
http://etheses.saurashtrauniversity.edu/id/eprint/750

Copyright and moral rights for this thesis are retained by the author

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge.

This thesis cannot be reproduced or quoted extensively from without first obtaining permission in writing from the Author.

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the Author.

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given.
Validity of Exemption Clauses In Contract – A Comparative Study of India and England

Thesis submitted to the Saurashtra University for the award of the degree of

Doctor of Philosophy

In

Law

By

Dhruti M. Trivedi

M.Com., LL.M. (Commercial Laws)

Guide

DR. BHARAT G. MANIYAR

READER

DEPARTMENT OF LAW

SAURASHTRA UNIVERSITY

RAJKOT-360 005

2008
‘A’

THOUGHT

IN A DAY, WHEN YOU DON’T COME ACROSS ANY PROBLEMS YOU CAN BE SURE THAT YOU ARE TRAVELLING IN A WRONG PATH.

-BY SWAMI VIVEKANAND
‘B’

DECLARATION

I, the undersigned, declare that my work is based on discovery of new facts and the comparison made by me. The work is based on comparison of different legislatures and on observations and directions/judgements delivered by the Hon’ble Supreme Court of India and Hon’ble High Courts of India and various law commission reports, articles, journals and reviews of different judges.

This is the original work undertaken by me. I have not submitted this work to any other university on any previous occasion.

Date: -……/…../2008 ........................................
Place: - (Dhruti. M. Trivedi)
‘C’

CERTIFICATE

This is to certify that the research work embodied in Thesis on “Validity of Exemption Clauses in Contract – A Comparative Study of India and England” is prepared by Shree Dhruti.M. Trivedi under my guidance and instructions. The work submitted for the award of Ph.D. Degree is her original work. The work has not been submitted for any other degree to this or any other University on any previous occasion.

Date: - ...../...../2008 ...........................................

Place: - (Dr. B.G.Maniyar)
        LL.M. Ph.D.
        Reader,
        Dept. of Law,
        Rajkot
ACKNOWLEDGEMENT

It is believed that howsoever powerful a human being may be, if he does not have blessings of the Almighty i.e. omnipresent, omnipotent, he/she cannot even jot down one’s own work.

The people who have laid the foundation for your success should not been forgotten. There is a saying that those who contribute to your rising, you must show your gratitude. My success is built on the strong pillars of my parents Mahesh Trivedi and Jagruti Trivedi who have been supporting, motivating, encouraging me in all my tough times. My brother Chintan despite going through his hard career of C.S. has not remain back in helping me cheerfully.

My guide Dr.B.G. Maniyar has given me a hope to complete my work. He has always been ready to help me whenever I needed him. I cannot forget my uncle Bhartendu Dave and Amit Dave who has worked behind curtains and have done wonderful job. My Ph.D. would have been impossible without them. I also thank Shri. J.B. Trivedi who has ignited my wishes to carry out the research.

In a very short but succinct manner, Prin. Dr. Indiraben Nityanandam, gave me very useful tips while doing this research work. She is a Ph.D. guide in English subject and besides her busy schedule she has revised every page I gave her. She has helped me with English language despite her busy schedule. She is my local guide. I must also thank Dr. H.N. Desai Sir, who is also a Ph.D. guide assessing my method of research and has checked my continuity of work. These people paved way for me to start the research work which I have completed.
I ought to thank my uncle Prabodh Bhatt as well as all my staff members of Prin. M.C.Shah Commerce College, S.R.Mehta Arts College, Mr. S.K.Shah, who has meant library to me for all my requirements. I also thank Mr. Hiren Patel – Lecturer – M.N.Law College- for his positive & inspirational support.

Last but not least my work would not have been completed without my friend Harsh Raval, A practicing lawyer, who has sacrificed lot of time after finding cases, journals and with a great active interest in formatting my work without getting tired. I also thank his better half Anal to allow him to do so.

Date : -       /       /2008           DHRUTI MAHESH TRIVEDI
**VALIDITY OF EXEMPTION CLAUSES IN CONTRACT – A COMPARATIVE STUDY OF INDIA AND ENGLAND**

**TABLE OF CONTENTS**

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Thought</td>
<td>i</td>
</tr>
<tr>
<td>B</td>
<td>Declaration</td>
<td>ii</td>
</tr>
<tr>
<td>C</td>
<td>Certificate</td>
<td>iii</td>
</tr>
<tr>
<td>D</td>
<td>Acknowledgement</td>
<td>iv</td>
</tr>
<tr>
<td>E</td>
<td>Table of Contents</td>
<td>Vi</td>
</tr>
</tbody>
</table>

**Chapter-1**

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Introduction</td>
<td>1</td>
</tr>
</tbody>
</table>

**Chaper-2**

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1</td>
<td>Definition of the term Contract</td>
<td>12</td>
</tr>
<tr>
<td>2.3</td>
<td>An examination of the Maine’s Dictum “Progress of society has hitherto Been from status to contract”</td>
<td>13</td>
</tr>
</tbody>
</table>

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Status</td>
<td>14</td>
</tr>
<tr>
<td>B</td>
<td>Status to Contract</td>
<td>18</td>
</tr>
<tr>
<td>C</td>
<td>The status of contract theory questioned</td>
<td>19</td>
</tr>
<tr>
<td>D</td>
<td>Reversion of contract to status</td>
<td>20</td>
</tr>
<tr>
<td>E</td>
<td>The Doctrine applicable until Maine’s Day</td>
<td>22</td>
</tr>
</tbody>
</table>

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2.4</td>
<td>Intuitionist’s Theory</td>
<td>24</td>
</tr>
<tr>
<td>2.5</td>
<td>Equivalent Theory</td>
<td>26</td>
</tr>
<tr>
<td>2.6</td>
<td>Holmes Theory</td>
<td>28</td>
</tr>
<tr>
<td>2.7</td>
<td>The Moral Theory</td>
<td>29</td>
</tr>
<tr>
<td>2.8</td>
<td>The Will Theory</td>
<td>33</td>
</tr>
<tr>
<td>2.9</td>
<td>Injurious Reliance Theory</td>
<td>37</td>
</tr>
<tr>
<td>2.10</td>
<td>Modern Developments</td>
<td>40</td>
</tr>
</tbody>
</table>

**Chapter-3**

<p>| | | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1</td>
<td>Introduction</td>
<td>46</td>
</tr>
<tr>
<td>3.2</td>
<td>Freedom of Contract as restricted by equity, legislation and common law.</td>
<td>51</td>
</tr>
<tr>
<td>3.3</td>
<td>Freedom of Contract and no Liability Clause</td>
<td>63</td>
</tr>
<tr>
<td>Section</td>
<td>Title</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>3.4</td>
<td>Concept of Reasonable man</td>
<td>65</td>
</tr>
<tr>
<td>3.5</td>
<td>Impact of inequality of bargaining power on freedom of contract</td>
<td>66</td>
</tr>
<tr>
<td>3.6</td>
<td>Position in the Nineteenth Century</td>
<td>67</td>
</tr>
<tr>
<td>3.7</td>
<td>Changing attitude to contractual relationships</td>
<td>67</td>
</tr>
<tr>
<td>3.8</td>
<td>Modern Trend of courts to over sue the fairness of bargain</td>
<td>69</td>
</tr>
<tr>
<td>3.9</td>
<td>Impact of abnormal conditions on contract</td>
<td>70</td>
</tr>
<tr>
<td>3.10</td>
<td>Review of concept of Contract</td>
<td>72</td>
</tr>
<tr>
<td>3.11</td>
<td>Position of Contract in India</td>
<td>74</td>
</tr>
<tr>
<td>3.12</td>
<td>Position of Contract in England</td>
<td>78</td>
</tr>
<tr>
<td>Chapter-4</td>
<td>Exemption Clauses- Incorporation &amp; Interpretation</td>
<td>85</td>
</tr>
<tr>
<td>4.1</td>
<td>Introduction</td>
<td>85</td>
</tr>
<tr>
<td>4.2</td>
<td>Exemption Clauses when permissible</td>
<td>86</td>
</tr>
<tr>
<td>A</td>
<td>Substitution of Rights</td>
<td>86</td>
</tr>
<tr>
<td>B</td>
<td>Undeterminable or unusually high risks</td>
<td>87</td>
</tr>
<tr>
<td>C</td>
<td>Offer or “Choice of Rates”</td>
<td>87</td>
</tr>
<tr>
<td>D</td>
<td>Insurance</td>
<td>87</td>
</tr>
<tr>
<td>E</td>
<td>Kind of violated obligation and of affected interest</td>
<td>88</td>
</tr>
<tr>
<td>F</td>
<td>Kind of Misconduct</td>
<td>88</td>
</tr>
<tr>
<td>4.3</td>
<td>Types of Exemption Clauses</td>
<td>89</td>
</tr>
<tr>
<td>A</td>
<td>Exemption from liability from Breach</td>
<td>89</td>
</tr>
<tr>
<td>B</td>
<td>Limitations of liability or remedy</td>
<td>90</td>
</tr>
<tr>
<td>C</td>
<td>Time-limit clauses</td>
<td>91</td>
</tr>
<tr>
<td>D</td>
<td>Controls on Evidence</td>
<td>92</td>
</tr>
<tr>
<td>E</td>
<td>Indemnity Clauses</td>
<td>93</td>
</tr>
<tr>
<td>F</td>
<td>Arbitration Clauses</td>
<td>93</td>
</tr>
<tr>
<td>G</td>
<td>Liquidated damages Clauses</td>
<td>94</td>
</tr>
<tr>
<td>H</td>
<td>Excepted perils clauses and Promissory warranties in contracts of Insurance</td>
<td>95</td>
</tr>
<tr>
<td>4.4</td>
<td>The Contractual Force of Exemption</td>
<td>97</td>
</tr>
<tr>
<td>A</td>
<td>Incorporation into contracts</td>
<td>97</td>
</tr>
<tr>
<td>B</td>
<td>The effect of signature</td>
<td>103</td>
</tr>
<tr>
<td>C</td>
<td>Written Clauses of Exemption</td>
<td>105</td>
</tr>
<tr>
<td>D</td>
<td>The “Battle of Forms”</td>
<td>110</td>
</tr>
<tr>
<td>4.5</td>
<td>The Statutory Control of Exemption Clauses</td>
<td>112</td>
</tr>
<tr>
<td>4.5.1</td>
<td>Total invalidity</td>
<td>113</td>
</tr>
<tr>
<td>4.5.2</td>
<td>The “reasonable” Exemption Clauses</td>
<td>118</td>
</tr>
<tr>
<td>A</td>
<td>Misrepresentation</td>
<td>118</td>
</tr>
<tr>
<td>B</td>
<td>Indemnity Clauses</td>
<td>121</td>
</tr>
<tr>
<td>C</td>
<td>Guarantees</td>
<td>123</td>
</tr>
<tr>
<td>D</td>
<td>Terms of Notices excluding liability for loss or damage arising</td>
<td>123</td>
</tr>
<tr>
<td>E</td>
<td>Unfair terms in standard form or consumer contracts</td>
<td>123</td>
</tr>
<tr>
<td>Section</td>
<td>Title</td>
<td>Page</td>
</tr>
<tr>
<td>---------</td>
<td>-----------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>F</td>
<td>Secondary Contracts</td>
<td>126</td>
</tr>
<tr>
<td>4.5.3</td>
<td>Statutorily imposed exemption clauses</td>
<td>128</td>
</tr>
<tr>
<td>4.6</td>
<td>The Construction of Exemption Clauses</td>
<td>131</td>
</tr>
<tr>
<td>4.6.1</td>
<td>Defense or Definition</td>
<td>131</td>
</tr>
<tr>
<td>4.6.2</td>
<td>Interpretative Devices</td>
<td>136</td>
</tr>
<tr>
<td>A</td>
<td>Strict interpretation of the clause</td>
<td>136</td>
</tr>
<tr>
<td>B</td>
<td>The Contra-Proferentem Rule</td>
<td>139</td>
</tr>
<tr>
<td>C</td>
<td>Repugnancy</td>
<td>140</td>
</tr>
<tr>
<td>D</td>
<td>Important terms</td>
<td>141</td>
</tr>
<tr>
<td>E</td>
<td>Liability for negligence</td>
<td>141</td>
</tr>
<tr>
<td>4.6.3</td>
<td>General rules of construction of Contractual terms</td>
<td>144</td>
</tr>
<tr>
<td>A</td>
<td>Plain Meaning</td>
<td>145</td>
</tr>
<tr>
<td>B</td>
<td>Ut reg Magis Valeat Quam Pareat</td>
<td>145</td>
</tr>
<tr>
<td>C</td>
<td>Expressio Unius Est Exclusio Alterius</td>
<td>145</td>
</tr>
<tr>
<td>D</td>
<td>The Ejusdem Generis Rule</td>
<td>145</td>
</tr>
<tr>
<td>4.7</td>
<td>Some special exemption clauses</td>
<td>147</td>
</tr>
<tr>
<td>A</td>
<td>“with all faults”</td>
<td>147</td>
</tr>
<tr>
<td>B</td>
<td>Excluding or limiting the damages recoverable</td>
<td>148</td>
</tr>
<tr>
<td>C</td>
<td>Consequential loss</td>
<td>149</td>
</tr>
<tr>
<td>D</td>
<td>Imposing time limits</td>
<td>150</td>
</tr>
<tr>
<td>E</td>
<td>Excluding the right to reject</td>
<td>150</td>
</tr>
<tr>
<td>F</td>
<td>Relevance of contract description</td>
<td>151</td>
</tr>
<tr>
<td>G</td>
<td>Arbitration</td>
<td>151</td>
</tr>
<tr>
<td>H</td>
<td>Acknowledgement and declarations of non-reliance</td>
<td>151</td>
</tr>
<tr>
<td>4.8</td>
<td>Exemption Clauses and Third Parties</td>
<td>152</td>
</tr>
<tr>
<td>A</td>
<td>The Common law</td>
<td>152</td>
</tr>
<tr>
<td>B</td>
<td>Statute law</td>
<td>156</td>
</tr>
<tr>
<td>C</td>
<td>Application to exemption clauses</td>
<td>156</td>
</tr>
<tr>
<td>D</td>
<td>Exemption from the 1999 Act</td>
<td>157</td>
</tr>
<tr>
<td>Chapter-5</td>
<td>Avoidance and Qualification of Exemption Clauses</td>
<td>170</td>
</tr>
<tr>
<td>5.1</td>
<td>Introduction</td>
<td>170</td>
</tr>
<tr>
<td>5.2</td>
<td>Onus of Proof</td>
<td>170</td>
</tr>
<tr>
<td>5.3</td>
<td>Liability for fraud</td>
<td>172</td>
</tr>
<tr>
<td>5.4</td>
<td>Liability for breach of fiduciary duty</td>
<td>175</td>
</tr>
<tr>
<td>5.5</td>
<td>Liability for breach of rules of natural justice</td>
<td>175</td>
</tr>
<tr>
<td>5.6</td>
<td>Oral Undertakings</td>
<td>175</td>
</tr>
<tr>
<td>5.7</td>
<td>Misrepresenting the effects of a term</td>
<td>177</td>
</tr>
<tr>
<td>5.8</td>
<td>Fundamental terms and fundamental breach</td>
<td>178</td>
</tr>
<tr>
<td>5.9</td>
<td>Position as to Fundamental Breach</td>
<td>180</td>
</tr>
<tr>
<td>Chapter-6</td>
<td>Harsh and Unconscionable Bargains</td>
<td>183</td>
</tr>
<tr>
<td>6.1</td>
<td>Introduction</td>
<td>183</td>
</tr>
<tr>
<td>6.2</td>
<td>Unconscionable bargains</td>
<td>183</td>
</tr>
<tr>
<td>Chapter-7</td>
<td>The effect of discharge by breach on Exemption Clauses</td>
<td>190</td>
</tr>
<tr>
<td>7.1</td>
<td>Introduction</td>
<td>190</td>
</tr>
<tr>
<td>7.2</td>
<td>The ordinary law of discharge by breach</td>
<td>191</td>
</tr>
<tr>
<td>A</td>
<td>The conditions of the remedy</td>
<td>191</td>
</tr>
<tr>
<td>B</td>
<td>The incidents of discharge by breach</td>
<td>193</td>
</tr>
<tr>
<td>7.3</td>
<td>Exemption clauses and discharge by breach</td>
<td>196</td>
</tr>
<tr>
<td>A</td>
<td>Exemption clauses as substantive</td>
<td>198</td>
</tr>
<tr>
<td>B</td>
<td>Exemption Clauses as Procedural</td>
<td>200</td>
</tr>
<tr>
<td>7.4</td>
<td>The effect of deviation cases</td>
<td>203</td>
</tr>
<tr>
<td>Chapter-8</td>
<td>Unlawful Exemption Clauses</td>
<td>213</td>
</tr>
<tr>
<td>8.1</td>
<td>Fair Trading Act 1973</td>
<td>213</td>
</tr>
<tr>
<td>8.3</td>
<td>Assurances as to Future Conduct</td>
<td>221</td>
</tr>
<tr>
<td>8.4</td>
<td>Defences</td>
<td>221</td>
</tr>
<tr>
<td>8.5</td>
<td>Innocent publication of advertisements</td>
<td>222</td>
</tr>
<tr>
<td>8.6</td>
<td>Trade Descriptions Act 1968</td>
<td>223</td>
</tr>
<tr>
<td>Chapter-9</td>
<td>Void and Ineffective Exemption Clauses</td>
<td>226</td>
</tr>
<tr>
<td>9.1</td>
<td>Introduction</td>
<td>226</td>
</tr>
<tr>
<td>9.2</td>
<td>Consumer credit</td>
<td>226</td>
</tr>
<tr>
<td>9.3</td>
<td>Transport</td>
<td>228</td>
</tr>
<tr>
<td>9.4</td>
<td>Housing</td>
<td>229</td>
</tr>
<tr>
<td>9.5</td>
<td>Seeds</td>
<td>230</td>
</tr>
<tr>
<td>9.6</td>
<td>Patents</td>
<td>230</td>
</tr>
<tr>
<td>9.7</td>
<td>Feeding Stuffs</td>
<td>230</td>
</tr>
<tr>
<td>9.8</td>
<td>Consumer Safety</td>
<td>231</td>
</tr>
<tr>
<td>9.9</td>
<td>Disability Discrimination</td>
<td>231</td>
</tr>
<tr>
<td>9.10</td>
<td>Social Security</td>
<td>232</td>
</tr>
<tr>
<td>9.11</td>
<td>Solicitor and Client</td>
<td>232</td>
</tr>
<tr>
<td>9.12</td>
<td>Employment</td>
<td>232</td>
</tr>
<tr>
<td>9.13</td>
<td>Late Payment</td>
<td>233</td>
</tr>
<tr>
<td>9.14</td>
<td>Distance Selling</td>
<td>233</td>
</tr>
<tr>
<td>Chapter-10</td>
<td>Conclusion</td>
<td>235</td>
</tr>
<tr>
<td></td>
<td>Bibliography</td>
<td>255</td>
</tr>
<tr>
<td></td>
<td>List of Journals</td>
<td>258</td>
</tr>
<tr>
<td></td>
<td>List of Articles</td>
<td>259</td>
</tr>
<tr>
<td></td>
<td>List of Websites referred</td>
<td>262</td>
</tr>
</tbody>
</table>
Chapter – 1

Introduction

The law of contract has in recent times to face a problem which is assuming new and wide dimensions. The problem has arisen out of the modern “large-scale and widespread” practice of concluding contracts in standardized forms.

The words “standard form contract” is used to include every contract, whether simple or under seal and whether contained in one or more document, one of the parties to habitually makes contract of the same type in a particular form and will allow little, if any, variation from that form.

The average man, the man in the street on the omni bus, is continually making such contracts and the probability is that they are the most important contracts that he ever makes. If he rents his house from the local authority or the owner of the estate his tenancy agreement will be in a standard form; he will have been supplied with gas and electricity only if he has signed a printed form of agreement; any item of furniture which he has brought on hire-purchase system will be subject on agreement designed by a finance company; his wireless set, his motor-car and most of his electrical equipment will have been sold to him subject to standard terms. His work, if he is a manual worker in a large undertaking, a civil servant, a local government officer or on an employee of a big organization, will almost certainly be based upon a contract of service, the conditions of which are set out in a printed document. His journey to and from work will be the subject of a contract of carriage on abstruse but unalterable conditions, and at least one of his leisure time activities, his football “pools”, will be carried on subject to the most rigid regulations.

The Life Corporation of India, for example, has to issue thousands of insurance covers everyday. Similarly, the railway administration of India has to make innumerable contracts of carriage. It would be difficult for such large-
scale organizations to draw up a separate contract with every individual. They, therefore, keep printed forms of contract. Such standardized contracts contain a large number of terms and conditions in “fine print” which restrict and often exclude liability under the contract. The individual can hardly bargain with the massive organizations and, therefore, his only function is to accept the offer whether he likes its terms or not. He cannot alter those terms or even discuss them; they are there for him to take it or leave it. He therefore does not undertake the laborious and profitless task of discovering what the terms are.

Although the roots of the law of contract lie in many disciplines – religion, ethics, economics, Government and philosophy – emphasis on the individual is the common theme. Having been cross-ruffled by economic and social changes, contract has become in large number. The vast majority of today’s “contracts” are standardized forms. Through the use of these contracts, substantial economics of time, effort and expense are achieved. Economy, adaptability and certainty are the three outstanding virtues of the standard contracts. The tempo and complicibility of modern life and commerce makes standard form contracts indispensable.

In standard form contracts contain exemption clauses in it which completely excludes the liability of one of the party. In all these transactions the bargaining power of the parties is unequal. The weaker party has no choice but to adhere to it may be because of monopoly or market position. The potential customer have no choice and the printed document which sets out standard conditions will never see the red, green and purple ink beloved of the conveyancer when negotiating his terms.

The law about exemption clauses has been much developed in recent years, at any rate about printed exemption clauses which so often pass unread. Notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respect........ They do not avail him when he is guilty of a breach
which goes to the root of the contract. The thing to do is to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses........ The principle is sometimes said to be that the party cannot rely on an exempting clause when he delivers something “different in kind” from that contracted for, or has broken a “fundamental term “ or “fundamental contractual obligation”, but these are, comprehended by the general principle that a breach which goes to the root of the contract disentitles the party from relying the exempting clause.”

Exempting clauses are now- a –days all held to be subject to the overriding provision that they only avail to exempt a party when he is carrying out his contract, not when he is deviating from it or is guilty of a breach which goes to the root of it.

A.G.Guest in 1956 in his famous article on fundamental breach accepted that the principle was a substantive one and summed it up in these terms: (Fundamental Breach of contract, (1961) 77LQR 98.)

“A party who has been guilty of a fundamental breach of contract cannot rely on an exemption clause inserted in the contract to protect him”.

It can be said that this basic concepts as revealed in the cases and literature on the doctrine are deviation and core. It is submitted that exemption clauses can never have “so wide an ambit as in effect to deprive one party’s stipulations of all contractual force.”

