some are completely prohibited.

This represents a significant recalibration of contractual risk, particularly in consumer-facing transactions.



Conclusion

If enacted, the proposed reforms will require immediate contractual review across multiple sectors. Businesses should begin by auditing their standard terms and conditions, particularly limitation of liability clauses, indemnities, warranty disclaimers, and force majeure or performance deviation provisions. Broad and blanket exclusion clauses are likely to face judicial challenge under the proposed statutory reasonableness test, and provisions that were previously considered routine may no longer be enforceable without objective justification.

The introduction of a statutory reasonableness standard is also likely to increase litigation and judicial scrutiny. Courts will be required to assess whether exclusion clauses are fair and reasonable in light of the circumstances existing at the time of contracting. This may result in more disputes over enforceability, a greater evidentiary burden on businesses seeking to rely on exclusion clauses, and fact-specific analysis of issues such as bargaining power, transparency, and commercial fairness.

From a risk management perspective, companies should reassess their insurance and risk allocation frameworks. Professional indemnity policies, product liability coverage, public liability insurance, and internal risk transfer arrangements should be reviewed to ensure alignment with the potential reduction in enforceable contractual protections. In consumer contexts especially, contractual allocation of risk may no longer provide sufficient protection against exposure.

Certain industries are likely to experience more immediate impact, including healthcare providers, financial institutions, retailers and manufacturers, technology and digital platforms, and construction and engineering firms. Consumer-facing businesses will bear the highest compliance obligations, given the enhanced protections proposed for consumers.

More broadly, the Bill reflects a significant shift from a strict freedom-of-contract model toward a regulated fairness approach, bringing Kenya closer in line with modern common law jurisdictions that impose statutory controls on exclusion clauses. While commercial parties transacting on relatively equal footing will retain some flexibility, the use of exclusion clauses as a shield against negligence or statutory breaches—particularly in consumer transactions—will be substantially curtailed.

In anticipation of possible enactment, businesses should conduct a comprehensive review of their standard form contracts, identify clauses that exclude liability for negligence or statutory warranties, and assess whether such provisions could satisfy a reasonableness threshold. Contractual risk management strategies should be aligned with insurance coverage, and organizations should closely monitor legislative developments while preparing implementation and compliance strategies.

Should you need further specific guidance on how the above changes impact your business, kindly feel free to contact any of the below or your usual RSM contact who will be always available to offer guidance and assistance that you need.

Jilna Shah
 Tax Director
jshah@ke.rsm-ea.com

Josphat Karanja
 Tax Consulting Senior Manager
jkaranja@ke.rsm-ea.com

Dedan Mumi
 Legal & Tax Semi senior
dmumi@ke.rsm-ea.com

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