But, always cited in power is its abuse; and contractual power is no exception. Not invariably but unusually the freedom to contract through exemption clauses and conditions is that of one party only. Though such contracts contain terms shaped simply to meet the practical needs of the transaction concerned, they also include clauses, few or many, simple or
complicated, that confer decided legal as well as other advantages upon the party who is in position to insert them. Purely economic clauses, operational clauses and in particular, exemption clauses may thus be imposed by the party of the weaker contracting position. These exemption clauses usually detract from the customer's normal rights.

The problems relating to exemption clauses in contracts are one that needs systematic analysis. The armory of law includes only some special and limited tools which could alleviate and mend unfair bargains but not a general instrument which could cut diverse forms of contractual clauses, and clauses, which are one, sided. It is novel in another sense, namely in the solutions attempted in the different legal systems of the world.

Courts have recognized their responsibility for translating the postulates of equality and freedom. Courts interfere in extreme cases. I venture to write that if courts ventures to take into account the social implications of legal concepts and how far they should go and what further steps they should take to handle the situations in India and England.

* Research Methodology adopted in this thesis is as follows

A. Identification/Selection of a Problem

In all standard Form Contracts, the bargaining power of parties is unequal; on the one side there is the ordinary individual and the other a monopoly or powerful organization with desirable goods or services to supply. This standard form contract contains exemption clauses which exclude the liability of a stronger party and a weaker party has to sign “on the dotted Line”. The documents are “a prendre ad laisser”, to take it or leave it. They are really speaking not agreements but phenomena of agreements. Terms are presented in a misleading way or are formulated in a tricky manner, giving an incorrect impression to purchasers. So it is titled as “Validity of Exemption Clauses in Contract-A Comparative study of India and England.”
B. Objectives of the study

The main objectives of the present research are as follows:

1. To find how the society strike a just balance between the freedom of contract as a useful principle of social order and the increasing scope of public policy.

2. To find if there is any real distinction between ignorance of the existence of special conditions on the one hand and ignorance of their meaning on the other hand.

3. To find if freedom of contract be cloak under which business enterprises are able, ‘to legislate in a substantially authoritarian manner’.

4. To find out the ways to prevent the exemption clauses in standard form contracts from becoming the instrument of oppression, exploitation and injustice.

5. To find the reasons for being such clauses accepted by the customers and what is the protection of consumer specially when he is not aware of them and even when he is aware he is not in a position to bargain because of the monopoly of the seller.

6. To find how the exemption clauses are to be interpreted by the court in case of ambiguity.

7. To find when exemption clauses are operative and inoperative and what the rights of third parties are and can they claim any benefit.

8. To find if any control is being exercised on them by the judiciary and legislature in both the countries under study.

9. To find possible reforms and their direction.

C. Hypothesis

The study revolves around the standardized contracts containing exemption clauses in it and how courts in India as well as England analyze and interpret it. To know whether there is freedom of contract in a real sense.
It examines how far different theories work. The hypothesis set up and focused is to check to what extent exemption clauses are legislatively and judicially controlled and monitored by various courts and parliament respectively in two different countries (India and England) under study.

D. Method of Research

This research is comparison of India and England two different common law countries. It is based on systematic desk review of all relevant literature available related to Contract Act.

In carrying out above research and all available literature on the topic under focus based on case-law material, reported and un-reported judgments, legislations, journals, articles, Law Commission Reports, the writing of jurists and different law web-sites.

The study and comparison of case-law developed by the Supreme Court and different High Courts is made. It has been a research approach combined with limited empirical study.

E. Design of the study

The topics have been divided into various chapters. The constitutional laws, substantive legislations and procedural rules and the remedies have been examined to answer the hypothesis.

F. Collection of data

Data has been collected from Gujarat High Court Library, different law colleges libraries in Ahmedabad, CERC-Ahmedabad, M.S.University Library, GNLU- Gandhinagar, Indian Law Institute-New Delhi, etc,. Different law websites have been visited to access various materials.
G. Significance of the Study

This research dares to bring in light strong position of monopoly markets and poor condition of the weaker parties. It tries to find out how far exemption clauses in contract are valid.

H. Limitation of the Study

This study is limited to Contract Act and area is confined to two countries India and England.

The first chapter is introduction which deals with various standard form contracts and exemption clauses in it. It discusses the research methodology adopted in the thesis and introduces other chapters.

The second chapter deals with the meaning and theories of contract. The nature of contract has been much discussed by lawyers interested in specific technical doctrines, and by moralists, economists and political theorists interested in general social philosophy. There is still need for some effort to combine these points of law. There are number of considerations which justify the legal enforcement of promises. The purpose of this chapter is to find out the reasons behind the enforcement of a promise, in the light of the various theories that have laid down from time to time. Whether the existing theories explain their true nature or change in social structure require their readjustment.

Third chapter deals with Exemption Clauses and freedom of contract - An Analysis of the Modern Trends in the light of Statutory Enactments and Judicial Decisions. It should be noted that recent trend towards collectivisms is restrictive of freedom of contract. Legislative measures do curtail pre-existing rights. E.g.: Landlord and tenancy legislation, Master and Servant Law, of Overseas Trade. In a social role man has to be cooperative, while he is competitive in his individual role. This raises the question of individual
needs and the demands of society and how far the Government can interfere in the individual's freedom. Statutory developments leave some scope for interpretation by judges who have necessarily to uphold established legal principles while trying to reconcile between the claims of the individual and the needs of society. They had to readjust old principles to new needs or situations.

The Legislature and the courts have also imposed certain restrictions on freedoms of contract for reasons of Government or public policy. The standard forms of agreements are too common in a highly developing commercial society, with the result that the customer is negatively drawn into it by force of circumstances. He is amazed later when he is told he cannot get any relief under the contract. The need therefore arose to examine whether such clauses were fair and instances there are where Legislation had to step in to veto such oppressive clauses.

The complexity of modern activities makes it also difficult to provide for all eventualities. The existence of problem is a sure indication of the growth of the law. Mr. Justice Holmes rightly observed:

“The Law is always approaching and never reaching consistency. It is forever adopting new principles from life at one end and it always retains old ones from history at the other........ it will become entirely consistent only when it ceases to grow.”

Fourth chapter is named as Exemption Clause – Interpretation and Incorporation. It is really a matter of fact that these exemption clauses should be used very tactfully. The question is whether the standard form of contract excludes the liability of a person in bargaining position and then to what extent. So it should be incorporated in such a way that there is fairness in contract.

This chapter deals with topics like when exemption clauses are permissible, types of exemption clauses, the contractual force of exemption,
the statutory control of exemption clauses, the construction of exemption clauses, general rules of construction of contractual terms, some special exemption clauses and exemption clauses and third parties.

Fifth chapter is Avoidance and Qualification of Exclusion Clauses. In this chapter, we discuss the methods by which the courts seek to avoid giving full effect to exemption clauses, notwithstanding that the clause has been incorporated into the contract and are apt to cover the damage which has occurred.

Sixth chapter is Harsh and Unconscionable Bargains. It deals with onus of proof, liabilities under various situations like fraud, breach of fiduciary duty, breach of rules of natural justice, oral undertakings, fundamental breach and fundamental term.

Seventh chapter is The Effect of Discharge by Breach on Exemption Clauses. It was perhaps never very likely that the proponents of fundamental breach would allow their doctrine to die just because of some obiter dicta on the subject from the House of Lords.

In that respect, therefore, the recent decision of the court of Appeal in Harbutt’s “Plasticine” Ltd. v/s. Wayne Tank and Pump Co. Ltd. Need cause no surprise that at least to a contract lawyer, is its findings that a contractor can be impressed with a liability even though he has adopted the correct formula for excluding it. It is rather odd and one may be forgiven for suspecting that somehow or somewhere, something has gone wrong. The Court of Appeal justified their decision by reference to discharge of the contract for breach.

The eighth chapter is Unlawful Exemption Clauses which discusses Fair Trading Act 1973, Consumer transactions, Defences, Trade Descriptions Act, etc.
The ninth chapter deals with Void and Ineffective Exemption Clauses. It deals with Consumer Credit, Transport, Housing, Seeds Patents, Feeding stuffs, Disability Discrimination, Social Security, Solicitor and Client, Employment, etc.

The tenth chapter will be the conclusions of the thesis that what is and what should be the exact position of exemption clauses in the standard form contract. To know how our law protects the poor opposite party who has the no alternative but to take it or leave it. To know if the party in a bargaining position can take the advantage of exemptions in standard form of contract.

Reference
1 Cf. Rodwell v Thomas (1944) 1 All.E.R.700.
2 Such regulations will, however, be binding “in honour only” and a clause even stronger than that used in Rose and Frank v. Crompton Bros. ([1925] A.C. 425) will bar any approach to the courts: Appleson v. H. Littlewood, Ltd. (1939) 1 All E.R. 464.
3 See Lord Mansfield, Law and Other Things at pp.38-54.
4 Cited in The Sanctity Of Contract, p.77.
2.1 Introduction

The nature of contract has been much discussed by lawyers interested in specific technical doctrines, and by moralists, economists and political theorists interested in general social philosophy. There is still need for some effort to combine these points of law. There are number of considerations which justify the legal enforcement of promises. The true function and nature of contract should correctly be understood before proceeding on the topic.

Savingsly very rightly observed

“This notion of contract is part of men’s stock even outside the field of legal science, and to men of law so familiar and necessary in its various applications that we might expect a settled and just apprehension of it to prevail everywhere. Nevertheless we are yet far short of this.’

Why should promise be enforced?

To this question various answers have been given. The simplest answer is that of intuitionist, namely, the promises are sacred per-se, that there is something inherently despicable about not keeping a promise, and that a properly organized society should not tolerate this, popular sentiment generally favours the enforcement of those promises which involve some quid-pro-quo [equivalent thereof]. In his common law Justice Holmes expressed the view that a contract is properly to be regarded as the taking of a risk creating liability to pay damages in a certain event. Professor Goodhard, who was a protagonist of moral theory said: -
"That the moral basis of the contract is that the promisor created a reasonable expectation that it shall be kept".

According to will theory, law protects the will of the parties, for the will is something inherently worthy of respect. While in sharp contrast to this theory is what Pound has termed Injurious Reliance Theory. This lays down emphasis on conduct rather than on status, the reason for the enforcement of the contract is security rather than mystical union of wills.

The modern approach to the problem is altogether different. Because of the welfare and social function of the state, standard form agreements, collective bargaining agreements and social security aspects of the contract, the function and substance of the law has altogether changed.

The purpose of this chapter is to examine various theories and to see whether changing social and economic needs of society require re-adjustment of old principles to the new needs or situations.

2.2 Definition of the term “Contract”

This term “contract” has been defined in a good many different ways. Definitions have been constructed by almost all writers on law and in many thousands of judicial opinions.²

The fact that these definitions are not in agreement has led occasionally to a little confusion; but the harm is not to great as might be expected. Diversity of definition does at times lead to a confused analysis, obscure reasoning and to unnecessary misunderstanding and litigation. This is, of course, socially harmful; and it occasionally leads to an unjust decision and to uncertainty in the law. It is very common error to suppose that legal terms, such as contract, have one absolute and eternally correct definition. The fact is that all such terms have many usages, among which everyone is free to select. One usage
is to be preferred over another only in so far as it serves our necessity and convenience.

A study of its common usage will show that the term “contract” has been made to denote three different kinds of things in various combinations:

1) The series of operative acts of the parties expressing their assent, or some part of these acts;
2) Physical document executed by the parties as an operative facts in itself and as lasting evidence of their having performed other necessary acts expressing their intentions;
3) The legal relations resulting from the operative acts of the parties; always including the relation of right in one party and duty in the other.

A very common definition is that a contract is a promise enforceable at law directly or indirectly. This has advantage of brevity, and it is perhaps as useful a definition as any that has been thus far suggested. It places emphasis upon one of the operative acts, and expression of assent. This is restricted to an expression that is promissory in character. By restricting it further to a promise that is enforceable at law, it brings into the definition the element of legal operation and effect.

2.3 An Examination of the Maine’s Dictum, ‘Progress of society has hitherto been from Status to Contract.’

One of the most influential of modern law is Maine’s famous dictum that the progress of the society has hitherto been status from contract. It has generally been understood as stating not only a historical generalization but also a judgement of sound policy..... that a legal system wherein rights and duties are determined by the agreement of the parties is preferable to a system wherein they are determined by status.

This easy assumption, that whatever happens to be outcome of history is necessarily for the best and cannot or ought not to be counteracted by any
human effort, is typical not only of the historical school of jurisprudence since Savigny, but also of general progressive or evolutionary of Maine’s generation and largely of our own.

A. Status

Status is a word which has no very precise connotation. Salmond\(^3\) gives four meanings:

(a) legal condition of any kind, whether personal or proprietary;
(b) personal legal condition, excluding proprietary relations;
(c) personal capacities and incapacities as opposed to other elements of personal status;\(^4\)
(d) compulsory as opposed to conventional legal position.

Austin\(^5\) agrees that the term cannot be used with exactness, but thinks that when for case of exposition it is useful to separate a complex of rights and duties, of capacities and incapacities which specifically affect a narrow class, it is convenient to designate that complex by the term status.

Very many factors may lead to the creation of a status. Thus sex, minority and marriage are bound up with the problem of the family; illegitimacy shows the lack of proper family ties; mentally or bodily defect may lead to special treatment by the law. Caste, official position or profession may create certain privileges or disabilities. Criminality may destroy liberty, or bankruptcy may divest of property. Foreign nationality, race or color may cause the law to distinguish a group.\(^6\)

One of the best analysis is that of Allen.\(^7\) Status may be described as the fact or condition of membership of a group of which the powers are determined extrinsically by law, status affecting not merely one particular relationship, but being a condition affecting generally though in varying degree a member’s claims and powers. Status is not merely a basis for classification, but a matter of great political, legal and social importance.
Firstly, status crises from membership of a class and the powers of that class are determined extrinsically by law, not by agreement between the parties. There is no power for a member to vary the conditions imposed by law, for example, the rules relating to the status of marriage are conclusively fixed.

Secondly, while an infant has no choice whether he will enter the status of infancy or not, it is not always the case that members of a status are compulsorily placed within a group by law. Thus Phyllis cannot be forced into the status of a married woman against her will, but if she does marry, the law attaches to that status certain incidents which cannot be varied by the consent of the parties. Thus she became at common law immune from actions in tort brought against her by her husband: she has a claim to support from her husband, and in cases of necessity a power to pledge his credit. The status of marriage cannot be ended merely by the wish of the parties. Graveson suggests that the will of the party may affect the beginning or end of status, but never both. Marriage illustrates freedom at the beginning, and the control of law at the dissolution, of the status. An ambassador can be made such only by act of the state, but presumably he can destroy his status by resignation.

Thirdly, Maine emphasizes that status normally arises today because of a defect in judgement of the members of the class in question. This statement is not universally true. Historically, status is due not to a desire to protect the weak, but rather to exploit them, as has already been seen in discussing the evolution of the law of guardianship. Today many typical cases of status do reflect a desire to protect certain classes against their own weaknesses, but this is the only cause for the singling out of a certain class for special treatment. Ambassadors may suffer from occasional defects of judgement, but that is not the reason why the law places them in a special status.

Fourthly, membership of a status does not always result in restricted power. In the case of an infant or a lunatic, legal power is restricted, but an
ambassador has increased privileges because he belongs to that particular class. It should not be thought that status creates only incapacities.

Fifthly, not all groups give rise to a status. Clearly membership of the group must affect a person’s legal relations, or at least his power to enter legal relations. There is no status of the blue eyed or of bridge players, for although both of these groups may be regarded as forming a class, that class has no precise legal significance. It is not enough even to confine the terms to groups based on a classification of legal relations; thus it is inaccurate to speak of the status of trustees or bankers. The test is that status is a condition which affects generally, although in varying degree, a person’s claims, liberties, powers and immunities.

In the case of a trustee, there are particular powers relating to the trust property and in particular duties owed to the beneficiary to the trust. But the fact that a man is a trustee does not affect his general powers. The particular rights and duties of a trustee spring from one particular title (the trust) and extend no farther.

But an infant suffers from a lack of contractual power which affected at common law not only one contract on relationship but all his contracts save those which relate to necessaries.

Holland asks: does the peculiarity of the personality arise from anything unconnected with the nature of the act itself which the person of inherence can enforce against the person of incidence? 14

I am a mortgagee because of one particular transaction and that does not affect my other legal relation. If Smith is lunatic so found, his power entirely disappears and thus he can perform no juristic acts. It is easy to draw the line between these two extremes, but it is not easy to determine the exact limits of the requirement that membership must affect generally a person’s claim and powers. Does a degree of judicial separation affect status? 15
Allen distinguishes between status which is a condition, capacity which is a power to acquire and exercise rights, and the rights themselves which are acquired by the exercise of that capacity. ¹⁶

According to Hohfeld, status is the condition of being a member of a particular group, which membership affects generally claims, liberties, power and immunities. In private international law it is only reasonable for English law to recognize a status which may be imposed by French law on a Frenchman, but English courts may refuse to recognize as effective in England some of the claims or powers which may arise from that status.

As Scott L.J. puts it: The general principle of status is that, when created by the law of one country, it is ought to be judicially recognized as being the case everywhere, all the world over; ¹⁷ and only for imperative reasons of public policy should the law refuse to allow in England the normal results that how from a foreign status. There if a child is legitimate by his personal law, he should be regarded as legitimate the world over, ¹⁸ but English law may refuse to recognize the status of slavery, or the status of a wife where the marriage is incestors by English Law, although valid by the law of the country where the marriage took place.

One of Maine’s most famous epigram is that “the movement of the progressive societies has hither to been a movement from status to contract,”¹⁹ when we contrast the difficulty in early communities of rising above the level which birth imposed and the comparative freedom of social movement in the modern world, there seems much historical justification for Maine’s thesis. The law has abolished many of the lower grades of society, and the tendency is to confine the creation of status to those cases where there is special justification. What were once the lower rank begins to enjoy many of the privileges of their ‘betters’. ²⁰ The evaluation of the rules relating to married women represents an increasing power to contract, and the long-continued partia-potestas of Roman Law is now, for most systems, merely an historical curiosity.
But there are grave dangers involved in treating Maine’s epigrammatic generalization as a universal law of legal history. Some neo-Hegelians regard contract as the legal category in which the free will of the individual has full play, and hence urge that its scope not only is increasing, but ought to be increased in the interests of human liberty. Yet it may be necessary to restrict freedom of contract in order to give real freedom and protection of economically weaker classes, and inference with freedom of contract has been so general that it is sometimes suggested that the conception of status is winning back some of its ancient importance. In some countries the details of employment for particular industries are so fixed by law there is little scope of or free discussion by the parties. But, even where wages, hours and conditions of labour are rigidly laid down by arbitration courts, is it accurate to say that the workman enjoys a status? is it not rather a legal determination of the conditions of one particular contract than a condition which affects capacity generally? Apart from the labour contract, does the fact that a person is a workman in a regulated industry affect generally his claims or powers?

In one sense, marriage is a contract the terms of which are fixed by law, but the power of a wife may be affected generally that is not only in relation to her husband, but in relation to third parties as well.

On the other hand, the wage contract affects only the relationship of employer and employed. It is of course, a question of degree and it is not inconceivable that marriage may cease to create a status, whereas in a socialist state the worker may enjoy particular powers merely because he is such. The ambiguity of the term ‘status’ is such that dogmatic assumptions are unwarranted, and even on Allen’s test, it is a question of degree whether the modification of powers and claims is sufficiently general to justify an assumption that a status has been created.

B. Status To Contract

According to Maine the movement of progressive societies has been uniform in one respect. In the stationary societies family is the legal unit, the
Pater families as its head and other members—wife, children, slaves, chattels are dependent on the head of the family and subject to his power. Except the head of the family and subject to his power no one has the power to enter into contracts. The relationship between father and other family members is based on status or position and not on contract. The son, the female, the slave, has only status in the family. In the progressive societies, however, along with legal development there is a marked change towards the growth of individual rights. There is a disintegration of family and dissolution of family dependency and the individual becoming the unit of which civil law takes account. In Western Europe status of slave was abolished and it was superseded by contractual relation of master and servant. The tutelage of female and children also cease to exist in relation of husband and parents. As compared to primitive or non-progressive societies the individual in the progressive societies the individual in the progressive societies became a free willing and free thinking one with all powers to enter into contract. From this Maine concluded:

“….. The movement of the progressive societies has hitherto been a movement from status to contract.”

C. The Status To Contract Theory Questioned

Ever since Sir Henry Maine wrote his Ancient Law (1861) it has been a common place among jurists and some who are not jurists that “the movement of progressive societies has hitherto been a movement from status to contract.” The formula has generally been gratefully accepted as a very useful summary of many phenomena encountered in legal history. Usually, its original meaning is extended so as to embrace within the concept of “status” the immediate or the remote results of agreement. Now and then the formula has been modified or limited or exceptions to it have been noted, then the universality of the doctrine began to be questioned and finally its applicability to Anglo-American law has been categorically denied. In Dean Roscoe Pound’s latest contribution to sociological Jurisprudence we read:
“But Maine’s generalization as it is commonly understood shows only the course of evolution of Roman Law. It has no basis in Anglo-American legal history, and the whole course of English and American law today is belying it unless indeed we are progressing backward.”

The issue framed by this flat contradiction is one of fact. Viewed as an event in the history of Anglo-American juristic thought, the rejection of a fundamental concept in current jurisprudence is no more academic quibble. The position taken by Dean Pound seems an essential part of the ground work of his sociological jurisprudence. Thus he remarks upon the significance of theory:

“The legislative development whereby duties and liabilities are imposed on the employer in relation of employer and employee, not because he has so willed, not because he is at fault, but because the nature of the relation is deemed to call for it.”

It is not only “significant”; it represents “the settled tendency of the present.” For such status the new jurisprudence speaks “the sympathetic judicial development which all statutes require in order to be effective”. The new school denies the soundness of the historical views of those courts that have been talking of freedom of contract in such matters.

D. Reversion From Contract To Status

In recent times it is being freely said that there is a reversion from contract to status, but this is not an accurate description of the process.

In certain respects status has become more important as a source of rights and obligations than it was in 1861 when Sir Henry Maine propounded his famous dictum. National citizenship is today a more important legal status than it was in 1861, when there was hardly any barrier to migration. It must not be forgotten that Maine was mainly writing of personal status. The pattern
of economic relationship has been undergoing a change from a free market negotiated contract between individuals vis-à-vis a particular transaction, one to one relationship to long term continuous relationship between organizations inter-se or consumer and an organization or Government and supplier.

Sometimes, the relationship is not even governed by a contract, e.g., the relationship between various Government Departments or between a Government Department or Government Corporation. These developments led to the virtual destruction of atomistic theory of society in which each individual was perceived as entering into free choice relationship with others and in which the overall social structure was made by large number of such one-to-one relationships.

The role of the individual as the centre of the network of relationships has largely disappeared. This is the sense in which it is correct to speak of enormous decline in the role played by contract in the modern society. A contract must not become a disguised form of status.

The Court in Horwood v. Millar's Timber and trading Co. held a contract illegally by which a man had, without any limitation of time, assigned his salary to a money-lender, contracted with him never to terminate employment without the money-lender’s consent, never to obtain credit, move from his house, and in several other respects to restrict his personal movements. The shape of things in the sphere of contract takes its colour from the development of commerce and industry. The economic pattern has been changing since the later half of the nineteenth century where small business has been yielding place to big business. This development has been characterized by big business concerns and public utility undertakings entering into contract with the users or consumer on the same pattern on standardized terms and conditions evolving form a standard contract.

This was initially adopted by insurers and bankers and subsequently taken over by railways, public-utility undertakings, companies, corporations and cartels, till one finds today that the normal form of business contract is the
standard form of contract. The traditional concept of a contract, individually negotiated between the contracting parties, he has given place to a uniform set of terms and conditions often printed in a booklet form. The result has been though the creation of a contract still requires the agreement of the parties, it is no longer true that the detailed terms of a contract depend upon the agreement of the contracting parties the terms and conditions of the contract and offers it to other for acceptance, which he must either accept as they are or going without. The other party cannot negotiate but merely adheres to the terms and conditions offered. Hence, the contract is called the contract of adhesion.

It may be more correct to regard the relationship, which arises out of such standard contract as one of the status. The other contracting party enjoys, as it were the status of a consumer or supplier to the Government, as the case may be. Since, the beginning of this century, changes in political thought in social and economic conditions and in the law have been taking place at an ever-increasing pace. Most of these changes do not represent on entirely new departure but are a continuation of a process which was already in evidence during the nineteenth century. No doubt, in the purely business area in which merchants contract with each other for the purchase and sale of commodities, much freedom of contract remains even in the classical sense. But it is the emergence of the consumer as a contracting party which led to major changes.

E. The Doctrine Applicable Until MAINE’S Day

Now what is the fact? Is there indeed “no basis in Anglo-American legal history” for status to contract theory generally understood? Its original application was to personal relations derived from or coloured by powers and privileges ancienly residing in the family. Is it not true that the relations of master and servant were originally and still is nominally a domestic relation? And whether the 19th century was out of line with the common law or not, is it not a fact that it has made of this relation a contractual one? “Employer” and
“Employee” (words having reference to the contract) now seem more appropriate terms than the older “master” and “servant” words having reference to status what of the relation has not depended on contract. Hence, persons incapable of making contracts are still competent to become agents. But in the living law of the last century this relation too, has veered from status to contract. The naïve statement in many textbooks and judicial opinions that “agency is a contract” is evidence of the tendency if not of the law. Perhaps even the marriage relation has been made somewhat subject to common law, at least on the property side, though, of course, here we should expect. Conservatism and marriage still be considered a status, but when we leave the family circle and turn the original application of the formula to its possible applications “as it is commonly understood”, it becomes difficult to comprehend. “It is obvious from this investigation, as has been already indicated, that marriage has a tendency to glide into a mere contract.” Even in guardianship, the element of consent now plays an important part. What is meant when we are told that the generalization has no basis in Anglo-American legal history. Holmes has shown the fact, whatever in Anglo-American legal history. Holmes has shown the fact, whatever the reason, that the law of bailment was originally a law of status, and that the 19th century has stretched contract law so as to make a contract even of a gratuitous bailment. Perhaps here the change is in the theory of the law rather than in the law itself; but what shall we say of the law of landlord and tenant? Beginning in status as indicated by the terms still used – though “lessor” and “lessee” are displacing them- it has progressed to the point.

A lease was formerly a conveyance of property, an instrument of status. We can even localize the point where assumpsit was allowed along wide of debt in the collection of rents. Turn to the history of assumpsit, the early tradesman was there sued as tradesman and not as contracting party. We may lament this progress and blame all our ills upon it, if we will, but the fact remains that most business relations have become contractual relations and at least until Maine’s day all business relations had shown a tendency in that direction. In the law of negotiable instruments the peculiar rights and liabilities of the parties were connected with the status of being a trader under
Lord Holt declared that the “gentleman” who signed a negotiable document became ad-hoc a trader. The basis thereafter was agreement. But more significant, because deeper, than the “gentleman” who signed a negotiable document became ad-hoc a trader. The basis thereafter was agreement. But more significant, because deeper, than the change in the particular branches of the law, has been the development of the general theory of implied contract. This is illustrated in the history of possessors liens. The presence or absence of a lien has become imperceptibly to depend on the implied contract. Of course, the terms of the implied contract are to be sought in usage, but there was a time when usage merely dictated a lien of bailees whose status entitles them of one kind or another without the meditation of any theory of implied contract.

Maine was, of course, no prophet. He could not foresee the twentieth century tendency of our law to go back to the year books, but as a shrewd observer of the tendencies about him, he was unsurpassed. At least, with reference to his status to contract generalization, whatever limitations we shall have to insert, whatever exceptions we shall be forced to engrave upon the rule, we must—however reluctantly—dissent from the view that it was a mere Romanism with no basis with no basis in Anglo-American legal history. Here is poetic justice, indeed Maine, who falsely accused Bralton of foisting Roman law on his unsuspecting countrymen, is now charged with having foisted Roman jurisprudence on his still unsuspecting countrymen.

2.4 Intuitionist’s Theory

Why should promises be enforced? To this question, the simplest answer is that of the intuitionists, namely that promises are sacred per-se, that there is something inherently despicable about not keeping a promise, and that a properly organized society should not tolerate this. This may also be said to be the common ‘man’s theory’. Learned writers ignore this because of their interest in showing the evil consequences of allowing promises to be broken.
There can be no doubt that common sense does generally find something revolting about the breaking of a promise, and this, if a fact, must be taken account of by the law, though it may be balanced by other factors or considerations.

In any case, let us not ignore the fact that judges and jurists, like other mortals do frequently express this in the feeling that it would be an outrage to let one who has broken his promise escape completely.

But while this intuitionist theory contains an element of truth, it is clearly inadequate. No legal system does or can attempt to enforce all promises. Not even the cannon law held all promises to be sacred. And when we came to draw a distinction between those promises which should be and those which should not be enforced, the intuitionists theory, that all promises should be kept, gives us not light or guiding principle.

Similar to the intuitionists theory is the view of Kantians like Reinach that the duty to keep one’s promise is one without which rational society would be impossible. There can be no doubt that from an imperial or historical point of view. The ability to rely on the promises of others adds to the confidence necessary for social intercourse and enterprise. But as an absolute proposition this is untenable. The actual world, which assuredly is among the possible ones, is not one in which all promises are kept, and there are many people – not necessarily diplomats – who prefer a world in which they and others occasionally depart from the truth and go back on some promise. It is indeed very doubtful whether there are many who would prefer to live in an entirely rigid world in which one would be obliged to keep all one’s promises instead of the preset more viable system, in which a vaguely fair proportion is sufficient. Some freedom to change one’s mind is necessary of free intercourse between those who lack omniscience.

For this reason we cannot accept Dean Pound’s theory that all promises in the course of business should be enforced. He is undoubtedly
right in his insistence that promises constitute modern wealth and that their enforcement is thus a necessity for maintaining wealth as a basis of civilization. Businessmen as a whole do not wish the law to enforce every promise.

Though the great authority of Gierke, following Tacitus and Grotius, can be filled for the view that the early bermans attached great importance to keeping one’s word; the evidence collected by men such as Brunner Von Amira, Heasler and Brissaud shows that the Germans; like other peoples, held promises binding only if some real object passed hands or some formal testimony took place, otherwise, pledge or security was required.

2.5. The Equivalent Theory

In the 18th century, the Equivalent Theory gained ground.

The Equivalent Theory had influenced on Anglo-American law and many jurists considered it to be the origin of the Theory of Consideration.

The basic principle of Equivalent Theory is that every promise, in its ultimate analysis, is a bargain. This theory is called Bargain Theory which is a developed form of Equivalent Theory.

Popular sentiment generally favours the enforcement of those promises which involve some quid pro quo. It is generally considered unfair that after A has given something of value or rendered B some services, B should fail to render anything in return. Even if what A did was by way of gift, B owes him gratitude and should express it in some appropriate way. And if, in addition, B has promised to pay A for the value or services received, the moral sense of the community condemns B’s failure to do so as even more unfair.
The demand for justice behind the law is but an elaboration of such feelings of what is fair and unfair.

The Equivalent theory of contract had the advantage of being supported by this popular sentiment. This sentiment also explains the primacy of real contract.

While a legal theory must not ignore common sense, it must also go beyond it. For common sense, while generally sound at its core, is almost always vague and inadequate. Common sentiment, for instance demands an equivalent. But what things are equivalent? It is easy to answer this in regard to goods or services that have a standard market value. But how shall we measure things that are dissimilar in nature or in a market where monopolistic or other factors prevent a fair or just price? Modern law therefore professes to abandon the effort of more primitive systems to enforce material fairness within the contract. The parties to the contract must themselves determine what is fair. Thereby, however, the law loses a good deal of support in the moral sense of the community.

Though legal historians like Amos are right in insisting that the common law doctrine of consideration did not originate in the la's insistence on equivalence in every, the later idea cannot be eliminated altogether. It colours the prevailing language as to consideration, and especially the doctrine that in a bilateral contract each promise is a consideration for the other. If a bare promise is of no legal validity, how can be it of any profit to the promise or of any detriment to the promissory? Clearly, two things that are valueless cannot become of value by being exchanged for each other. The real reason for the sanctioning of certain exchanges of promises is that thereby certain transaction can be legally protected, and when we desire to achieve this result we try to construe the transaction as an exchange of promises. Consideration is in effect a formality, like an oath, the affixing of a seal, or a stipulation in court.
The difficulty in the way of Equivalent theory is that law considers inadequacy of consideration to be of no importance. Successive attempts have been made by the courts to propound principles in order to hold men to their undertaking; overriding consideration has been to ensure the sanctity and security to the transaction. A man’s word given in the course of business should be as good as his bond. The theory of consideration has been in vogue for the last four hundred years, yet up to today there is no comprehensive definition of consideration. In the continental countries all promise made deliberately are enforceable without the requirement of consideration.37

2.6 Holmes Theory Of Law Of Contract

In his “common Law” Mr. Justice Holmes expressed the view that a contract is properly to be regarded as the taking of a risk creating liability to pay damages in a certain event. The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. His position seems to be that liability in contracts is completely analogous to that in Tort you commit a tort you are liable to pay damages, unless something happens, i.e., performance, over which you are liable to pay damages, unless something happens, i.e., performance, over which you may or may not have control it is a conditional liability to pay damages. There is, he holds, no reason to speak of ‘promise’ in the matter at all, in particular, the performance and the payment of damages are not to be thought of as alternative obligations (this is answer to an objection by Pollock).

To this Pollock makes various objections. Such a view, he says, disappoints reasonable expectations (one does not buy a right to damages, one buys a horse). It is inconsistent with the law of specific performance. It is inconsistent with the doctrine that anticipatory refusal to perform is a breach. It is inconsistent with rules about frustration and the like. To the reasonable expectations point Holmes answers: “I don’t see why the cases on damages
do not embody the principles of reasonable expectation: he must know that the person he contracts with believes that he accepts the contract with the special conditions attached to it.” That seems to be no answer; he knows, indeed, that it is possible that he may be put off with damages, but that is not what in the normal case, he either wants or expects. But perhaps the objection is not fatal; the law does sometimes disappoint reasonable expectations. As to specific performance, Holmes replies that this is not common law, and is exceptional. That, again, seems to be no answer. Pollock observes that it is the normal remedy in other systems i.e. German law.

It is observed that Holmes neat parallel commit a tort, commit a contract- is extremely misleading. A man who has committed a tort has done a wrong and rendered himself liable to proceedings. That is indeed what; in this connection, the word ‘commit’ means. It comes to us from the Latin, probably through the Roman law and commission is a wrong done. But a man who commits a contract, in Holmes sense, that is to say makes one, has not rendered himself liable to legal proceedings, though later events may do so. He has done no wrong, and the word ‘commit’ is wholly in appropriate.

2.7 The Moral Theory

It was Professor Goodhart, who said, “that the moral basis of contract is that the promissory has by his promise created a reasonable expectation that it will be kept”. This theory of a moral basis has been in vague for long, since in 1916, Sir Thomas Erskine Holland had declared 38 “That when law enforces contracts it does so to prevent disappointment of well founded expectations, which though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise.” There is good support for this in American opinion expressed by Professor Corbin in 1950 in his work on the Law of Contracts: 39

“That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations
that have been induced by the making of promise. Doubtless this is not only purpose by which men have been motivated in creating the law of contracts…….”

We had already to the historical aspect of the early growth of the contract laws in England- the old writs then in action on the case and the further development of Assumpsit. The action on the case was merely an attempt to bring to look the promissory for his moral lapse in not fulfilling his promise. The earlier writs were technical and were only a means of enforcement of certain contracts.

There was no moral or ethical emphasis in the theory of those writs. But in the fifteenth and sixteenth centuries, the moral aspect forced a solution. The promissory by his deceit failed to carry out his promise and caused injury to the promise. It was but proper the latter should be enabled to recover damages for breach of contract. To break a contract and injure the other party was immoral. So the ‘Action on the case’ was resorted to as a suitable remedy in such cases.

The moral basis was stressed also to bespeede up commerce which was growing in those centuries (15th and 16th), Commerce grew on credit and credit was matured on promise. If the promise was broken, the edifice of commerce stood in danger. So Sir George Paton rightly stated “credit depends essentially on ability to rely on the promise of others and thus can flourish only where there is a fully developed law of contract.”

The third ground on which the moral basis of contract was matured was the cause of justice. If parties come to an agreement freely and independently, it is but just they are enabled to keep to the agreement. The law of contract is sanction for the legal enforcement of such promises; it guaranteed the fulfillment of reasonable expectations. As stated already the Court of Chancery often stepped in to fill the gap in the common law writ system to fulfill the moral demands of individuals and society.
“The church very early took a strong view of the sanctity of contractual relationships, insisting that in conscience the obligation of a contract was completely independent of writings, forms and ceremonies and tried so far as he could translate this moral theory into terms of law.”

Though the kings court refused to ratify a pledge of faith and the constitution of clarendon (1164) also would not allow ecclesiastical courts from enforcing them, yet the later courts would not allow moral lapses in the shape of breach of faith. In medieval times the obligations of law and religion were almost indistinguishable, and despite the constitutions of clarendon, the common lawyers would press for the moral basis of contract and their performance. The court of chancery hereforth offered remedies where good faith and honest dealing demanded promises being enforced. Gradually, this influenced the common law courts also to give suitable remedy for a breach of contract. The writ of Assumpsit was the result. The doctrine of consideration had not yet then fully developed but the judges felt a duty to enforce moral obligations.

Dutton’s case indicated the trend. Family affinity was enough moral bound to provide as the consideration for a promise. The theory of ‘Good’ family consideration was the precursor to the theory of ‘valuable consideration’. Lord Mansfield developed this aspect in Alkins v. Hill. The action in Assumpsit was successfully launched in that case by a legatee upon a promise by an executor with adequate assets to pay a legacy. The learned Chief Justice remarked:

“It is a promise made upon a good and valuable consideration which in all cases is a sufficient ground to support an action. It is so in case obligations which would otherwise only behind a man’s
conscience and which without such promise, he could not be compelled to pay.”

The theory of moral basis was further developed by the same judge some years later in Hawks v. Saunders, wherein he stated, “Where a man is under a moral obligation which no court of law or equity can enforce any promises, the honesty and rectitude of the thing is consideration. The tide, however, turned against such a general doctrine in Rann v. Hughes and Littlefield v. Sheek. In the last case Lord Tenderden C.J. put it: “The doctrine that a moral obligation is a sufficient consideration for a subsequent promise is one which should be received with some limitation.” The moral theory had to meet the challenge in latter years of the doctrine of consideration.

The theory of sufficiency of consideration put the theory of moral obligations more and more remote. The moral theory still lingered on in Leev. Muggeridge but in Eastwood v. Kenyan it got its final death blow, with Lord Denman declaring: -

“The doctrine would annihilate the necessity for any consideration at all, in as much as the mere act of giving a promise creates a moral obligation to perform it”.

And his Lordship cited that of the many mischievous consequences to society and would be “The frequent performance of voluntary undertakings to claims for just debts.”

Thus the ‘moral’ theory which held the field for over a generation made its exit in the middle of the nineteenth century. Slowly the rationalistic school of Bodin and Hobbes canvassed the gospel of reason and drew a distinction between law and morality. Utility rather than morality provided the justification to the enforcement of obligations.
Jeremy Bentham was the exponent of utilitarianism and gave the lead to John Austin’s theory of sovereignty and the commands of the sovereign which necessarily separated jurisprudence from morals. The analytical jurisprudence of Austin was explained by Salmond\textsuperscript{51} as:

\textit{“to analyse without reference either to their ethical origin or development or their ethical significance or validity, the first principle of the law”}.

Holland and Salmond walked on the footsteps of Austin and concluded that contracts should be enforced so as to prevent disappointment of well-founded expectations. Alongside this analytical school, there was the statistical school of which Maine and George Paton could be mentioned. This school laid emphasis on the gradual evolution of legal institutions amid changing social and economic background. Paton in his jurisprudence referred to the dictum ‘status to contract’ as not merely a convenient generalization of certain aspects of legal history but an external principle, the onward march of which could not be stayed.\textsuperscript{52} There was yet another school called the ‘Will Theory’ of contract where the essence of agreement was considered to be in the union of wills.

2.8. The Will Theory \textsuperscript{53}

The every increasing needs of commerce forced the Roman Law to evolve the theory that every promise made intentionally is binding and enforceable. The theory was called the ‘Will Theory’ of contract.

According to the Will Theory, agreement was necessarily the outcome of consenting minds. There must be consensus ad idem to bring into being a contract. Agreement, however, is not a mental state but an act, and as an act is a matter of inference from conduct. The parties are to be judged, not by what is in their minds, but by what they have said or written or done. If one party makes to other a promise which is reasonably understood by that other
to be intended to effect legal relations and the promise, acts upon it to his
detriment, the promisor will be contractually bound by the promise even
though he did not intend to contract, or to contract in those terms.

In the 18th century the property orientation of the community led to the
law being protective and paternalistic about the fairness of an exchange. The
subsequent doctrine, that adequacy of consideration is for the parties alone,
obtained in the 19th century, was not present in the 18th. The stress on the will
theory of the 19th century was not present in the law of the 18th century. In the
19th century law of contract was of regulative nature, leaning it to the parties to
enter into any contract they liked within the permissible limits of the law and
such a contract had to be enforced by the courts irrespective of the question
whether it was fair or reasonable.

Law of part executed contract was slowly but surely yielding place to
the law of executory contract, which was adopted as the classical model of
contract.

In an executory contract, a party was liable not because of anything
done at the time of entering into the contract but because of his promise or
intention to do something in the future. The importance of the contract led to
the formulation of the will theory.

Mansfield while putting emphasis on intention in the interpretation of
the contract had also emphasized the importance of intention in the formation
of the contract by talking of the intent of a transaction in his judgements. 54
e.g., Kingston v. Preston.55

It was argued that if a transaction could have an intent and if the
interpretation and effect of a contract depended on intent of the parties, why
can’t the creation of a liability, i.e. formation of the contract depend on the
parties intent.
According to classical view, the law of contract gives expression to and protects the will of the parties, for the will is something inherently worthy of respect. Hence, such authorities as Savigny, Windshield, Pothier, Planiol, Salmond and Langdell hold that the first essential of a contract is the agreement of the wills, or the meeting of minds.

The metaphysical difficulties of this view have often been pointed out. Mind or will are not in themselves existing things that we can look at and recognize. We are restricted in our earthly experience to the observations of the changes or actions of more or less animated bodies in time and space; and disembodied minds or wills are beyond the scope and reach of earthly law. But while this objection has become familiar, it has not been very effectively. The force of the old ideas, embodied in the traditional language, and has not always been overcome even by those who like Langdell and Salmond professes to recognize the fictional element in the will theory.

Another line of objection can be found in the incapability of the classical theory with the consequences that the law attaches to an offer. Law demands definite rules with regard to the time that an offer is accepted, if the parties are corresponding by post. In English law and Indian law contract is completed when the letter of acceptance is posted, but an offer can be revoked only when the revocation is communicated to the offeree. It may happen that A reads an offer and posts his acceptance after B has sent a telegram revoking the offer, but, so long as A posts the letter before he receives the telegram, the contract is valid, although the real will of the parties were not ad idem at any particular moment.

A more important objection to the theory that every contract expresses the consensus or agreed wills of the two parties is the fact that most litigation in this field arises precisely because of the advent of conditions that the two parties did not foresee when they entered into the transaction.

Litigation usually needs the absence of genuine agreement between the parties ab-initio. If both parties had foreseen the difficulty, provision would
have been made for in the beginning when the contract was drawn up. When courts thus proceed to interpret the terms of the contract they are generally not merely seeking to discover the actual past meanings (though that may sometimes be investigated) but more generally they decide the “equities” the rights and obligations of the parties, in such circumstances; and these legal relations are determined by the courts and the jural system and not by the agreed will of the consenting parties.

Planial and others have argued that while certain effects of a contract may not have been foreseen by the parties, nevertheless these are effects following from the original objective and are, therefore, the will of the two contractors. But to argue that because the law fixes certain obligations you did foresee something that in fact you did not see is a confusion which would be too ridiculous to criticize, were it not so prevalent in juristic decisions. So in contracts men are liable for things that they did not actually foresee; and to say that they intended or willed these results are a fiction designed to save the will theory.

The will theory leads to such a subjective view of mistake that the security of transaction is thereby imperiled. Where the mistake is due to A’s carelessness and the other contracting party is unaware of A’s error, the real will of the parties cannot be regarded as ad idem, but to avoid the contract would frequently be very unjust. Modern law tends to take rather a narrow view of the kinds of mistake which void a contract. The obvious limitations of the will theory of contract have caused a reaction that takes the forms of position or behaviorism. Away with the whole notion of will – the only realities are specific acts to which the law attaches certain consequences, that is, if you do something by word of mouth, by writing or by any other act that someone else takes a promise, then latter can under certain conditions, bring an action. In its extreme form, this appears in what Dean Pound calls the state of strict law, which like everything called primitive, is always with us. A developed system of law, however, must draw some distinction, between voluntary and involuntary acts. Mr. Justice Holmes thinks that even a dog discriminates between one who stumbles over him and one who kicks him.
The whole of the modern law of contract, it may be argued, thus does and should respond to the need of greater or finer discrimination in regard to the intentional character of acts. The law of error, duress and fraud in contract would be unintelligible apart from such distinction.

2.9 Injurious Reliance Theory

In sharp contrast to the will theory is what Pound has termed the injurious reliance theory. Though this seems to be the favourable theory today, it has not yet been adequately formulated and many of those who subscribe to it fall back on the will theory when they come to discuss special topics in the law of contract.

Injurious reliance theory is considerably followed in the United States, and places emphasis upon consensus and much more upon legal expectations aroused by the conduct of the parties.

The difficulties attendant upon a definition of a contract in terms of agreement have led the supporters of this theory to concentrate their attention on the element of a promise, which it is said, is more suggestive of an objective attitude than agreement.

In English Law, certain additional factors are required for the validity of a contractual obligation. The contract must either be executed in a certain form (i.e., under seal), in which case no injurious reliance need be shown, or there must be present some ‘consideration’ moving from the promise. As this consideration is normally a deteriment, or injury, to the promise, it might seem to accord well with the theory of injurious reliance. But this is not in fact the case, for the deteriment must have been incurred in return for the promise, and so the idea of agreement is seen once again.
In the 18th century, contractual liability was based on reasonable expectation (reliance) rather than on promise. Promise was assigned the role of an instrument of justification.

Eighteenth century witnessed a slow change. In the 18th century the prices of land changed very little. Contracts for future performance made in the 18th century contained no element of risk or very little risk if at all. Mostly contracts were executed contracts.

Executory contracts stipulating future performance were usually entered into because of some practical requirement of deferring payment of price or investigation of title, etc. The contracts had not yet assumed the characteristics of risk allocation. It was much later that he contract became an instrument of future planning. A person who bought at the ruling market rate at the time of entering into the contract with an eye to the rising market was rewarded for his foresight.

But in the 18th century such a transaction was not considered to be in good taste. Though expectation damages came subsequently to be regarded as reward for foresight, in 1775 they were frowned on. The court observed in Flureau v. Thornhill: 58

“To ask for expectation damages is to ask the court to count the plaintiff’s egg as chicken before it hatched.”

The essence of theory, however, is clear enough. Contractual liabilities arise or should arise only where (1) some one makes a promise explicitly in words implicit by some act; (2) some one else relies on it and (3) suffers some loss thereby. The theory emphasis on conduct rather than on status of mind, the reason for the enforcement of the contract is security rather than any mystical union of wills.

This theory appeals to the general moral feeling that not only ought promises to be kept, but than anyone innocently injured by relying on them is
entitled to have his loss “made good” by the one who thus caused it. If, as Schopenhaver has maintained the sense of wrong is the ultimate human source of the law, then to base the obligation of the promise on the injury of the one who has relied on it, is to appeal to something really fundamental.

This theory has also appealed powerfully to modern legal theorists because it seems to be entirely objective and social. It does not ask the court to examine the intention of the promissory. Instead, the court is asked to consider whether what the defendant has said or done is such that reasonable people generally do rely on it under the circumstances. The resulting loss can be directly proved and to some extent, even measured.

But the injurious reliance theory is the best only an approach, for it has not been fully worked out. Firstly, the law of contract is not created by deductions from a peculiar theory, but the presence of practical needs on the legal structure bequeathed by history. The views of lawyers change, and in every legal system we find legacies from the past that conflict with modern views. Hence, even if it be useful to study the theories that underlie the law of contract, we can not expect to find a consistent approach in any one system of law. Thus no legal system regards mere reliance on the promise of the another as sufficient. Both English and Continental law require an intention to effect legal relations and in England there is the further requirement that there must be either consideration or deed. Secondly, in most systems, if a contract is created there is no need to prove injurious reliance. A promise by deed to give a donation is binding even although the recipient has not altered his position for the worse by relying upon it. Thirdly, the word ‘security’ has not been thoroughly analysed. Demogue, dealing with transfer of title, distinguished between static and dynamic security. Static security protects the rights of owners and prefers to sacrifice, if necessary, the rights of bonafide purchasers for value. Dynamic security results from the desire to facilitate transactions and to over rule some of the inconvenient consequences of the maxim, nemo dat non habeat. With regard to the transfer of land, the traditional English approach has been to protect the interests of the owners even at the cost of rendering transactions slow and cumbersome, although
legislation had lately somewhat simplified the problem. With regard to personal property, the instructions of dynamic security were more far reaching. Rules concerning Negotiable Instruments, The Factories Act of 1889 and certain provisions of the Sale of Goods Act may lead to the title of the true owner being defeated without his own consent. The security of which Pound speaks is somewhat analogous to dynamic security in that it facilitates the speed of transactions. But Domogue is analyzing the problem from the angle of the owner of property, Pound from the approach of a contracting party who wished to know if he may rely on the conduct of another. Security, in terms of the injurious reliance theory, can mean only ability to rely on expectations reasonably aroused by the conduct of another.

There can be no question about the soundness of the injurious reliance theory in accounting for a dominant phase of the law of contract, and the foregoing difficulties may thus seem petty. But they do call attention to fundamental obscurities in the very idea of “reliance” as well as in the criteria of “injury”. The injurious reliance theory, like others calls attention to a necessary element but does not give an adequate account of the whole of the law of contract. Its merits are clearer when its claims are properly limited.

The theories of reliance were over-shadowed by the consensus theory.

By the end of the 19th century, academicians had to face the problem regarding the place of consideration in the classical concept of contract. One school advocated the concept that benefit or detriment could be the consideration for the contract, while the other school advanced the idea that only detriment could be considered as sufficient consideration. It was only the beginning of the 20th century that the clouds cleared and the concept of the first school gained prominence.

2.10 Modern Developments

The old respect of the individual for his contractual obligations is not so much in evidence in modern days. We no longer can say that the sphere of
individual assertion is increasing and ought to be increased. For various reasons the law has interfered seriously with contractual liberty, sometimes in the interest of the economically weaker party, sometimes in the hope of regulating an industry in order to protect it from foreign competition. Non-performance of obligations found support in the development of the doctrine of frustration. The demand for the relaxation of the strict letter of the contract to relieve hardship and the importation of terms if performance was insisted upon was more in evidence. Defences of illegality or immorality or public policy helped a party who desired to back out from his pledged word. Professor Friedmann in his book law in changing society has mentioned four major factors which are responsible for transformation in the function and substance of contract which is creating a widening gap between legal reality and the traditional textbook approach.

The first is the widespread process of concentration in industry and business, corresponding to an increasing urbanization and standardization of life. Its legal result is the ‘Standard Contract’ or ‘Contract of Adhesion’.

The second factor is the increasing substitution of collective for individual bargaining in industrial society. Its legal product is the collective contract between management and labour, with a varying degree of state interference.

The third factor is the tremendous expansion of the welfare and social service functions of the state in all common law jurisdictions; its legal product is two fold: on the one hand; it has led to multitude of statutory terms of contract, substituted for, or added to, the terms agreed between the parties, on the other hand, it has led to a vast increase of contracts where government departments or public authorities are on one side, and a private party on the other. The effect of this side on the law of contract, though as yet little explored, is profound.
Lastly the economic security aspect of contract, the elaboration of remedies for breach, is increasingly affected by the spread of such political, economic and social upheavals as war, revolution or inflation.

Its legal result is the doctrine of frustration of contract, which its consequent extension of legal excuses for the non-performance of contract.

All these developments affect the theory and practice of contract, but in different ways. The social security ideology means emphasis on stability and corresponding lack of mobility, especially in employment contracts. Collective bargaining on the other hand, has substantially restored equality of bargaining power between employers and employees, though increasingly at the cost of individual freedom, as the legal or practical compulsion to join employer’s associations and trade unions progresses. The imposition of statutory duties in the interest of social justice largely sacrifices mobility for stability and security. The increasing participation of public authority in contract creates the wider and as yet generally unexplored problem of the dual function of the state, as a superior and as an equal.

The standardization of the contract greatly restricts the freedom of the weaker party, and is usually accompanied by inequality of bargaining power. They are too common in a highly commercial society. Customer is negatively drawn into these contracts by force of circumstances. He is amazed later when he is told that he cannot get from the court the relief he wants on account of the “exemption clauses” placing the promissory in an undesirably advantageous position. The abstract legal theory of contract as an agreement arrived at through discussion and regulation must be supplemented by a realist study of its operation in the world today.
Reference


2. Complete the following definitions “The most popular description of a contract that can be given is also the most exact one namely, that it is a promise or set of promises which the law will enforce. The specific mark of a contract is the creation of right, not to a thing, but to another men’s conduct in the future.” “Every agreement and promise enforceable by law is a contract.” Pollock, contracts 3rd ed. Pp. 1, 2. A contract is “an agreement enforceable at law, made between two or more persons by which rights are acquired by one or more to acts or forbearances on the part of the other or others.” Anson Contracts. “The act alone is the contract. The resulting contractual relation is quite a different thing.” Holland Jurisprudence. “An agreement enforceable by law is a contract.” Section 2(ii) Indian Contract Act, 1872.


4. Status is in the main a matter of personal capacity :per Scott L.J., Re Luch’s settlement Trusts, (1940) ch. 864 at 889.

5. Jurisprudence, ii, 687.

6. Other possibilities are civil death, heresy, slavery. But the latter hardly creates a status, for the slave is not really a person at all. Prodigality may create a status, but some regard the prodigal as only another instance of the feble-minded.

7. Legal Duties, 28. And see R.H.Graveson, Status in the common Law (1953).

8. ‘Status is in every case the creature of substantive law”: per Scott L.J. in Re Luck’s Settlement Trusts, (1940) ch. At 890.

9. 10 Mod. L.R. (1947), 80 at 81.


11. Supra., 72.

12. L. Josserand, Evolutions et Actualities, 159.

13. C.K. Allen, Legal Duties, 43.


15. The majority of the High Court of Australia held that such a decree not affect the status of the parties, but only the incidents thereof: Ford, (1947) A.L.R. 181.

16. Legal Duties. 47.

17. Re Luch’s Settlement Trusts, (1940) 1 ch. 864 at 891; see also Salvesen v. Administration of Austrian property, (1927) A.C. 641.

18. But according to the decision of the C.A. cited in the preceding note, there are exceptions to this rule. The dissenting judgement of Scott L.J. seems more reasonable: G.C. Cheshire, private International Law (8th ed.), 174.


20. Once the age of majority varied according to the class of the person concerned. Thus, the mercantile community required only ability to count and weigh, the spokeman must achieve the age of fifteen years, and the knight twenty-one: Pollock and Maitland, History of English law, ii 436. Again the rules evolved by equity to protect the property of
wealthy wives were gradually extended by statute for the protection of all.

21. R. Pound, Interpretations of legal History, 54-61. R.H. Graveson, 4 Mod.L.R. (1941), 261, suggests that the dictum is not readily applicable to the common law - The foundation of feudalism was agreement.

22. Cf. P. Vinogradoff, Collected Papers, ii. 230. st seq. L. Josserand, Evolutions it Actualities, 167, speaks of les noue aux faibles. It should be pointed out that Maine expressly guarded himself, for he stated that the progress has hitherto been from status to contract.

23. In modern communities the powers of a husband are not “affected generally” because he is married. Yet it is common to speak of a married man (or even a bachelor) or a woman as enjoying a particular status. This illustrates the wider use of the term, which really deprives it of all significance for jurisprudence.

24. Thus Edward Jenks in Law and Politics in the Middle Ages (1867) speaks of “caste and contract”. See chapter VII.


26. Sir Frederick Pollock’s Note, L to Chapter V of Maine’s Ancient Law (1906).


29. Thus 26 Cye. 968: “The relation of master and servant arise only out of contract.”

30. 2 C.J. 432, Agency as a Contract, quotes Cullinass v. Garfenkle (19906) 114 App. Div. 509: “Agency is a contract, and like other contracts, it is essential that the minds of the parties should meet in making it.”

31. A score or more of our states have statutes declaring marriage “a civil contract” having reference rather to the inception of the relation then to its incidents. CF. Sheldon Amos, The Science of Law (1880) 217.

32. O.W. Holmes. The Common Law (1881), Lecture V.

33. For the Elizabethan cases showing the Transition, sec- 2 Bray’s cases on property. (2nd ed.) 571.


36. Law and Social Order, Maris. R. Cohen, P.98

37. Law relating to Government Contracts- M.A. Sujan.

38. Jurisprudence, 12th ed. (1916) at P.262


40. Jurisprudence, 2nd ed. P.350


43. See Dutton v. Poole (1677) 2 lev. 210,211,292.

44. (1775) 1 Coup. 284:288.

45. (1782) 1 Coup.289.

46. (1765) 4 Brown P.C. 217.

47. (1881) 2B and Ad. 811,818.
48. (1813) 5 Taunt. 36.
49. (1840) 11 Ad. E-438.
50. Fiffot op. Cit. at P.140-141.
51. Jurisprudence, 11th ed. At p.4
52. Jurisprudence, 1sr ed., P.298: cited David Hughes Parry’s ‘sanctity of contracts’, P.15
53. This theory is taken from Paton,s book on Jurisprudence.
54. Law relating to Govt. Contracts- M.A.Sujan
55. 1773 2 Doug. 689,99 E.R. 437
56. This theory has been taken from Paton’s Book on Jurisprudence and now relating to government contracts from M.A.Sujan.
58. 1775 2 W.B.L. 1078, 96 E.R. 635.
Chapter 3
Exemption Clauses and Freedom of Contract-
An Analysis of The Modern Trends In The Light of Statutory
Enactments and Judicial Decisions.

3.1 Introduction

Freedom of contract is the most cherished aspects of individual liberty and it is therefore unfortunate that its ambivalent nature has resulted in its abuse. In the words of Sir George Jessel,

“If there is one thing more than another which public policy requires, it is the men of full age and competent understanding shall have the utmost liberty of contracting and their contracts, when entered into freely and voluntarily, shall be entered by courts of justice”. ¹

Freedom of contracts has no longer absolute value attributable to it in the 19th century. Great inroads have been made by legislation and judiciary. Restrictions on the contractual freedom of parties have been inevitable. The doctrine of freedom of will has confronted with the social pressures and economic compulsions of all sorts and the principle of formal equality of the two contracting parties becomes an instrument of oppression and injustice in the face of economic inequality. As a result of humanitarian philosophy, the moral principle that one should abide by one’s agreement and fulfill one’s promises was being increasingly met by another moral principle, namely, that one should not take advantage of an unfair contract which one has persuaded another party to make economic or social pressure.

The old respect of the individual for his contractual obligations is not so much in evidence in modern days. Non-Performance of obligations found support in the development of the doctrine of frustration. The demand for the relaxation of the strict letter of the contract to relieve hardships and the importation of terms, if performance was insisted upon, was more in evidence.
Defences of illegality, immorality or public policy helped a party who desired to back out from his pledged word.

The philosophy of welfare state has converted the state into a giant business and industrial corporation, and the almost universal faith in economic planning has reduced, beyond recognition the scope of the freedom of contract. And lastly, the process of mass production and distribution has given birth to the standard form contract which has curtailed the parties freedom of contract to a very great extent.

But as a freedom became a rallying cry for political reforms, freedom of contract was the ideological principle for development of the law of contract. In Main’s classical phrase, it was widely believed that “the movement of the progressive societies has hitherto been a movement from status of contract.”

Williston adds: “Economic writers adopted the same line of thought. Adam Smith, Ricardo, Bentham and John Stuart Mill successively insisted on freedom of bargaining as the fundamental and indispensable requisite of progress; and imposed their theories on the educated thought of their times with a thoroughness not common in economic speculation.”

In the 20th society the tide has turned away from the 19th century tendency towards the unrestricted freedom of contract. While the parties to the contract as they please for lawful purposes remain a basic principle of our legal system, it is hemmed in by increasing legislative restrictions. Two areas of the law serve to illustrate this. Contracts of employment are controlled by a wide range of Federal and State laws concerning minimum wages, hours, working conditions and required social insurance programs. Contracts of insurance, perhaps to a greater extent than labour contracts, are controlled by often terms of policy are dictated by statute.

Apart from legislative restrictions on freedom of contract it seems likely that in future there will be greater restrictions imposed by courts in the exercise of their function of developing the common law. There has been
increasing recognition in legal literature that the bargaining process has become more limited in modern society.

In purchasing a new automobile, for example, the individual may be able to dicker over price, model, color, and certain other factors, but if he wishes to commute the contract to purchase, he usually must sign the standard form prepared by the manufacturer (although he is contracting with an independent dealer). He has no real choice. He must take that form or leave it. Such contracts called contracts of “adhesion” constitute a serious challenge too much of contract theory.

Most of contract law is premised upon a model constituting of two alert individuals, mindful of their self-interest, hammering out an agreement by a process of hard bargaining. The process of entering into a contract of adhesion, however “…is not one of haggle or co-operative process but rather of a fly and flypaper.” Courts, legislators and scholars have become increasingly aware of this divergence between the theory and practice of contract formation, and new techniques are evolving for coping with the challenges stemming from this divergence.

Freedom of contract presaged

Freedom of Choice in the sense that nobody was bound to enter into any contract if he did not chose to do so.

Freedom of Choice in the sense that everyone had a choice of persons with whom he can contract.

Freedom of choice in the sense that people could make virtually any kind of contract on any terms they chose.
(i) Freedom of choice in the sense that nobody was bound to enter into any contract if he did not choose to do so

In the early nineteenth century the proposition that nobody was bound to enter into a contract at all if he did not choose to do so, reflected the realities of the situation as obtained at that time. In that period it was only in very few cases that a person was under a legal obligation to enter into a contract, e.g., Persons exercising “common calling” such as inn-keeper, common carrier etc.

The classical concept of freedom of contract took no notice of the social and economic pressures, which might virtually force a person to enter into the contract. Even in the nineteenth century in case of persons who had to find a job it meant entering into a contract of service. Public services like supply of water, electricity etc., could only be obtained by entering into contracts. The conditions obtaining today virtually force a person to enter into a contract, which he had no desire to make. A person may be compelled to join a trade union (by entering into a contract), in order to exercise his trade or even earn his livelihood. A retailer may be virtually compelled to contract with a whole seller to obtain goods necessary for his business.

(ii) Freedom of choice in the sense that everyone had a choice of persons with whom he can contract

Ordinarily in a competitive society every one has a choice of persons with whom he could enter into a contract. But in the case of public utilities run by monopolistic concerns, there is no choice left to the consumer, he has to take it or leave it. There is a steady modern tendency towards larger and larger industrial and commercial organizations culminating in monopoly, still it is common to find different organizations agreeing together to form a ring.\(^7\)
(iii) Freedom of choice in the sense that people could make virtually any kind of contract on any terms they choose.

Freedom in this sense was even in the nineteenth century somewhat restricted. There was always the overriding consideration of public policy and the courts retained the power to declare contracts to be ineffective being repugnant to public policy. As noticed the development of economic patterns took place by which public utilities and other spheres of activity were operated by monopolistic concerns or rings leaving no choice to the individual. These concerns developed a form of standard contract imposing their own terms, a contract of adhesion as it was called which in effect meant take it or leave it, leaving no option to the individual to negotiate the terms of the contract.

The image envisaged by the classical theory of contract of two physical individuals sitting across a table and negotiating terms of the contract is replaced by huge corporations, monopolistic concerns and industrial and commercial rings dictating their terms embodied in standard form of contract, leaving no option to the party to negotiate or settle terms of the contract.

The classical theory assumed equality of bargaining power in a background of free market. The foundation of this concept was shared when corporations increasingly displaced physical persons as legal individuals as parties to commercial and industrial contracts. The concept of bargain between two equally placed individuals was no longer a reality.

It is nowadays no exaggeration to say that important contracts are not made between individual persons at all. They are made either between two organizations on one side and an individual on the other, an obvious example of inequality of bargaining power. It may be noticed that in the purely business area in which merchants contract with each other for the purchase and sale of commodities, much freedom of contract still remains in the classical sense. But it is the emergence of the consumer as a contracting party with large corporations at the other end, which led to major changes.
In the first case contract may be briefest possible in the shape of BOUGHT and SOLD – NOTES . A TWO LINE AFFAIR- while in the second case the contract would be in the Standard Form a complete code in itself-A PRINTED BOOK.

3.2 Freedom of contract as restricted by equity, legislation and common law.

No doubt the courts of equity even during the seventeenth and eighteenth centuries were inclined to assist in the enforcement of contracts. But it declined to exercise it in cases where the partner was guilty of dishonesty and sharp practice.

For e.g. where A contracted to purchase the estate of B pretending that it was for a friend of B and therefore got it cheaper when in fact he had bought it for another, the court refused to help A. ⁹

In Webster v. Cecil. ¹⁰ Plaintiff sued for specific performance of contract to sell a certain property for £1250. The defendant’s plea was that he had refused to sell it to plaintiff even for £2000 but in his letter he had by mistake offered it for £1250. Plaintiff knowing the error accepted the written offer. The court refused to help the plaintiff and said it cannot compel a party to sell property for less than its real value. In Equity plaintiff can ask no relief though he may try his luck at Common Law Courts of Equity were so jealous in protecting the party from injustice that they did not look with favour the provision in section 4 of the Statute of Frauds whereby contract not in writing could be enforced.

In Half Penny v. Ballot ¹¹ the court stated that they cannot allow the statute to be made a cloak for frauds and that it would be something like frauds if the promise is true on oral evidence and yet the promise would take shelter under the statute.
(A) Legislative Encroachments

The sanctity of contracts had thus suffered a setback and an encroachment by the provisions in the Statute of Frauds. But the reason for the statute was to prevent frauds on innocent persons by manipulated oral evidence. There were also some other legislative encroachments upon the freedom of contract. They are

1. The Sunday Observance Act, 1677 made all contracts entered into on Sunday void due to religious reasons prompted by the puritan influence in the early days on legislation.

2. Wagering contracts were another field for what may be called moral legislation to put down gambling. Wagering contracts were not illegal or unenforceable at Common Law.

3. The Gaming Act, 1840 declared all contracts or agreements by way of gaming or wagering null and void, except where it was a contribution towards a lawful prize. The contracts were yet not illegal in the strict sense.

4. The Gaming Act, 1892 made void any promise to repay any person money paid by him under the Gaming Act, 1945 or any agreement to pay a sum of money by way of fee or reward in respect of any services relating to such contract.

5. In the matter of Infants contract the Infants Relief Act, 1874 declared three clauses of infant contracts absolutely void e.g.: contracts to repay money loans, contracts for goods supplied or to be supplied (other than necessaries) and all accounts stated.

6. The Truck Act, 1831, was another instance of an inroad into contract law. It made it an offence for an employer to contract that wages payable to his servant should be paid otherwise than in current coin of the realm and declared such contracts as illegal. This saved the employee from exploitation by the employer in compelling in the employees shop at his price.
(7) The Money-lenders Act 1900 and 1927 were further statutory inroads in private contracts with object of saving the debtor from usury and malpractices indulged in by the lender.

(8) The Hire Purchase Acts, 1938 and 1954 were further instances intended for protection of the Hire Purchasers in the lower income groups.

(9) The Trade Unions Act, 1871 provided that the purposes of Trade Union should not by reason only that they were in restraint of trade be treated as unlawful either:

i. So as to make members of the association criminally liable for conspiracy or

ii. So as to render void or voidable any agreement entered into by them. For political and industrial reasons certain trade union contracts have been made statutorily unenforceable by courts.

(B) At Common Law

Freedom of contract is at present regulated in several respects by statutory provisions and judicial decisions. It is no longer a freedom to make a contract which one wishes to make, but a contract which one ought to make. One of the tools of this kind of regulation is the theory of implied terms. One of the statutory tools is the Unfair (Contract Terms) Act, 1978.

(a) Doctrine of implied terms

Sir Frederick Pollock, had observed:12 “Courts were averse to going beyond the strict letter of instruments and would only in extreme cases imply terms that were not expressed or at least imported by some generally understood custom.”

Often businessmen enter into contract and respect the usages and conventions vogue in the business though the written contract may not have those reduced to writing.
Bowen L.J. \(^{13}\) was of the view that in business transactions “what the law desires to effect by the implication as must have been intended at all events by both parties who are businessmen; not to impose on one side all the parties of the transactions, or to emancipate on one side from all the chances of failure, but to make such party promise in law as such at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.” These opinions crystallized slowly and were codified in the (English) Sale of Goods Act, 1898.

The statutory provisions only gave effect to the intention or will of the parties, in the background of trade usage, or past professional dealings.

Difficulties arose when such background was not available. Then the court was driven to find out what provisions the parties would have made as reasonable persons “if they had contemplated facts which had proved to be beyond their provision.”\(^ {14}\)


The theory of implied terms gradually developed and judges like Denning L.J.\(^ {15}\) would “no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of a Chalmers” and so would prevent injustice. By reading into the contract the necessary implied terms. The tendency was to make wider use of the theory of implied terms for adjusting the rights and obligations of parties.

In Haive Ltd. V Park Royal Scientific Instruments Ltd.\(^ {16}\) employees of Plaintiff Company worked in their spare time for the revival concern
producing the same appliances. Injunction against them was granted on the ground “that there should be implied into the contract of employment of term that the servant undertakes to serve his master with good faith and fidelity.”

Implied terms have been read into contracts in umpteen cases.\(^\text{17}\)

A word of caution has however sounded by Mackinnon L.J.\(^\text{18}\) to this effect:

“I recognize that the right or duty of a court to find the existence of implied terms in a written contract is a matter to be exercised with care and a court is too often invited to do so on vague and uncertain grounds.”

A too wide application of “implied terms” theory, in the words of Denning L.J.,\(^\text{19}\) “have seriously damaged the sanctity of contracts.”

(aa) Terms implied by courts

Halsbury \(^\text{20}\) catalogues some instances in this regard are catalogued in Halsbury:

(I) The Moorcock’s case\(^\text{21}\), postulates that the court should give efficacy to a contract and prevent such failure of consideration as cannot be within the contemplation of either side.

In a King’s Bench case,\(^\text{22}\) the parties had contracted for the sale and purchase of seed to be shipped by a named ship at a specified date. It was held there was no warranty that the ship should continue to exist upon that date since the parties must have known that the performance of the contract would become impossible unless the ship continued to exist.

(II) In Reigate v. Union Mfg. Co. (Rambottom)\(^\text{23}\) and other cases are instances where the terms are implied by statute which cannot be
excluded by any contrary agreement. “Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement they would suppress him with a common “oh! of course”.

(III) Notwithstanding that the court has no discretion to create a new contract, the principle is that a term will be implied into a contract when it is necessary to give it business efficacy.

* Following are some instances of the application of implied terms:

(i) In a contract of service that the employee will observe good faith towards his employer.
(ii) That he will not divulge information obtained in the course of employment and will not be required to do any lawful act.
(iii) Implied terms read into a charter party as to the measurement of cargo at the port of loading; into a contract for a Turkish bath that the couches for reclining on are free from Vermin; into a contract to print bank notes, not to use the plates for any unauthorized purpose; into a contract for a employment of a director that the articles of the company will not be altered and then acted upon so as to terminate his contract of service; into a building contract where work commenced long before the contract was made that the agreement would operate respectively; into a contract of bailment the purpose of which was the use of the goods by the bailee, authority to do in relation to the goods all things reasonably incidental to their use; into an oral contract made between two parties both of whom were heirs of plant, that the usual standard form conditions of hire applied.

(IV) In general a term is necessarily implied in any contract (provided the other terms do not repel the implication) that neither party shall
prevent the other from performing it and that a party so preventing the other is guilty of breach.\textsuperscript{38} (vide 9 Halsbury’s para 359.)

Lord Asquith adds: “There can be no breach if the term in question is illegal, contrary to public policy or (in the case of a corporation) ultravires the contracting party”.

Halsbury adds: “Not only is reasonableness at the very foundation of the principle that a term may be implied into a contract if necessary to give efficacy to it but the courts have frequently actually implied a provision as to reasonableness of contracts in some cases in order to care an uncertainty which would otherwise be fatal to the very existence of the contract, e.g., implying a term as to a reasonable price\textsuperscript{39}, valuation\textsuperscript{40} or sum\textsuperscript{41}.

(V) Reasonableness principle has been invoked by courts only for reasonable duration of a contract\textsuperscript{42}, that a right under a contract will be exercised within a reasonable time\textsuperscript{43}, that rent may be increased by giving reasonable notice.\textsuperscript{44}

(VI) Implied term as to export and import licenses also arise\textsuperscript{45}. Thus parties may expressly provide as to who should assume responsibility of obtaining the necessary licence\textsuperscript{46} (in the absence of any express term there may be an implied term to that effect)\textsuperscript{47}.

(VII) There have been instances where the implied terms principle stood rejected.\textsuperscript{48} There has been a strong judicial warning given against the over ready application of the principle to justify the implication of terms.\textsuperscript{49}

In a contract to carry mails for the crown, there can be no implied condition that the crown would employ the contractor to carry any particular quantity of mails.\textsuperscript{50}
In a contract for the sale of a patent, no implied term can be invoked that the buyer would keep the patent alive.\textsuperscript{51}

In a contract for the sale of all the grain to be manufactured by the seller, there can be no implied term that the seller would retain his business.\textsuperscript{52}

(a) When performance is impossible and frustrated

The common law postulated that a person was bound by terms of his contract, physical or legal impossibility of performance being no answer.\textsuperscript{53}

But courts found the implied terms theory handy to grant the needed relief if there is frustration of contract, due to an intervening event or change of circumstances so fundamental as to strike at the root of the agreement.\textsuperscript{54}

Lord Loreburn \textsuperscript{55} explained that courts discharged a contract in certain events as it was able to \textit{“infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was the foundation upon which the parties contracted”}.

The doctrine of frustration found a good explanation in the speech of Lord Russel of Killowen in Re. Badishe Co.\textsuperscript{56}:

\textit{“It rests on implications arising from the presumed intention of parties. If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances. The dissolution lies not in the choice of one or other of the parties, but results automatically from a term of the contract. The term to be implied must not be inconsistent with any express term of the contract.”}
The doctrine of frustration on the basis of implied term theory would however appear unjustified if the parties to the contract had adverted to the possible happening of the frustrating event but nevertheless decided to do nothing about it and made the contract in absolute terms. 57

The doctrine may not also be invoked when the parties had provided in general terms what was to happen on the occurrence of the frustrating event. In such a case a term could not be implied if it would conflict or be inconsistent with the parties express provision. Yet in Bank Line Ltd. v Capel 58 the House of Lords decided otherwise.

So the position in law now is that the contract is deemed frustrated on the occurrence of the frustrating event irrespective of the volition or the intention of the parties or their knowledge as to that particular event.59

As Streatfield J. stated “Their own belief and their own intention is evidence only, upon which the court can form its own view whether the changed circumstances were So fundamental as to strike of the root of the contract and not to have been contemplated by the parties.”

Thus the court by a legal fiction can assume the jurisdiction to modify or dissolve contractual obligations with a view to dispense justice, having due regard to the change of circumstances beyond the control of parties.

(C) When contract is opposed to Law or Morality

The common law courts gradually followed the footsteps of the courts of chancery and the legislature in the sense that they also sanctified encroachments on freedom of contract on the ground of illegality or immorality. It appeared paradoxical that the courts who looked into the morality of upholding contractual obligations, were disposed to destroy them on the ground of public policy.
Lord Mansfield’s pronouncement in Holman v Johnson.⁶⁰ is oft quoted in this connection:

“The objection that a contract is immoral or illegal as between plaintiff and defendant. If is not for his sake, however, that the objection is allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so. The principle of public policy is this, ex dolamalo now oriter action. No court will lend its aid to a man who found the cause of action upon an immoral or illegal act. If from the plaintiff’s own stating, or otherwise, the cause of action appears to arise ex turpi causa, to the transgression of a Positive Law of this country, there the courts say he has no right to be assisted. It is upon that ground the court goes; not for the sake of defendants, but because they will not lend their aid to such a plaintiff. So the plaintiff and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est condition defenden lis.”

It appears distinctly wretched and distasteful than man who has made a promise should be allowed to wriggle out of that promise on the plea of illegality or immorality. A person who had work done for him by a building contractor, could refuse to pay on the plea that the contractor had no license and so the transaction was vitiated.⁶¹

Justice Cordozo put it like this: “If the moral and physical fibre of manhood and womanhood is not a state concern, the question is what is? ⁶²

One could however agree with Lord Atkin ⁶³ in his statement “the doctrine should only be invoked in clear cases in which the harm to the public is substantially incondensable and does not depend upon the idiosyncratic inferences of few judicial minds.”
The suicide is a crime and so if the policy holder shoots himself before the policy matured, the executors could not recover the insured amount since as Lord Wright put it <sup>64</sup> “the court must we think, apply the general principle that it will not allow a criminal or his representative to reap by the judgement of the court the fruits of his crime.”

(D) Restraints of trade

Courts in England even as early as the middle of the previous century considered restraints of trade harmful to the development of commerce. Such restraints in business contracts have a tendency to create monopolies.<sup>65</sup>

In Lord Macnaughton’s words<sup>66</sup>: “The public have an interest in every persons carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void.”

Courts will strike down contracts with restraint clauses. The Restrictive Trade Practices Act 1956 has a provision (s.21) to the effect that all registerable restrictive agreements within the Act are presumed to be contrary to public interest unless they are justifiable under the Act. The whole thing rests on the ground of public policy. What is public policy is difficult to precise definition.

Lord Truro would say <sup>67</sup> that it was a “principle of judicial legislation or interpretation founded on the current needs of the community.”

Lord Wright would put it differently<sup>68</sup> as “considerations of public interest which require the courts to depart from their primary function of enforcing contracts and exceptionally refuse to enforce them….. Certain
rules of public policy have to be moulded to suit new conditions of a changing world."

Trade Unions and Trade Associations have their own regulations to guide them instead of seeking their aid to court. The need thus arose for a new machinery to protect the public from restrictive and monopolistic trade practices.

The Monopolies and Restrictive Trade Practices Act, 1948 brought about the appointment of a commission to investigate and report on those restrictive trade agreements which were referred to it by the Board of Trade. This led to the legislation called the Restrictive Trade Practices Act, 1956 which enabled the maintenance of a Registrar of Agreements register able under the Act.

The restrictions related to prices and control of supplies or manufacturers and whether the restrictions were in public interest had to be restricted in the Restrictive Practices Court, which is manned by Judges with experience in industry, commerce or public affairs, failing which, they were declare void. These provisions gave a major shake up to almost every section of industry. 69

(E) Executive Arrangements and Freedom of Contract

Prof. J.D.B. Michell70 amply explains as to how executive agreements are more in the nature of governmental directives than as enforceable contracts. He says.71

“The principle is simply that in the last resort the law permits a governmental agency to fulfill fundamental purposes for which it was created, even though so doing may involve interference with vested contractual rights which an individual may have against that agency.”
The special purpose for which governmental agencies exist, the service of the community requires that on occasions those agencies must be released from or may be able to override, their obligations….. this limitation of the obligation of contracts depend not on the acceptance of any particular theory of political philosophy but upon practical necessity.72

An instance is furnished in the case The Amhitrite 73 where a Swedish ship in 1918, during the First World War, was able to sail and deliver her cargo on the undertaking extended by the British Legation in Stockholm that at least sixty percent of the goods should be approved goods. But on its second voyage to England clearance was refused to the ship as it was contrary to British practice. Basing its claim for damages on the undertaking given by Legation, the ship owners launched a suit, which was rejected since no agreement can bind governmental actions.

In India, Government contracts are governed by the provisions in Article 299 of the Constitution of India. The citizen is thereby assured of his remedy against the government provided the requirements of that Article are fulfilled. Executive arrangements in India have been protected by the Article to a great extent.

3.3 Freedom of Contract and the No Liability Clause

In the last few years the courts in England have had occasion to consider the effect in an ordinary business contract of a clause purporting to free either of the contracting parties from all liability for any breach on their part of the obligations which they had undertaken.

In Crouch v Jevens Pty Ltd., 74 the facts shortly were as follows. The Plaintiff left an article to be cleaned, received in exchange a document which set out the terms of the transaction, and the article was lost by the company.
The document contained two clauses exempting the company from liability as follows

“We are responsible for goods left over three months.”

Conditions: “No responsibility is accepted for loss or damage to any article through any cause whatsoever, but every possible care is taken.”

The contention put forward on behalf of the company and which received support of the majority of the Full Court was that the exemption headed “CONDITIONS” completely freed the company from liability for lost or damaged articles and the last five words were merely narrative and in no way contractual.

It is suggested that such an interpretation is erroneous and that the clause is open to a further construction which gives force to every part of it.

However, whether the decision in Crouch v Jeeres Ltd. or any other similar case was right or wrong is not of real importance – some one sooner or later will no draft a clause excluding liability and which will be beyond criticism. The important thing is to consider whether or not the many conflicting decisions on the subject can be reconciled and if not, what is there can be done. In attempting to reach a conclusion as to whether the various decisions are reconcilable, one is at once met with the difficulty that one finds oneself seeking to construe by the rules relating to the interpretation of contracts a clause which, as has been said previously, in its very nature negatives the existence of a contract at all.

Anson, Law of Contracts, 17th edn. P. 1 says “the law of contract is intended to ensure that what a men has been led to expect shall come to pass; that what has been promised him shall be performed.” A provision successfully releasing one party from “all liability” is a flat denial of and could not be part of such a law. It is a complete and direct negation of Anson’s definition. The real position is that such a clause has no more right to
attempt to exist in our law of contract and the only alternative will be and
should be for either the legislatures or the courts to look at such exemption
clause with somewhat jealous eyes and ask themselves the question is it in
the public interest that such clauses should exist, is it in the public interest
that a party may enter into an agreement promising to do certain paid
consideration and then add a term freeing himself completely from any
liability for his failure to perform his solemn obligations.

The legislature has taken steps to protect people who purchase on
the hire purchase and lay by systems.

The courts have dealt with terms inserted in courts which seek to oust
their jurisdiction and have retained for themselves the right to decide what is
penalty and what liquidated damages.

Such inferences with freedom to contract have readily been accepted
and I feel there is no valid reason why further intervention should not be
made in the direction of preserving the validity of contractual liabilities. So
that a person who enters into a contract shall find with some certainty that
“what has been promised to him shall be performed.”

One has some difficulty in appreciating the distinction of a clause in a
contract which limits liabilities perhaps to a mere pittance or frees him from
liability altogether from on the other hand a clause which provides that
should there be a breach the other party is precluded from enforcing his
remedies in the courts at all 75 or a clause which states a party’s liability in
case of breach to be an amount which the court is free to refuse to enforce
as being a penalty. There should be no difference between the effect of such
clauses, but at present there is.

3.4 Concept of Reasonable Man

By this time it may seem that the parties themselves have become so
far disembodied spirits that their actual persons should be allowed to rest in
peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is the court itself.\textsuperscript{76} The idea that contractual obligations are based on agreement must be qualified in relation to the scope of the principle of freedom of contract. In the nineteenth century judges took the view that persons of full capacity should, in general, be allowed to make what contracts they liked. The law only interfered on fairly specific grounds, such as, misrepresentation, undue influence or illegality. It did not interfere merely because one party was economically more powerful than the other and so able to drive a hard bargain. This attitude became particularly important when standard form contracts, by which one party excluded or limited his common law liabilities, were held valid.

3.5 Impact of Inequality of Bargaining Power on Freedom of Contract

The older theory of freedom of contract presupposed that any party to a contract was free to choose whether or not he would enter into it. If, therefore, he chooses to enter into a contract which was onerous to him, he had only himself to blame. The courts would not interfere.

Today the position is seen in a very different light. Freedom of contract is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed and no injury is done to the economic interest of the community at large. It is now realized that economic interest of the community at large. It is now realized that economic equality often does not exist in any real sense and that individual interests have to be made to sub serve those of the community. Hence, there have been fundamental changes both in our social outlook and in the policy of the legislature towards contract and the law today interferes at numerous points with the freedom of the parties to make what contract they like.
As early as 1877 in Parker v South Eastern Railway Co., Bramuell C.J., thought: “There is an implied understanding that there is no condition unreasonable to the knowledge of the parties tendering the documents and in insisting on it be read no condition not relevant to the matter in hand.” Lord Denning, M.R. has on numerous occasions maintained that an exemption clause will not be given effect if it is unreasonable or if it would be unreasonable to apply it in the circumstances of the case, for “there is the vigilance of the common law which, while allowing freedom of contract, watches to see that it is not abused.”

3.6 Position in the nineteenth century:

(Reported case in Robson (1831))

In the nineteenth century freedom of contract was assured. The parties had the choice of dealing with anybody they liked on the terms mutually agreed. According to the law, the parties were not accountable to the courts for the reasons for their decisions embodied in the contract. The right to decide with whom to deal was carried to such a length that in a reported case where a person had to agreed to hire a boat from a firm consisting of ‘S’ and ‘R’ he was entitled to give up the contract when ‘S’ retired and the business was carried on by ‘R’ alone. Robson and Sharpe v Drummon, it was observed by the court that the defendant may have been induced to enter into this contract by reason of the personal confidence which he reported in ‘S’ but this was a mere possibility and advanced as an argument but not a fact which was enquired into, as it was neither pleaded nor relied on.

3.7 Changing Attitude to Contractual Relationships

Reported case of Esso Petroleum (1976)

The decision in Esso Petroleum v Marden, well illustrates the changing attitude to contractual relationships. In this case there was a lease of petrol station by the plaintiffs to the defendant. The rent stipulated in the
contract was based on an estimate of the sales potential of the petrol station prepared by the plaintiff’s staff and relied on by the defendant. It transpired that the estimates were found to be widely over sanguine and as the defendant were unable to sell anything like the estimated quantities; he defaulted in the payment of rent. The plaintiff sued for the rent stipulated. The defendant counter claimed damages. The defendant succeeded in the case. The court observed that the plaintiffs owed a duty to take care in the preparation of the estimates as they knew that the defendant was entering into the contract having placed reliance on those estimates and reasonable expectations of the defendant were protected. This decision holds one party to a prospective contract to owe a duty to the other party to give him misleading information on matters of estimate and judgement as distinguished from straight away question of fact and therefore is utterly opposed to the basic idea underlying the free market contract. The basic concept of classical contract or a free market contract is that each party in the market makes his own judgement and estimates and that the striking of a bargain by free consent is a way of allocating the risk of future events as to such matters. This decision established that such a concept is no longer accepted. The concept so far has been that neither party owes any duty to the other until a deal is struck.

During negotiations neither party owes any duty to volunteer information to the other. Law goes so far as to hold that if one party labours under same misapprehension, the other is under no obligation to undeceive him. It has also been held that silence is not binding even where a reply might be expected. The party concerned has to rely on its own judgement and act at its own peril, the only exception being fraud or misrepresentation on the part of the other party. 81 It is, therefore, that the above decision is a significant departure from this concept and must be carefully considered and specially noted.
3.8 Modern trend of courts to overuse the fairness of Bargain

It must be noticed that the theory obtained in classical law of contract that parties had the absolute right of entering into contract they liked and the court refuse to examine reasons which prompted the parties to enter into the contract, has been gradually giving way to the courts looking into the surrounding facts and examining reasons for decisions of the parties to enter into the contract and to judge their reasonableness by objective tests.

These contrasting attitudes across a century may be illustrated by two typical cases. The first case of Bowes v Shaud, the House of Lords held that in case of contract for the sale of Madras rice to be shipped in March and/or April, the buyer was entitled to reject the rice loaded on the ship in February. They observed that it was immaterial why the buyer rejected the rice and why the contract was in this form. It was observed that these were solely matters for the parties and that it was not the business of the courts to enquire into the reasons for the party’s action.

The second case is of Rear Den Smith Line v Hansen Tangen. It is a contract for the construction of a ship at Yard No.354 of Osaka Zosen in Japan but the ship was built at a different yard. The defendant declined to accept it, although there was no suggestion that the ship did not comply with the stipulated specifications. The court examined the surrounding circumstances and came to the conclusion that the mention of the number of the Yard and the location of the Yard was of no substantial significance and it was held that defendant had wrongly rejected the ship though built of different yard. The defendant was therefore, held liable.

Analyzing the approach in both the cases it is clear that there has been change in the judicial thinking process and the values to be assessed. There is no longer the same judicial willingness to accept the parties as the ultimate and sole arbiters of the importance of matters arising in the
performance of contract. Much greater willingness is exhibited by the courts in examining the facts of a case in detail to see where the merits lie and not plead helplessness and confine their role to an enforcing agency of the contract entered into by the parties.

In the words of Lord Denning: “The day is done when we can excuse an unforeseen injustice by saying to the sufferer: ‘It is your own folly. You ought not to have passed that form of words. You ought to have put in a clause to protect yourself. We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of Chalmers. We realize that they have limitations and make allowances accordingly.” However, this view was repudiated on appeal by the House of Lords by reaffirming the view that no court has an absolving power.

However, subsequent judicial decisions have veered round to the view that the courts can impose on the party’s just and reasonable solution that the new situation may demand. Well has it been said that this in keeping with the object of the judicial process which is to reach a just and reasonable solution between litigating parties. But this doctrine has to be accepted with care test it may be taken to suggest that the court has an inherent jurisdiction to go behind the literal words of the contract and to make such changes, as it considers desirable in the circumstances. Such a power may amount to re-writing the contract, which certainly is not permissible in law.

3.9 Impact of Abnormal Conditions on Contract

One interesting feature of the development of law of contract, as an impact of war, was that due to circumstances beyond the control of the contracting party, the contract could not be performed. This state of affairs continued long after the termination of the war because of its impact on the economic conditions. The war led to devaluation of currency consequent on post war inflation, social unrest, fixation of higher wages for labour; in short, social and economic upheaveal against the background on international
tensions resulting in uncertainties which definitely went beyond the reasonable calculations of economic risk contemplated by the parties when entering into the contract. While it was considered reasonable to hold the parties to risks attendant upon fluctuations of the market in normal times, it was considered unreasonable to hold the parties to their contractual obligations in view of these abnormal conditions.

This state of affairs gave rise to the enlargement of the doctrine of frustration in U.K. and liberal interpretation of the French doctrine of imprecision in administrative contracts. In England, this doctrine of frustration developed due to the conditions obtained after the First World War and heightened by the Second World War. It was considered reasonable to hold that where circumstances occur, neither foreseen nor reasonably foreseeable at the time of entering into the contracts, it may be taken that it was not intended by the parties that the contract would be binding in unanticipated situations. This was sought to be introduced by way of construction of the contract holding that the broad terms do not cover unforeseen and unforeseeable contingencies and, as such, there was a gap in the contract and, by proper interpretation, the courts performed the gap filling function.

But the courts stopped short of varying the terms of the contract until the decision in England, in Sir Lindsay Parkinson & Co. Ltd. v Commissioners of Works and Public Building, the Court of Appeal followed some continental models and boldly revised the terms of the contract. A contract between the Commissioner of Works and private firm had stipulated that the sum to be paid to the contractor should not be greater than the actual cost plus net remuneration of £3,00,000. The parties had contracted for about £ 5,00,000 but extra work ordered brought the total cost up to £ 66,83,000. The court awarded the contractors extra remuneration in proportion to the excess cost.

In another case a contract for the supply of news films made during the war was to continue until a Cinematograph Film Order, made in 1943,
under the Defence Act, 1939 was cancelled. When the Defence Act expired after the war, the order was continued under the Supplies and Services Act, 1945. The Court of Appeal considered the circumstances, which had led to the agreement and came to the conclusion that the order had been continued for reasons different from those leading to the original Cinematograph Film Order, and it discharged the defendants from further performance of the contract, despite its clear wording. The court really exercised the qualifying power, i.e. a power to qualify the absolute, literal or wide terms of the contract, in order to do what it considered to be just and reasonable in the new situation which had arisen.

Until recently, the court only exercised that power when there was a frustrating event, i.e. a supervening event which struck away the foundations of the contract. Subsequently, however, the court exercised such a power when there was no frustrating event but only unanticipated turn of events as in the case of Sir Lindsay Parkinson & Co. v Commissioners of Works and Public Buildings. But the House of Lords reversed the decision and repudiated the suggestion that the courts had a broad qualifying power in regard to contracts and thus the decision in Parkinson’s case was therefore reduced to one of construction of the language of contract.

3.10 Review of concept of contract

A review of the developments of the concept of contract in various fields historical, political and legal throughout the ages reveals that while the outward appearance has been maintained, the inner core has changed very considerably. While the textbook concept of the contract as agreement and obligation remains the same, the connotation and the actual working of the concept of agreement in reality is totally different from what obtained in the early nineteenth century under the influence of the doctrine of laissez faire.

While at that time it was thought that the people had full freedom of entering into the contract, which meant to enter into the contract or not at all,
to make a contract or unmake a contract, free choice of persons with whom to enter into a contract, free choice of setting the terms of the contract based on the assumptions that parties had equal bargaining power and that there was a free market and conditions of competition untrammeled by controls and uncontrolled by large corporation of rings; subsequently with the economic development and the change of political theory resulting in assumption by the state of functions in conformity with its role as a Welfare State, the conditions totally changed and the field of operation of agreement was increasingly circumscribed, reaching a point of compulsory contracts.

Law of Contract differs from other branches of the law of obligations in one important respect that parties themselves are free to make their own terms on which to enter into a contract, which the legal machinery will enforce as a private piece of legislation.

The law of contract does not prescribe the rights and obligations of the parties but imposes a number of restrictions subject to which the parties may create, by their contract, such rights and obligations as they may agree to, so long as they do not infringe the legal prohibition.

The parties cannot for instance, render valid a contract which according to the law is illegal or that a contract, which the law requires to be in writing, shall be enforceable without such writing.

It may be noticed that this position of the law has changed with the times. This position was obtained when the doctrine of laissez faire was permitted to have its full force but with the change of times and the virtual eclipse of the doctrine of laissez-faire as a political force, there is an indication that people no longer think or feel in the same way about the law. No longer is the law of contract seen as a negative instrument whose main function is merely to enforce agreements which people have chosen to make. The tendency nowadays is to look on the law as a positive instrument for the achievement of justice. The moral principle that one should abide by one’s agreements and fulfill one’s promises is being increasingly met by
another moral principle, namely, that one should not take advantage of an unfair contract which one has “perused” another party to make under economic or social pressure.

This has profoundly affected both moral and legal ideas about freedom of contract and sanctity of contract. The process of development of the concept of contract over the ages has thrown up the doctrine of frustration as a device to do justice between man and man, to be fair and reasonable to both the parties of the contract in the event of uncontemplated or unforeseen, involuntary supervening circumstances affecting the operation of the contract.

3.11 Position of Freedom of Contract in India

So long as any agreement is based on this substantial equality of bargaining position between the two parties and represents a method of satisfaction of their needs by mutual exchange, there is no question of unfairness or unreasonableness or injustice between them as free agreement itself is constitutive of justice. In such a case the doctrine of freedom of contract itself embraces the value of fairness or justness, and the only ground of such an agreement will be public policy as representing other values or public interests.

We find in India judges proclaiming in the most traditionalists and classic way the freedom and sanctity of contract. Mark the words of Justice Sarkar, “there is very little the courts can do if the words used in the contract are clear.” and of Mr. Justice Hidayatullah, “where parties agree upon certain terms which are to be regulate their relationship it is not for the courts to make a new contract, however, reasonable, if the parties have not made it for themselves.”

Section 23 of The Indian Contract Act is one of the most important grounds of invalidity of any agreement. The concept expresses the
fundamental values and principles of the society. The principle underlying this section is that any type of contractual relation can be created by a contract unless it is hit by section 23 of the Contract Act, other sections of The Contract Act or other laws.

The idea of welfare state has necessarily led to the expansion of the functions of the state, affecting each and every aspect of the individual and social life, and has consequently converted the modern legislature into a very busy machine enacting a large number of laws at an accelerating rate every year e.g.: Hire Purchase Act, Laws restraining monopoly, Factory Act, Industrial Dispute Act, Sale of Goods Act, various laws protecting consumers etc. These laws affect the freedom of contract at various points and in different degrees and therefore, give rise to a large number of cases where the agreement is challenged on the ground of its inconsistency with any of these laws. Moreover, the changing socio-economic structure of our society, the clear articulation of the fundamental values of liberty, equality and socio-economic justice in our constitution and the pervading influence of the philosophy of humanitarianism necessarily lead to the expanding scope of public policy which will continue to impugned moral and upon freedom of contract. So, long as the society continues to recognize the utility of the doctrine of the freedom of contract as an instrument of social engineering, the courts will have to perform a very difficult task of striking a just balance between public policy which supports and seeks to maintain the contract as a useful principle of social order and public policy which seeks to protect other social interests and values.

In K.T.Chandy v Mansa Ram Zade, the Supreme Court had the occasion to make certain observations on the principle of freedom of contract. Seemingly, it is a small case. However, as observed by Dwivedi J., it brings into the flashpoint on issue of great importance to liberty of contract. Where to draw the dividing line between the area of contempt of courts and the area of operation of contractual rights.
The facts of the said case were that M was employed by C on a contract of service. The contract contained a provision for termination of M’s services by giving him three months notice or three months pay in lieu thereof and without assigning any reason. On February 21, 1968, C served M with a notice terminating his services. M soon rushed for relief to the Munsif’s court. He did not ask the Munsif to grant an interim injunction restraining C from terminating his services during the pending of his suit. So no interim injunction was operating at the relevant time. While the suit was pending, C issued second notice terminating M’s services. M moved the court for taking contempt of court proceedings against C.

The High Court of Calcutta held that C’s notice terminating M’s services during the pendency of the suit amounts to contempt of court. Against this decision C came in appeal to the Supreme Court. The question before Supreme Court was whether C had committed contempt of munsif’s court by terminating M’s services while the suit was pending in the court. The Supreme Court, answering the question in negative observed:

“It is true that the Law of Contract is essential for keeping the administration of justice pure and unified. It is also well to remember that our society is also interested in the fulfillment of man’s expectation under a contract. Assigning an unlimited and undefined area to either of them would unduly curtail the area of the other. Each should have the viable area so that justice may hold higher head and contract is not cribbed and cramped.”

In Central Bank of India v H.F. Insurance Co., the Supreme Court unambiguously and emphatically declared that is the duty of the court, to give effect to the bargains of the parties according to their (declared) intention and that the plain and categorical language cannot be radically changed relying upon the surrounding circumstances.

In Indian Airlines v Madhuri Choudhri – Calcutta High Court has recognized that no doubt it is their primary duty to enforce a promise which
the parties have made and to uphold sanctity of contracts provided they are not hit by any provision of the law in the land.

In Life Insurance Corporation v Paravarthavardhini, the considerations of justice had influenced the Madras High Court to give to the terms of such agreement a construction favourable to the weaker party. The court required from the corporation a strict proof of misrepresentation when the later wanted to repudiate a policy after it had become a claim. The following observations in the judgement are significant:

The business of Life Insurance has been nationalized and in the matter of its business activities, the Corporation has a great responsibility to the public. Whenever the claims are repudiated and disputes come to the court of law, the Life Insurance Corporations should not put fight on the pattern of ordinary litigants. But it must be on a higher plane so as to inspire confidence in the public.

Similarly, in Shivnath v Union of India, the Supreme Court imposed on the railways the duty to take responsible care of goods eventhough the legislation provided for liability only in cases of misconduct. The consignment in this case was lost in communal disturbances but the railway administration was held liable for the loss even in in the absence of a definitive proof of misconduct on the part of its employees. Evidently the court expects these monopolies in the public sector to maintain a high standard of service to the people.

In Ramula v The Director of Tamilnadu Raffle the court observed if the terms of contract are so unconscionable and if one of the terms is in terroyem and without any consideration known to law and is, therefore, against public and then the party affected can approach the High Court under Art.226 for relief. The sine qua non, however, in such cases is that the term in the bargain should be unreasonable and against public policy.
The concluding picture that emerges from the above study is that these are two sets of decisions – one upholding the freedom of contracts and sanctity of promises while the other refusing it under certain circumstances. The picture that has emerged is that has emerged is that of conflicting decision and doubtful distinctions. While upholding the freedom of contract court ignore the one party getting away from his obligation under a contract to the detriment and loss of other by reason of a clause in it to which the aggrieved party could never have been a party had it know its full implications or at any rate which runs counter to the main object of the contract.

3.12 Position of Freedom of Contract in England

The English law of contract is rooted in the nation that a promise which has been freely and fairly bargained for ought to be performed, when a promisor makes a binding promise, he makes a partial surrender of his freedom, and it is fair that he should be able to make that surrender on terms. If he may promise to be liable, if some event happens he may equally well stipulate that he will not be liable if some event happens. The common law leaves the parties to allocate contractual risks in their own way, and in the absence of dishonesty or unfairness the arrangement will be unheld.

The rationale of the common law approach is that parties who enter into contracts without compulsion are the best judges of their own bargains. It is not for the courts to interfere between the parties to make the results of their bargain more reasonably balanced; their only concern is to find the intention of the parties (in an objective sense) at the time of contracting, and to give effect to it. “Pacta sunt servanda”, writes Professor Friedman, “must still be a cardinal principle of law, else there will be little foundation for any law.” It has recently been affirmed that “courts of equity have never interested with contracts merely by reason of their being improvident... If a man made a foolish or a improvident one so much the worse for him.”

And
Nottingham’s apohism “the chancery mends no mans bargain” is still cited by chancery judges with approval.101

But even under common law this freedom of contract is not absolute. In case of fraud, misrepresentation, duress court will declare the contract voidable. Equity has gone further and given relief where, in circumstances falling short of legal duress, the party’s freedom to make the contract was unreal. Thus, a contract was unreal. Thus, a contract may be upset if unfair advantage is taken of an uneducated or weak minded person, or of a desperate person in pecuniary distress; but the imposition of the superior party must be such as would shock the conscience, by the manifest inequality of the situation.102

It is common place learning in the present century, with the increase of large scale commercial organizations and the widespread use of standard form contracts, that legal freedom of contract is sometimes far removed from economic freedom. Even if a party has the freedom to refuse to make a particular contract, he rarely use the freedom to refuse to make a particular contract, he rarely has the freedom to co-ordinate the terms of contract; and very often, because of the universality of standardized forms or the existence of monopolies, neither kind of freedom is present. Many writers have touched this lack of freedom in daily life.103

The Position has been summed up by Professor Atiyah as follows

“The moral principle that one should abide by one’s agreements and fulfill one’s promises is being increasingly met by another moral principle, namely, that one should not take advantage of an unfair contract which one has persuaded another party to make under economic or social pressure.”104

But even today the position has not much changed. Professor Wedderburn has warned courts that “frolics of their own into interpretation of contract based upon economic theory are notoriously dangerous journeys for
common law judges” and the judges have not overcome their fear of this uncharted territory. Only recently, Donaldson J. affirmed that “if (an exemption clause) occurred in a printed form of contract between the parties of unequal bargaining power, it would be socially undesirable but of no less equal validity. It has even been held that a contract cannot be avoided on the ground of economic duress, where a party under necessity is obliged to agree to a supplier’s terms because the supplier enjoys a de-facto monopoly. Tucker L.J. answered the objection that in such a situation there is no freedom of contract with the assertion:

“It is truly said that for a contract to be enforceable it must be freely entered into, but that does not mean that one party to a contract can escape its provisions merely because he was compelled to accept the terms of the other contracting party because there was no one else with whom he could contract for the supply of the particular commodity required.”

In spite of these decisions if inequality of the party clearly demonstrated, equitable relief can be granted. Although there are no clear cases on this point reference may be made to D and C Builders v Rees where Court of Appeal treated as void an agreement by a creditor in a financial difficulties to accept part of a debt in satisfaction of the whole; apart from the absence of consideration, the agreement was unreal because of the economic pressure. In Bonsor v Musicians Union. Lord Denning attacked a contract between a “closed shop” Trade Union and a member on the ground that it was not a free contract.

Whatever view one takes of the present state of English law, however, there can be little doubt that the judges do not have the means to redress mere inequalities of bargaining power. It is not their providence, because once the recognized principles of law are laid aside the problem becomes a political and social rather than a legal one. The conclusion to be drawn is that, so long as the law permits individuals to bind themselves by agreement – an exemption clause which has been agreed upon must be
treated as binding, however, extravagant it may appear unless the apparent agreement is demonstrated not a real agreement. Any written contract is open to attack if it does not represent a true bargain. Of course, the courts have an inherent power to refuse to sanction certain kinds of contract on the ground of public policy; but that unruly horse has not been let loose in this field.  

Reference

1. Printing and Numerical Registering Company v Sampson (1875) L.R. 19 Eq. at p.465
5. Leff, Contracts as Thing, 19 A.m.U.L.Rev.131,143 (1970)
7. See P.S. Attiyah’s Introduction to the Law of Contract, 2nd Edn. P.16
8. Ibid p.6
10. (1861) 30 Beav 62.
11. (1699) 2 Vern. 373
13. In the Moorcock (1889) 14 P.D. 64-68. See also Sethia Ltd. v. Pratapnul Rameshwar, (1951) 2 All. E.R. 350.
19. See (1956) 1 K.B. 302 at 308.
20. 9 Hals., para 355 at p.308.
21. (1889) 14 P.D. 64 at 68 C.A. See Lamb v Evans, (1813) 1 ch 218 at 229 CA.
22. Nickole & Knight v Ashton, Edridge & Co., (1901) 2 KB 126 CA. See also Lukor (Eastbourne) Ltd. v Cooper, (1941) AC 108 (1941). 1 All Er 33 at 52. See also (1969) 1 AC 480; (1973) 2 All Er 260.

23. (1918) 1 KB 592 at 605 approved in (1973) 2 All Er 260.

24. Shirlaw v Southern Foundries, (1926) Ltd. (1939) 2 KB 206 at 227. 2 All Er 113 at 124 per Mackinnon LJ.

25. 9 Hals. Para 358.

26. op at 14 PD 64.

27. Robb v Green, (1895) 29 BD 15.

28. Kirchner & Co. v Gouban, (1909) 1 ch. 413.

29. Gregory v Ford, (1951) 1 All ER 1221.


32. Banco de Portugal v Waterlon & Sons Ltd., (1932) AC 452 HL.

33. Southern Foundries (1926) Ltd v Shinlaw, (1940) 2 All ER 445 HL.

34. Trollope and colls and Holland and Hanren and Cubbils Ltd. v Atomic Power Construction Ltd., (1962) 3 All ER 1035.

35. Tappenden v Arlus, (1964) 2 QB 185: (1963) 3 All ER 213 CA.


37. Aspolin v Austin, (1844) 5 QB 671: (1951) 2 All ER 85: (1941) AC 108.

38. William Cory & Sons Ltd. v London Corpn., (1951) 2 All ER 85 at 88 CA obiter per Lord Asquith.

39. Foley v Classique Coaches Ltd., (1934) 2 KB 1 Ca.

40. Talbot v Talbot, (1967) 2 All ER 920 CA.

41. Powell v Brawn, (1954) 1 All ER 484.

42. Joneson v Royal Free Hospital Board of Governors, (1965) Sol JO 534 CA.

43. United Dominion Trust (Commercial) Ltd., v Eagle Aircraft Service Ltd., (1968) 1 All ER 104. See also (1968) 3 All ER 473.


45. 9 Halsbury's (4th Edn.), Para 361.

46. Windschuegl Ltd. v Pickering Co. Ltd., (1950) 84 LiL Rep. 89.

47. H.O. Brandt & Co., vH.N. Mornis & Co. Ltd., (1917) 2 KB 784 CA.


52. Hamlyn & Co.v Wood & Co., (1891) 2 QB 488 CA.

53. See ‘Paradine v Jane’ (1647) Alyn 96.


56. (1921) 2 Ch.331, 379.


59. Per Streatfield F. in Morgan v Manser (1948) 1 KB 184-191.

60. (1775) 1 Coup. 341.
62. Alder v Deogan, 251 Ny 467,484.
63. Fender v Midmay, (1938) AC 1,12.
67. Egerton v Brownlow, (1853) HLC 1 at p.196.
68. Fender v Mildmay, (1938) AC 138.
70. Contract of Public Authorities p.17
73. (1921) 3 KB 500.
74. (1946) 46 S.R. (N.S.W.) 242
75. Scott v Avery (1856) 5 H.L.C. 811.
77. (1877), 2 C.P.D. 416.
82. 1877 2 Appeal Cases 455.
83. 1976 3 All England Reporter 570.
84. British Movietones Ltd. v London and District Cinemas Ltd. (1951) 1 K.B. 190 at 202
85. 1952 A.C. 166.
86. 1949 2 K.B. 632.
87. British Movietonuess Ltd. v London District Cinemas Ltd. (1951) 1 K.B. 190, Appeal to House of Lords, 1952 A.C. 166.
89. AIR 1965 SC 1288 at p.1290.
90. AIR 1966 SC 1644 at p.1651.
92. AIR 1965 SC 1088.
93. AIR 1965 Cal. 252.
94. AIR 1965 Mad. 357.
95. Id. At 360.
96. AIR 1965 SC. 1666.
98. See Wallis v Smith (1882) 21 Ch. D. 234, at p.266, per Jessel M. R.
100. Gallraith v Mitchenal Estate Ltd. (1964) 2 All E.R. 653 at p.658. Robophone Facilities Ltd. v Blank (1966) 3 All E.R. 128 at p. 142, per Diplock L.J.


104. Introduction to the law of contract (1961) p.11


108. (1954) Ch.479.

Chapter 4
Exemption Clauses- Interpretation and Incorporation

4.1 Introduction

Ordinary business transactions today, be it the servicing or repair of a motor-car, its deposit at a parking lot or station, the hire of a rental car, the repair of an umbrella or shoe, the framing of a painting or a dry cleaning of a suit, the dispatch of goods by the sea or land, even the use of public transport, are generally conducted on the basis that the proprietor either will not be liable for any loss of or damage to the property of his customer or for any personal injury to the latter (even though caused by the proprietor's negligence), or that, if liable, such liability shall be limited to a stipulated amount. Invariably, the proprietor is in the stronger bargaining position\(^1\) and uses a standard form of contract which the customer must accept or go without the service he seeks.\(^2\)

The question arises as to the legal effect of these various stipulations. Are they to be given effect to according to their tenor on the theory that each party is perfectly free to enter into the contract or not as he wishes and that having done so the courts will not lightly interfere with the freedom of contract? Or is regard to be paid to the realities of the situation, and recognition be given to that fact that the party called upon to agree to the clauses exempting the other party from the liability for his own carelessness is in anything but a strong bargaining position and generally has no choice in the matter at all?

There is no principle of English Law which renders it incompetent for parties to make an agreement involving exemption from liability in any number of situations for one of the parties.\(^3\) The Common Law notion of freedom of contract\(^4\) necessarily involves acceptance of this proposition although it is not without relevance to note that, in at least some American Jurisdictions, the inclusion in contracts of clauses purporting to relieve from or limit the liability of a
party for injury or loss due to negligence, is regarded as against public policy, and hence the clauses are null and void.\textsuperscript{5}

In the course for the last hundred years numerous decisions have been given on the validity of the exemption clauses appearing in various types of contracts\textsuperscript{6} and while the attitude of Courts has not always been consistent, it is well established that, in absence of statutory prohibition, liability at common law can be excluded by suitably worded clauses in contracts of bailment, carriage and for the performance of skilled work, and in license to enter upon land or premises.

Certain principles have been evolved regarding the interpretation of these exemption clauses. For instances, it has been emphasized over and over again that a condition seeking to exempt a party from liability must be expressed in clear and in ambiguous language to be effective.\textsuperscript{7}

Again, it has been said on many occasions that an exemption clause is to be construed strictly and against the person who seeks to rely on it.\textsuperscript{8}

4.2 Exemption Clauses when Permissible \textsuperscript{9}

It is hardly possible to mention all those circumstances which justify derogation from the normal rights of a consumer by standard contract. But certain factors which are relevant and sometimes have already been taken into account may be indicated

(A) Substitution of Rights

Derogation from certain normal rights of the consumer may be admitted as long as his legal position as a whole (by the grant of other rights) is not materially deteriorated. For instance, it may be admissible that the usual
remedies of a buyer are temporarily excluded until the seller has had a chance to repair a defect, especially in case where defects are rather common, as with second hand cars.

(B) Undeterminable or Unusually High Risks

In certain cases, where the risk are undeterminable or unusually high, as is often true with regard to consequential damages, a limitation, perhaps even the exclusion of the liability may be adequate, e.g., by the manufacturer of the electronic equipment for planes. In so far as cases of products liability are concerned, it can be important whether the product in question is a novelty, whether there is the risk of unusual or unknown damages and whether the customer has been informed of this fact.

(C) Offer of “Choice of Rates”

The factor “choice of rates” has played a part in United States. Thus it has been recognized by the American Courts that a common carrier may plead an exemption clause if it has offered to the customer a choice of rates: The customer must have had the opportunity to choose between the lower price couples with a limited liability and higher price coupled with an unrestricted liability. The requirement of a “choice of rates” was rooted in the consideration doctrine, but become later on independent of its historical origin. The underlying idea is not restricted to the common law systems but is of general importance. A customer who has the free choice whether he want full protection of his goods for a higher price or only partial protection for a lower price may not complain if-according to his choice- the liability of the supplier is limited.

(D) Insurance

The last mentioned consideration touched another factor, namely the factor of insurance. The German Bundes-gerichts of has in several decisions
pointed out that the question of whether the customer has, or could have, protected himself by insurance can in certain cases relevant. But the cases were exceptional: in the one case, there was no dispute that the price had been fixed too low to cover the risk of damage and in the other the supplier had pointed out the necessity of insurance.

If the supplier takes insurance in favour of the customer he should be allowed to exclude his liability so fast as the customer is protected by the insurance coverage. Thus according to German, “General condition of Forwardness” of 1927 the forwarding agent is relieved of his liability by insuring the goods in favour of the owner.

(E) Kind of Violated Obligations and of Affected Interests

The more important the obligation is which the debtor offends against, the less the exemption clauses should be admitted. This idea underlies the doctrine of “fundamental breach”.

Closely connected with this aspect is the weight of the interest which is affected by the debtor’s misconduct. In case of personal injuries the protection against exemption clauses should as a ruler be stronger than in cases of economic loss. The international tendency seems to correspond to this postulate. Thus, according to the prevailing French view nobody is allowed to exclude his liability for personal injuries caused by negligence. And the Uniform Commercial Code, although in principal admitting exemption clauses, prescribes that limitation of consequential damages for injury to the persons in the case of consumer goods is to be regarded “prima facie unconscionable”

(F) Kind of Misconduct

Finally, the degree of Debtor’s fault (gross, average or slight negligence) should be taken into account: the more the debtors conduct is to be blamed the
less he should be protected by exemption clauses. This idea has found expression in German and French case law. It is also respected by American Courts which allow common carriers and innkeepers to exonerate themselves within certain limit from strict liability, but not from liability for negligence.

4.3 Types of Exemption Clauses

A. Exemption from Liability For Breach

Some clauses may be in a form which purports to excuse the defendant from any liability incurred as a result of his breach; others may appear to limit or define the circumstances in which the proferens will be bound under the contract.

However, the form is by no means conclusive as to the effects of the clause and, a clause drafted in terms that apparently exclude liability for a pre-existing breach may be construed in such a way as to prevent certain acts or omissions ever being regarded as breaches of contracts at all.

The flavour of the problem may, perhaps, be gleaned from the following exclusion found in the engineering company’s “back of order” terms:

“The company’s liability under any order is limited to replacement or remedial work undertaken under these conditions of sale, to the entire exclusion of any other remedies which, but for this condition, the buyer might have. Any representation, condition, warranty or other undertaking in relation to the contract whether express or implied by statute, common law, custom or otherwise and whether made or given before or after the date of order or acceptance thereof, is hereby excluded for all purposes. Save as provided in these conditions, the company shall be under no liability of any sort (however arising) and shall not in any circumstances be liable for any damage, injury, direct consequential or other loss or loss of profits or costs, charges and expenses, however arising.”
B. Limitations Of Liability Or Remedies

These will be provisions in the contract that restricts the exercise of a right or remedy arising out of the breach of any obligation, express or implied, in the contract. So, for example, a term commonly found in building and civil engineering contract that the contractor’s liability for failure to complete on the due date shall not exceed a specified figure, is such a clause. Similar clauses are found in contracts of carriage.

The following example is contained in clause 12 of the standard conditions of carriage issued by the Road Haulge Association.

Subject to these conditions the liability of the carrier in respect of any one consignment shall in any case be limited:

(1) Where the loss or damage however sustained is in respect of the whole of the consignment to a sum at the rate of £ 800 per ton on either the gross weight of the consignment as computed for the purpose of charges under clause 9 hereof (the provisions for calculating carriage charges by weight) or where no such computations have been made, the actual gross weight;

(2) Where loss or damages however sustained is in respect of a part of a consignment to the proportion of a sum ascertained in accordance with (1) of this condition which the actual value of that part of consignment bears to the actual value of that part of the consignment bears to the actual value of the whole of the consignment.

Provided That

(a) nothing in this clause shall limit the carrier’s liability below the sum of £ 10 in respect of any one consignment;
(b) the carrier shall not in any case be liable for indirect or consequential
damages or for a loss of particular market whether held daily or at intervals;
(c) the carrier shall be entitled to require proof of the value of the whole of the
consignment...."

It would seem that clauses of this type are not agreements for liquidated
damages, since they are not genuine pre-estimated of damage, nor are they
penalty clauses.10

They do not destroy the contract and the content of the initial promise, but
simply qualify the right to enforce the promise by imposing limits on the quantum
of damages recoverable.

Some clauses may go further and purport to exclude the right to damages
or the right to reject altogether. 11It could be argued that excluding the right to
damages altogether is rather different in effect from simply limiting damages. By
denying the remedy of damages the promisor is depriving his promise of any
contractual content.12 This is not the case with a clause denying the promisee
the right to repudiate, since it leaves the remedy of damages intact.

C. Time Limit Clauses

These clauses are generally designed to limit the time within which suit must
be brought. They can be of two kinds. A clause may impose time limit shorter
than that fixed by the general law for the enforcement of a right or remedy, or
alternatively it may impose a time limit on action necessary (e.g. notification of
claims) before any right, remedy, duty or liability arises. The purpose of a time
limit clause may not always be immediately apparent. Thus the clause whereby
"the carrier....shall be discharged from all the liability....unless suit is brought
within one year" was held not merely to bar the remedy but extinguished the
claim.13 An example of a time limit clause may again be cited from the conditions
of carriage of the Road Haulage Association:
“The carrier should not be liable:

(1) (a) for loss from a package or from an unpacked consignment;
   (b) for damage, deviation, misdelivery, delay or detention;

Unless he is advised thereof in writing otherwise than upon a consignment
note or delivery document within three days and the claim be made in writing
within seven days after the termination of transit;

(2) for loss or non-delivery of whole of the consignment or of any
separate package forming part of the consignment;

Unless he is advised of the loss or non delivery in writing (other than upon
the consignment note or delivery document) within twenty –eight days and the
claim made in writing within forty two days after the commencement of transit”

D. Control On Evidence

Some limitation clauses may attempt to affect the question of how certain
items of evidence are to be treated in the event of any claim being made
against the proferens. It may purport to alter the onus of proof of matters under
the contract, or provide that one matter is to be treated as conclusive evidence
of another. An old case that provides a clause combining the effect of a time
limit clause and a clause affecting evidentiary matters is that of Buchanan v
Parnshow. In that case a horse sold at auction was warranted to be six years
old and sound. It was the term of the sale that, if the horse was unsound, it
should be returned within two days was, therefore, made conclusive evidence
of soundness.
E. Indemnity Clause

Any clause which requires the promise to indemnify another as a consequence of the promise having exercised a right or remedy under the contract can have the same effect as a straight forward exclusion clause.

F. Arbitration Clause

An arbitration clause would seem to be only procedural in that a provision whereby the parties agree that any disputes should be submitted to arbitration does not exclude or limit rights or remedies but simply provides a procedure under which parties may settle their grievance.

The Courts have held that such a clause is not an exclusion clause proper\(^{15}\) and the parties are free, such a clause, notwithstanding, to pursue their claims in the courts\(^{16}\) (see Doleman & Sons v/s. Osset Corporation (1912) 3. K.B. 259) subject to the right of the court to grant the stay of proceedings.\(^{17}\)

However, one type of arbitration can have substantive effect in that it can make the obligation to perform contingent upon the happening of an event. This clause is the so called Scott v/s. Avery clause \(^{18}\) under which the parties agree that no action shall be brought upon the contract until the arbitrator’s award has been made, or the promisor’s liability shall be to pay only such a sum as an arbitrator shall award.

However, notwithstanding the difference between these clauses and the more normal type of arbitration clause, the court has still be reluctant to treat them as exclusion clauses and the Law Commission, in its second report in Exemption clauses be treated as other exclusion clauses.
The Unfair Contract Terms Bill contained a clause controlling the use of arbitration clauses in consumer agreements, but this was dropped during the passage of the Bill through the House of Lords.

It is, however, arguable that a Scott v Avery clause at least would be subject to the statutory control on Unfair Contract Terms Act, 1977 were it not for section 13(2) of that Act, which provides that “an agreement in writing to submit present or future differences to arbitration is not to be treated under (the Act) as excluding or restricting any liability”

G. Liquidated Damages Clause

A liquidated damages clause, unlike a clause that simply fixes a maximum limit on the amount of damages recoverable, is a genuine attempt at a pre-estimate of damages.19

Where, however, the contract stipulates for a named sum, not for the purpose of fixing in advance the loss which the parties consider is likely to flow from the breach, but as a penalty, to secure the performance of the contract, a claim on the penalty will succeed only to the extent of the loss actually suffered by the innocent party.20 A valid liquidated damage clause may in practice limit the liability that would have been imposed on a party in breach of contract had there been no such provision. A term providing liquidated damages is not, however, normally regarded as exemption clause.

In Suisse Atlantique Societe’d Armement S.A. v N. V. Rotterdamsche Kolen Centrale21 it was argued that a demurrage clause (a clause making a pre-estimate of damage caused to a ship owner by delay of he vessel in port after he date specified in the charter party as the due sailing date)m should be trated as an exemption clauses, but Lord Upjohn distinguished between “a clauses which are truly clauses of exception or limitation, that is to say clauses
essentially inserted for the purpose only of protecting one contracting party from terms which would otherwise be implied by law or from the terms of the contract regarded as a whole.” And clauses inserted for the benefit of both parties, such as agreed damage clauses. A distinction was drawn in that case between a clause agreeing a figure of damages where no proof of loss was needed (a liquidated damage clause), and a clause imposing a limit where proof of loss at least up to the limit would be necessary (an exemption clause).

H. Excepted Perils clauses and promissory warranties in contract of insurance

In the law of insurance, the word “warranty” should be clearly distinguished from its use in other branches of the law of contract. The common use of the term is to denote a promise, the breach of which only entitles the party aggrieved to damages, leaving him still liable to perform his side of the bargain. A warranty in a policy of insurance, on the other hand, corresponds with a condition in any other contract, and breach of it entitles the insurers to repudiate liability under the policy. Examples of such warranty would be stipulations in the policy that the assured will not proceed abroad, or that he will fit a certain type of burglar alarm to his promises. Until breach the insurers are bound; a breach, even after the contract is complete, relieves the insurers from liability. Warranties relating to the future are sometimes described as “promissory warranties”. This term is misleading, however, as most warranties are, in an sense promissory. In fact, in marine insurance “promissory” warranties are contrasted with warranties which merely define the risk insured against, which can only relate to the future. These risk defining warranties, e.g. the stipulation in a policy of marine insurance that a ship is “warranted free of capture” by an F.C. and S clause, are not the warranties in the sense of contractual conditions at all. There is no question of a term of the policy being broken, thus allowing repudiation, should the stipulation not be met. The warranty in this instance simply expresses an excepted peril. So, if a vessel “warranted free of capture” is captured or requisitioned, the underwriters
will not be responsible for that loss, since that was a peril accepted from the cover, but they will be liable for a subsequent loss by a peril of the sea, provided the capture was not the proximate cause of it.\textsuperscript{27}

In general insurance law also, any representation that is warranted to be true is sometimes spoken of as being, for that reason, a “promissory” warranty.\textsuperscript{28} These “promissory” warranties are, in effect, conditions precedent to the insurer’s liability and must be clearly distinguished from terms or clauses in a contract which define or limit the risk, such as the “promissory” warranties just discussed in the context of marine insurance. They will include stipulations as to safety precautions the insured must take, or essential repairs or works he must carry out, before the policy comes into effect.

In addition, however, it will invariably be the case that the policy will contain some clauses or “warranties” that define the risk in a positive fashion, and still more that cut down its scope negatively by means of exception or accepted perils. Such excepted perils are frequently printed among the conditions of the policy, exempting the insurers from liability for certain kinds of loss which would otherwise be covered by it.\textsuperscript{29}

So, the occurrence of an excepted peril will not preclude the assured from recovery unless it is also the proximate cause of the loss. In the case of the breach of a promissory warranty entitles the insurers to repudiate, even if it had nothing whatever to do with the loss.

Thus, in Provincial Insurance v Morgan\textsuperscript{30} assured stated that a lorry in respect of which he took out cover, was to be used to carry coal, and the policy was limited to transportation in connection with his business. He also warranted his answers to be true. He occasionally uses the lorry to carry timber, but was involved in an accident when carrying coal only. It was held that the effect of his statement was only to limit the risk covered by the insurers to use the lorry
while carrying coal, and that, while he would not be insured while carrying timber, he could recover in respect of the accident since then the vehicle was being used for the activity in respect of which the insurers had undertaken the risk of damage.

Similarly, in Farr v Motor Traders Mutual Insurances Society Ltd. a statement by the assured that a club was only to be driven on one shift per twenty-four hours was held to be only a description of the risk and was not constructed as a promissory warranty.

In de Maurier (Jewels) v Bastion Insurance Co. Donaldson J. held that a warranty regarding locks and alarms fitted to vehicles was not of a promissory character, it delimited and was part of the description of the risk.

On the other hand, in Balatine Insurance v Gregory fire insurances on timber were made “subject to the fifty feet clear space clause attached.” The clear space of clause read: “Warranted by the assured that a clear space of fifty feet shall hereafter be maintained between the timber hereby insured and any sawmill.” It was held that this clause amounted to a promissory warranty and was not merely definitional of the cover afforded. The problem is really one of construction as to whether the court finds the statement to be “promissory”, or alternatively defining the risk covered.

4.4 The Contractual Force of Exemption

(A) Incorporation into Contracts

An exemption clause will only operate to limit or modify contractual rights or remedies when it has been incorporated into contracts upon which it purports to have effect. This apparently obvious statement is no more than an illustration of the general proportion that not all the words which the parties said or wrote during their negotiations will become part of the contract. If the contract is wholly oral, its contents are a matter of fact to be established by evidence proving what
the parties said and intended. If the contract is wholly written then there will rarely be any dispute of fact as to what was agreed but instead a disagreement as to what the words used actually mean, which is a matter of interpretation for the judge.  

However, where the contract is wholly in writing, extrinsic evidence is generally inadmissible when it would, if accepted, have the effect of adding to, varying or contradicting the terms of a document constituting a valid and effective contract. In Bank of Australia v Palmer, Lord Morris said (at p.545): Parol testimony cannot be received to contradict, vary add to or subtract from the terms of the written contract, or the terms in which the parties have deliberately agreed to record any part of their contract.

Were this to be an unshakeable principle of contractual construction there would be no occasion when an exemption clause, not found in the original written contract, would bind the parties. Despite the obvious hostility of the courts towards exemption clauses in the context of “non-negotiable” contracts, the courts seem curiously to have resisted the temptation to place heavy reliance on the pay-roll evidence rule in order to counter attempts to import exemption clauses into written contracts. Evidence may be admitted to prove a custom or trade usage, notwithstanding the absence of any mention of such matters in the written document. Indeed, the practical effect of “payroll evidence rule” can be completely negative by the court finding that the document only contains part of the terms, i.e., the contracts was made partly in writing and partly by word of mouth or by conduct. While the presence of writing raises a presumption that the writing contains the whole contract, this presumption may be rebutted by evidence that the parties did not intend the writing to be exclusive. In the particular context of exemption clauses, it may sometimes be argued by the party seeking to rely on the clause that, notwithstanding its apparent absence from the contractual document in question, that document does not represent the entire contract between the parties and a clause of exemption should still apply.
because, for instance, the parties intended it to be implied into their agreement from a previous course of dealing.

The problems created by attempts to incorporate exemption clauses from previous dealings between the parties into contracts, whether those contracts be written or oral, are not new\textsuperscript{41}, although there is little doubt that the attitude of the judiciary towards them has changed radically as the “consumer interest” as the area of primary intervention.\textsuperscript{42} The courts initially took the view that businessmen who were used to dealing with each other over a long period on virtually identical terms on each occasion, may not necessarily read all the contract documents every time, but simply assume them to be in conformity with the previous course of dealing.\textsuperscript{43}

That being so, incorporation of an exemption clause into the instant contract could be inferred from a previous course of dealing between the parties. For instance, in J. Spurling Ltd. v Bradshaw\textsuperscript{44}, the defendant delivered eight barrels of orange juice to the plaintiff warehousemen, with whom he had frequently dealt in the past. Some days later the defendant received a “landing account” acknowledging receipt of the barrels and referring on its face to a set of “contract conditions” printed on the back. These conditions contained a clause purporting to exempt the plaintiffs from liability for loss or damage “occasioned by the negligence, wrongful act or default” of themselves, their servant or agents. When the defendant eventually collected the barrels somewhere empty, some contained dirty water and some were leaking badly. The defendant failed to pay the storage charges and the plaintiffs sued him. The defendant counter claimed for damages alleging that the plaintiffs either were in breach of an implied term of the contract of bailment to take reasonable care of barrels or were guilty of negligence in the storage. The plaintiffs pleaded the exemption clause but the defendant argued that since he had only received the “landing account” after conclusion of the contract, the exemption clauses contained therein should not affect him. However, the defendant did give evidence to the effect that he had
received many landing accounts from the plaintiffs in the past in respect of other goods but that he had never read them. As a result of this previous course of business dealing between the parties the defendant was held to be bound by the clause which had thus become incorporated into the instant contract.

Despite the view of Lord Devlin that cases in which terms will be implied in to agreements by usage or by a course of dealing between the parties will be of increasing rarity in modern commercial practice, it still appears to be relatively easy to show that terms are included in a contract by a course of dealing.

In British Crane Hire Corporation Ltd. v Ipswich Plant Hire Ltd., the plaintiffs and defendants were both engaged in the business of hiring out earthmoving equipment. The defendants were also involved in draining some marshy ground and urgently required some crane. They agreed to hire a crane from the plaintiffs. The terms of payment were agreed but no mention was made of the plaintiff’s conditions of hire. The plaintiff’s sent the defendants a copy of such conditions which provided, inter-alia that the hirer would be responsible for all expenses arising out of the crane’s use. Before the defendants signed the form containing the conditions, the crane sank into the marsh through no fault of the defendants and the plaintiffs claimed the cost of recovering the crane. The Court of Appeal held that since the bargaining power of the defendants was equal to the plaintiffs and the defendants knew that he printed conditions in similar terms to those of the plaintiffs were in common use in the business, the plaintiffs were entitled to conclude that the defendants were accepting the crane on the terms of their conditions. The conditions had therefore been incorporated into contract on the basis of the common understanding of the parties and accordingly the plaintiffs claim succeeded.

It would appear to follow from this that where the bargaining power of the parties is not equal, as is frequently the case in the consumer context,
implications of terms by reference to a previous course of dealing is far more difficult.

While it does sometimes happen that the doctrine enunciated in J.Spurling Ltd. v Bradshaw is applied in consumer cases, it is comparatively rare.

For example, in Hollier v Rambler Motors (A.M.C.) Ltd., the plaintiff telephoned the defendant’s garage and asked if they would repair his car. The defendant’s manager said that they would if the plaintiff had it towed to the garage. While in the garage the car was damaged by a fire which started as a result of the garage’s negligence. On three or four occasions in the previous five years the plaintiff had made use of the repair services of the garage and on each of those occasions had signed a form which stated that “The Company is not responsible for damage caused by fire to customer’s car on the premises.” In an action by the plaintiff claiming damages for negligence the defendants contended that, although the plaintiff had not signed the form on this occasion, the exemption clause had been incorporated into the oral contract between them by a course of dealing and that its effect was to exclude liability for negligence causing a fire while the car was in their care.

The Court of Appeal held inter-alia, that the defendants were liable to the plaintiff because three or four transactions in the course of five years were not sufficient to establish a course of dealing and so the clause was not incorporated into the oral contract.

Commenting on that decision, Lord Denning M.R., observed in British Crane Hire Corporation v Isswich Plant Hire Ltd.: “That was a case of a private individual who had signed forms with conditions on three or four occasions. The plaintiff there was not of equal bargaining power with the garage company which repaired the car. The conditions were not incorporated.” The implication is clear.
Had he parties both been commercial men, contracting on equal terms, the result might well have been different.

However, of equal significance in the Hollier case, and other cases in which a previous pattern of business is relied upon to incorporate an exemption clause into a contract, Is the problem of what constitutes a previous course of dealing between the parties? Some degree of regularity of conduct is required but the precise amount is subject to doubt.

In J.Spurling Ltd., v Bradshaw, for example, it was merely stated that the defendant “had received many landing accounts before.” In Henry Kendall & Sons v William Lillico & Sons, a contract of sale was made orally by one Golden on the Bury St. Edmunds Corn Exchange for the sale of poultry feeding stuffs to the Suffolk Agricultural Poultry Producers Association Ltd., by Grimsale and Sons Ltd. They contracted by a confirmation note containing a conditions of sale. The frequency of previous dealing here was three or four agreements a month in the previous three years involving the use of such confirmation notes. In British Crane Hire Corporation Ltd. v Ipswich Plant Hire Ltd. there were only two transactions many months before, although there was also trade usage to take account of. In Hollier v Rambler Motors (A.M.C.)Ltd., on the other hand, there were three or four transactions over a period of five years. This was not sufficient to show a course of dealing although, as has already been noted, this may, in part, depend upon the fact that the case involved a “consumer” as opposed to a “commercial “transaction.

It would seem, therefore, that the previous course of dealing must at least be consistent and regular, and there is even an implication in the Victoria Fur Traders case that there be some proof of the parties having deemed themselves bound by the particular clause in question. This observation is perhaps dependant upon the view that it is simply constructive knowledge of the term to be implied, rather than actual knowledge that is material.
This is contrary to the opinion expressed by Lord Devlin in the House of Lords in Mc. Cutcheon v David Mac Brayne Ltd. The usual procedure of signing a written note of the terms was not adopted. Lord Pearce stated (at P.138) that the ordinary course of business could not be of help to the carrier, since the transaction did not follow the ordinary course, no written control having been supplied. This does seem a more satisfactory explanation of the result than Lord Devlin’s reliance on actual as against constructive knowledge.54

Certainly there were written terms, although the actual contract was oral. Nevertheless, it could be argued that the parties were “dealing” on the plaintiffs written standard terms of business and therefore that, were it to be decided today, this and similar cases would fall within the Act. In any event, the fact that the proferens needs to rely upon a previous course of dealing between the parties, whether or not such dealing was on written terms, may, in itself, be a factor to take into account in deciding whether the exemption clause is a fair and reasonable one to be included, within section 11(1) of the 1977 Act, or a fair and reasonable one to be relied upon, at common law.55

(B) The Effect of Signature

Where a contractual document is signed by a party, the fact of agreement is proved by his Signature and, in the absence of fraud or misrepresentation, or the availability of non est factum, 56 it is wholly immaterial that he has not read the contract and does not know its contents or even that he cannot speak or read English.57 He will therefore be unable to argue that he has no notice of an exemption clause contained in a contractual document to which he has put his signature. Thus, in L’Estrange v Gracoub, the plaintiff agreed to purchase from the defendants a cigarette vending machine. The agreement provided for payment by installments and it contained a clause excluding liability for breaches of warranty or condition. The plaintiff signed the agreement without
reading its terms. The machine was faulty and the plaintiff purported to terminate for breach of condition. It was held that she could not do so since the exemption clause had effectively excluded all liability on the part of the seller. Scrutton L.J. said:

“In cases in which the contract is contained in a railway ticket or other unsigned document, it is necessary to prove that an alleged party was aware, or ought to have been aware, of its terms and conditions. These cases have no application when the document has been signed. When a document containing contractual term is signed, then in the absence of fraud, containing contractual terms is signed, then in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.”

In some cases, however, the absolute effect of the signature will not be enforced. So, where an employee of a dry cleaning firm misrepresented to the customer the true purpose of the receipt signed by customer, the Court of Appeal held that the defendant company was precluded from enjoying the full force of exemption clause contained therein.59

Statute has also had some impact on this area. So, for example, the Unfair Contract Terms Act 1977, S.2(3) provides that “where a contract term of notice purports to exclude or restrict liability for a negligence a person’s agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of any risk.” The meaning of this provision is not entirely clear, although it appears to prevent the defence of volenti non fit injuria being raised in an action in tort solely on the ground that the plaintiff was aware of a clause excluding or restricting liability. Since, the fiction applied at common law to a signatory to a contractual document is that, by his signature he at least has knowledge of, if not consents to, any exemption clause contained in that document, Section 2(3) would seem to prevent such a rule being applied so as
to make the signatory volents to the risk in a tortuous action, in the absence of any other evidence that the risk was accepted.

Certain statutory provisions\(^{60}\) have rendered certain types of contractual provision, including exemption clauses, totally void in certain circumstances. Notwithstanding, therefore, that a contract document has been signed at a common law clauses contained in it are regarded as part of the contract between the parties, these statutory provisions would still operate on these clauses, as would any common law invalidatory rule, such as the rule against penalties.

(C) Written Clauses of Exemption

It is rare to encounter an oral exemption clause. In theory there is nothing against such clauses, but in practice the evidentary problems make them unlikely. Thus, exemption or limitation clauses will normally be written, either within the contract itself, or upon notices, tickets, receipts or other documents which the party seeking to rely on them hopes to incorporate into the transaction.

In those cases, in which the contract partly oral and partly written, the party seeking to rely on the exemption clause will have to show that he has incorporated it into the bargain between the parties and in the case of contracts falling within The Unfair Terms Act 1977 that it is reasonable one to have been incorporated.\(^{61}\) And it must be signed by the other party as a proof that it is accepted as a written part of the transaction. In the absence of either of these possibilities, the exemption clause will only be treated as part of the agreement if it has been brought to the notice of the party affected by it.\(^{62}\)

There has been a very great deal of litigation on the problem of what constitutes sufficient notice of a written exemption clause for it to be regarded as
part of the agreement. The first point of significance is the timing of the notice in that for a term to become a binding part of the contract it must be brought to the notice of the party affected by it, and he must expressly or impliedly assent to it, before or at the time that the contract is made.

The classic illustration of this principle is to be found in Olley v Marlborough Court Ltd.\textsuperscript{63}, where the plaintiff and her husband booked and paid for in advance a week’s board and residence in the defendant’s hotel. They then went up to their room, where a notice was exhibited which contained the following clause: “The proprietors will not hold themselves responsible for articles lost or stolen unless held to managers for safe custody.” Owing to the negligence of the hotel staff in allowing a third party access to the room key, the wife’s furs were stolen. The plaintiff sued and the defendants attempted to rely on the exemption clause, arguing that it had been incorporated into the contract by the notice in the room.

The Court of Appeal held that the contract was made at the reception desk when the defendants agreed to accept the weeks booking from the plaintiff. The notice, therefore, could not form part of contract since the plaintiff could not have seen it until after the contract was made and the defendants were thus liable for the loss.

Similarly, in Daly v General Steam Navigation Co. Ltd.\textsuperscript{64}, the plaintiff’s husband had booked passage on the defendant’s ship. His attention to the conditions of the carriage was not drawn at any point of time during contract. Later the ticket arrived, by post, in a folder on which were set out the conditions of carriage including a clause purporting to exempt the defendants from liability for any injury or accident sustained by a passenger. Such a provision would now be void by virtue of The Unfair Terms Act 1977. S.2(1), but the contract in the case was concluded before the Act came into force. During voyage plaintiff was injured. Bradon J. held, interalia, that the contract of carriage was concluded when the bookings were made and confirmed, at which time neither the plaintiff
nor her husband, were aware of the conditions. The defendants could not rely upon conditions subsequently and ultimately introduced, into the contract, and accordingly they had no defence, based upon the exemption, to the plaintiff’s action.\textsuperscript{65}

The problem of contemporaneity can be raised in a particularly striking form when the contract is concluded through the medium of automatic machine.

In so far as notice of any exemption clause must be given before or at the time of concluding the agreement, the precise moment when the offer is accepted, and indeed the question of who makes the offer and who the acceptance, is of especial significance where the contract is concluded through the medium of a machine which accepts money or tokens.

In Thornton v Shoe Lane Parking Ltd.,\textsuperscript{66} the plaintiff drove his car into a park which held an automatic barrier. He had never been there before. A notice outside gave the charges and stated that all cars were “parked at owner’s risk”. A traffic light at the entrance showed red and a machine produced a ticket when the car stopped beside it. The plaintiff took the ticket and the light having turned to green, drove into the garage and parked his car. On returning to collect it there was an accident in which he was injured. In his action against the garage for damages the garage contended inter-alia, that the ticket incorporated a condition exempting them from liability. It was mentioned on the ticket at bottom in small - print:”issued subject to conditions….displayed on the premises.”

The Court of Appeal held that the plaintiff was not bound by the conditions printed on the ticket; the contract was concluded when the car was driven to the entrance of the garage, causing the ticket to be issued, and the plaintiff could not be bound by conditions brought to his attention after this.
This case, while specifically involving an automatic machine, raised in a general sense a further point concerning the adequacy of the notice that must be given by a party seeking to rely on an exemption clause.

This is almost certainly going too far, although a similar principle was applied in Hollingworth v Southern Ferries Ltd., 67 to prevent incorporation of an exemption clause in a contract for a cruise, where the brochure from which the trip was booked merely referred to a set of conditions that could be inspected at the company’s offices; the conditions themselves not being furnished to the passenger until after the contract of carriage was concluded. It seems, therefore, that the defendant must establish that adequate steps have been taken to draw the plaintiff’s attention in the most explicit way to the particular clause relied on.

Such a line of argument is based, essentially, on the reasonableness of the steps that have been taken to draw the clauses to the attention of the party allegedly affected by them. It has an old and respected pedigree, stemming from the judgement of Mellish L.J. in Parker v South Eastern Railway Co. Ltd. 68 Lord Hudson commenting in Mc Cutcheon v David Mac-Brayne Ltd. 69 the judgement of Mallish L.J. said that the correct questions to ask in a ticket case were the following

(1) Did the person receiving the ticket know that there was printing on it? If not, he is not bound.

(2) Did he know that the ticket contained or referred to condition? If he did, then he will be bound.

(3) Did the party seeking to rely on the clause do what was reasonable in the way of notifying prospective contracting parties of the existence of conditions and where their terms might be considered? If he did then, notwithstanding a negative answer to (1) above, the clause will be part of the contract. If he did not then, unless there is an affirmative answer to (2) above, the conditions will not be part of the contract.
In the words of Denning L.J.(as he was then) in J.Spurling Ltd. v Bradshaw:70 
“some clauses which I have seen would need to be printed in red ink on the face 
of the document with a red hand pointing to it before the notice could be held to 
be sufficient.71

Although the question of the reasonableness of the steps taken is one of fact, 
the test of reasonableness is objective, so that the fact the plaintiff is under 
some disability, for instance, he is blind or illiterate or cannot speak English is 
irrelevant, provided that the notice is reasonably sufficient for a person normally 
entering into such a transaction who is not under the disability.

In Thompson v London, Midland and Scottish Railway Co. Ltd., the plaintiff 
who was illiterate, asked her niece purchase for her a railway excursion ticket 
on the face of which were the words: “For conditions see back.” The plaintiff 
suffered injuries. The conditions exempted the company’s liability.

The Court of Appeal held that the defendant company had taken reasonable 
steps to bring the conditions to the notice of ordinary travelers and even had 
she bought the ticket herself instead of through an agent, the judgement seem 
to indicate that the particular illiteracy of the plaintiff would have been irrelevant.

It could be argued from this that if the party affected by the clause is known, 
for whatever reason, to be unable to read it, then for greater diligence is 
required of the party seeking to rely on the clause to bring it to the other’s 
attention before the steps taken will be held to be sufficient to effect 
incorporation.

One factor that will clearly affect the reasonableness of the notice is the kind 
of document inn which the exemption clause is contained.
In Chapleton v Barry U.D.C.\textsuperscript{74}, the plaintiff hired one of the defendant’s desk-chairs for the beach, paying and receiving a ticket in return from the attendant. He sat on it and fell through the canvas. He suffered the personal injuries as a result and when he sued the defendants for damages they set up the exemption clause printed on the back of the ticket as a defence.

The plaintiff admitted that he had glanced at the ticket, but had not realized that it contained conditions. The court took the view that such a ticket was not of a type that one would normally regard as a contractual document, and thus one would not reasonably expect it to contain contractual conditions. So, the defendants were not protected by the exemption clause since the ticket was simply a voucher or receipt. It did not purport to set out the conditions of hire but merely to show for how long the chair had been hired and that the hire charge had been paid.

Simply calling a document “a receipt” does not, however, automatically prevent it from being treated as “a contractual document”\textsuperscript{75} It may be intended by the parties to have this effect or be delivered to the party to be affected by the conditions in such circumstances as to give him reasonable notice of them.\textsuperscript{76} Whether a document is or is not a “contractual” document, i.e., one that could reasonably be expected to contain contractual terms, is a question of fact that may change with commercial or consumer practices.

(D) The “Battle of The Forms”

This term is frequently used to describe the situation that arises where one party sends a standard form (possibly an “order form”) stating that the contract is on his terms and the other party responds by returning another standard form(possibly an “acceptance note”.) stating that the contract one of his terms. The terms may either be set out in the forms themselves, or stated to be available on request, as in Smith v South Wales Switchgear Ltd.\textsuperscript{77} Frequently
such standard forms will contain exclusions. The usual approach to this problem is through the medium of offer and acceptance and it can produce several solutions. It may be it will yield a contract on the first party’s terms, on the second party’s terms a contract on such terms as may be implied at common law, a contract on both standard forms, or on contract at all.

The offer and acceptance analysis is almost certainly the best to adopt where one party seeks to substitute his conditions for he other’s and neither party explicitly acknowledges assent, although it may fall down where both the parties simultaneously send out standard forms and each proceeds to trade on the assumption that its own conditions apply.

In B.R.S. v Arthur Crutenley Ltd., a consignment of whisky was delivered by the plaintiffs driver to the defendants warehouse for storage. The driver presented a receipt, which incorporated the plaintiff’s standard trading conditions, for signature. The warehouseman signed the receipt but added in writing that it was subject to the defendant’s own conditions. The court held that this constituted a counter offer which nullified the original offer and was accepted by the driver’s subsequent unqualified delivery of the goods.

The decision was recently considered by the Court of Appeal in Butter Machine Tool Co. Ltd. v Ex-Cell-O-Corporation (England) Ltd.

Here, in this case in response to an enquiry by the buyers, the sellers offered to sell a machine tool for £ 75,535, delivery to be in 10 months time. The offer was on the sellers standard conditions, which were stated to “prevail over any terms and conditions in the buyer’s order.” These conditions included a price-variation clause providing for the goods to be charged at the price current on the date of delivery. The buyer’s replied accepting the order, but on terms and conditions which were materially different from those put forward by the seller’s and which in particular contained no provision for a price-variation.
The buyers conditions had a tear-off slip attached, which the sellers signed and returned, containing the words “we accept your order on the Terms and Conditions thereon.” The returned slip was accompanied by a letter from the sellers stating that buyers order was being entered in accordance with the seller’s original offer when the machine tool was delivered, the sellers claimed on additional £ 2,892 under the price variation provision contained in their terms. The buyers argued that the contract had been concluded on their, rather that seller’s terms and was therefore a fixed-price contract.

The Court of Appeal analysed the issue between the parties as one of offer and acceptance and held that the sellers had contracted on the buyer’s terms, since the return of acknowledgement slip amounted to an acceptance of the buyer’s counter offer, but merely confirmed that the price and identity of the machine. Hence, the sellers could not claim to increase eh price. Had the sellers not returned the tear-off slip, but simply sent the letter, both Lawten and Bridge, L.JJ. Express the view that there would have been no contract at all between the parties. They do not, however, consider what would then happen if the goods were delivered by the sellers and accepted by the buyers.

No solution is ideal. The analysis of offer and acceptance, while conceptually correct, is often difficult to reconcile with business practic4e and the view the parties took of what they were doing. Lord Denning’s view has at least the merit of allowing a fair measure of flexibility.

4.5 The Statutory Control of Exemption Clauses

There have been many attempts to control by statute the operation of exemption clauses, or their incorporation into contracts, and several different legislative techniques have been used. However, these techniques all have one characteristic in common – they view exemption clauses as something
separate from the other promises and undertakings in the contract. On one view, an exemption clause is simply one form of incorporating into a contract a statement of what the parties are promising, or not promising, to do a negative statement delineating positive obligations rather than a shield or defence to a liability already undertaken or accrued. Statutory attempts at control do not appear to acknowledge this and, to a greater or lesser degree, regard clauses of exemption as terms apart from the promises and liabilities of the contract. While this used to reflect the judicial attitude also, there are clear signs now that some judges are taking a different view of such clauses. However, so far as statute is concerned, the unchanging view of the legislature seems to be that exemption clauses have an exclusively prophylactic function, and this has produced some remarkable problems of statutory interpretation.

4.5.1 Total Invalidity

Certain types of exemption clauses are declared absolutely void by statute. They are void either because the type of damage for which they purport to exclude liability or the contractual duty, the breach of which it is hoped to exclude, is such that by statutory control, the public consumer of commercial interest is thereby better served.

There are many examples of legislation rendering clauses void on account of the type of damage for which they seek to exclude liability. Thus, any provision attempting to negative or limit the liability of the operator of a public service road vehicle for causing the death of or personal injury to a passenger is void (Road Traffic Act 1960, S.151). There is a similar provision in section 43(7) of The Transport Act 1962 to cover the carriage of passengers by rail; thus making void a clause such as that held to be operative in Thompson v London, Midland and Scottish Railway Co. Ltd. Any antecedent agreement or understanding between the user of a motor vehicle and his passenger which purports to restrict the driver’s liability to that passenger in respect of risks for which compulsory
insurance cover is required (see Road Traffic Act 1972, S.143), is void under Section 148(3) of the Road Traffic Act, 1972.

All these and many more attempts to relieve from liability for causing death or personal injury have been brought within the net of voidness by section 2(1) of The Unfair Contract Terms Act, 1977. Under the terms of this section, any clause or notice (thus bringing into statutory control those areas where liability in negligence does not depend upon a pre-existing contract) will be void in so far as it purports to exclude or restrict liability for death or personal injury arising as a result of negligence. This provision does not apply, however, to this list of exceptions set out in Schedule 1, paragraph 1, nor to contractual limitations on liability which are permitted by international convention, or by a statutory enactment which extends provisions based on a convention to domestic carriage (such as The Civil Aviation Act, 1971). Nor does section 2(1) extend to a contract of employment, except in favour of the employees (scheld.1, para 4) and will only apply to “business liability”.

However, this apparently straightforward statutory ban is not entirely unambiguous, since it must be read in conjunction with section 13(1). This requires that

“To the extent that this part of this Act. [i.e., Sections 1-14] prevents the exclusion or restriction of any liability…… sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms or notices while exclude or restrict the relevant obligations or duty.”

It will be noted that section 2(1) is drafted in terms of restriction or exclusion of liability – “liability for death or personal injury resulting from negligence.” Negligence is itself defined in terms of a breach of an existing obligation. This may be an obligation to take reasonable care of exercise reasonable skill arising by way of contract (S. 1 (1) (a) or by way of any common law duty of care. In
other words, in all cases contemplated by sec-2(1), the duty of care. In other words, in all cases contemplated by sec-2(1), the duty of care is pre-supposed.

Section 13(1) appears to require that the same prohibition which section 2(1) applies to an exclusion or restriction of liability must also be applied to an exclusion or restriction of the duty of care itself, the breach of which would have produced that liability. Just as liability for death or personal injury arising from conduct performed in the course of business cannot be excluded, so the relevant duty of care itself cannot be excluded.

Suppose a departure store attaches a notice to its lifts stating that they are out of order and not to be used, and that it will not be responsible for injury caused to anyone who uses them. Suppose, that a customer of full age and capacity uses the lift and is injured. Undoubtedly, the notice purports to restrict the store’s common duty of care under the Liability Act, 1957, s. 2(10. Can the customer, therefore, argue that the notice is totally inoperative under section 2(1) and 13(1) of the 1977 Act? If the notice (and the knowledge conferred thereby) is deleted from the parties relationship, the charter of the customer as a trespasser may be lost, and the store’s common duty of care owed to a lawful entrant (which on common sense grounds this customer is not) would revive. Such, a reading of section 13(1) mutilates legal relationships into a set of standard stereotypes.87

The Unfair Contract Terms Act, 1977 also renders void some Exemption Clause on the ground that the particular duty, the breach of which it is hoped the clause will excuse or obviate, is not one which, on the grounds of policy, may be omitted from the contractual relations between the parties. In their original forms, sections 13,14 and 15 of what is now the Sale of Goods Act 1979 contained terms to be implied, in the absence of contrary evidence, in all contracts for The Sale of Goods, dealing with such matters as correspondence of the goods, dealing with such matters as correspondence of the goods,
dealing with such matters as correspondence of goods to contract description, fitness of the goods for their purpose, the merchantability of the goods, and their correspondence with sample. The original intention of the draftsmen was to fill any gaps left by commercial men in their agreements by means of implied terms.  

The general tendency of the law of contract over the past twenty-five years to shift away from the protection of the commercial interest has resulted in the statutory insertion of compulsorily imposed terms as to quality by redrafting of section 12 to 15 of the Sale of Goods Act 1893 into the form in which they now appear in the act of 1979. Any attempt to exclude the implied undertakings as to title in contracts of sale or hire-purchase will be of no effect. In consumer contracts of sale or hire-purchase, the seller or owner's implied undertakings as to conformity of goods with description or sample, or as to their quality, or fitness for a particular purpose, cannot be excluded or restricted. Similar provisions apply, under The Unfair Contract Terms Act 1977, S 7(2), to contracts which involve the transfer of ownership or possession of goods from one person to another or the use of or expenditure on goods from one person to another or the use of or expenditure on goods in the performance of any services, such as contracts of hire, exchange and for work and materials. As to the exact content of this last group of implied terms, the common law is unclear and there is, as yet, no statutory definition of them. The 1977 Act provides that, whatever these implied terms may be relating to correspondence with the description or sample, quality or fitness for purpose, they may not be excluded or restricted in consumer contracts.

This technique of multifying attempts to contract out of duties imposed by contract or legislation is becoming a common feature on our statute books. It does, however, inhibit the reasonable bargains of reasonable parties, and creates extremely difficult points of interpretation. Where, for instance, in relation to section 13 of The sale of Goods Act, 1979, should one draw the line between
a term that excludes a particular characteristic from the description of the contract goods and one which exempts the supplier from liability for supplying goods lacking that characteristic? 95

Suppose that consumer then buys the car for the asking price without further examination and later relies upon those defects in a claim that the vehicle is not of mercantable quality. Normally, no condition to this effect would arise with regard to defects that are specifically indicated. 96 Is the position altered by the fact that the term or notice undoubtedly prevents the relevant obligation from arising?

There are other objections that could be made to section 13(1). These proceed mainly on semantic grounds but taken literally, they suggest that the provision may, in fact, be discarded as wholly meaningless. Thus, the provision refers to "excluding or restricting liability" by terms or notices which exclude or restrict the relevant duty, whereas if the original duty were excluded no liability would arise. Again, it refers to "terms or notices which exclude or restrict the relevant obligation or duty," whereas the main object of the provision is to ensure that (in certain circumstances at least) the obligation or duty should not be excluded or restricted at all: what then, is to be made of a provision which achieves this object by assuming that the very thing it sought to prohibit has occurred?

Such results flow, in part, from treating exemption clauses as if they had an existence completely independent of the promises and undertakings contained in the contract. So, for instance, in relation to the implied undertakings as to quality and fitness in the Sale of Goods Act1979, the statutory controls on exemption clauses appear to ignore the basic function of such clauses, which is to allocate contractual risks or, put another way, to determine who is going to pay if the goods are defective. The first priority under the legislation is the domestic consumer and his interests are safeguarded in so far as any exclusion
attempt by the retailer in relation to the statutorily implied terms will be void. However, the ultimate responsibility will, in many cases, be that of the manufacturer depends upon the view the statute takes of exemption clause in non-consumer sales which depends, in turn, as we shall see, upon an element of judicial discretion. This applies without distinction between commercial sales of consumer durables in the chain between the manufacturer, whose fault the defect may well be and the retailer.

4.5.2 The “Reasonable” Exemption Clause

Some statutes have given the courts discretion to control exemption clauses according to whether the clause is fair and reasonable. By far the most important of these is now The Unfair Contract Terms Act, 1977. As against a person dealing other than a consumer, statutorily implied terms as to quality, fitness for purpose and correspondence with description or sample in contracts for the sale of goods or hire-purchase, or the similar terms implied by the common law into analogous contracts for the supply of goods, can be excluded, but only insofar as the exemption satisfies the statutory concept of reasonableness.

(A) Misrepresentation

Section 3 of the Misrepresentation Act 1967, as substituted by The Unfair Contract Terms Act, 1977, S.8 (1), enacts that any provision in any agreement which purports to exclude or restrict any liability of a contracting party for a misrepresentation, or any remedy available to the other party by reason of the misrepresentation, “shall be of no effect except in so far as it satisfies the requirement of reasonableness.”

The section appears to apply to clauses excluding liability for misdescriptions, however, trivial, but the usual commercial stipulations for a margin in, for
example, specification of goods, would not be invalidated, either because there would be no misrepresentation at all if the deviation from specifications fell within the stipulated margin, or, more doubtfully, on the ground that such a provision did not exclude or restrict a liability or remedy, but merely prevented the liability or remedy from arising in the first place.

Professor Atiyah raises an interesting problem concerning the fate of agreed damages clause under section 3 of the 1967 Act.\textsuperscript{101} It is clearly a clause restricting liability and so prima facie does fall within section 3. However, as the members of the House of Lords observed in the Suisse Atlantique Case\textsuperscript{102}, genuine pre-estimates of damages differ from the usual type of exemption clause in that they are inserted into contracts for the benefit of both parties.

Although section 3 of the 1967 Act is clearly aimed both at clauses excluding liability and at those restricting remedies, there is no statutory definition of either. Provided the draftsman is able to prevent his clause looking like an exclusion or restriction, he has a sporting chance of escaping the section altogether. In Overbrook Estate ltd. v Glencombe Properties Ltd.\textsuperscript{103}, an arrangement whereby a principal limited the authority of his agent to make representations was held not to be a clause limiting or excluding the liability of the principal seller, and so not within section 3.\textsuperscript{104}

Another type of case where there would appear, on the face of it, to be no restriction or exclusion of a liability or a remedy which would otherwise arise is that in which the representor tries to evade the normal consequences of misrepresentation by stipulating that there should be no reliance placed upon the statements, reliance, of course, being essential before it can be said that there is an operative misrepresentation in the first place.\textsuperscript{105} For example, “The buyer warrants that he has examined the vehicle(s) and has not relied on any representation made to him by the seller, but solely upon his judgement.”
One difficulty with this type of clause is that by the courts would not likely to permit reliance upon it, the 1967 act notwithstanding, where to do so would be to uphold a sham.

That this might well be the approach taken by the courts to similar kinds of clauses in misrepresentation cases was hinted at by Fox J. in Cremdean Properties Ltd. v Nash, where the plaintiffs claimed rescission of contracts for the sale of two properties, alleging innocent misrepresentation of the area of lettable office space. The defendant relied upon of disclaimer of responsibility for the accuracy of the particulars in the following terms:

“[The Agents] for themselves for the vendors or land lords whose agents they are give notice that (a) these particulars are prepared for the convenience of an interesting purchaser or tenant, and although they are believed to be correct their accuracy is not guaranteed and any error omission or misdescription shall not annul the sale or be grounds on which compensation may be claimed and neither do they constitute any part of an offer of a contract (b) any intending purchaser or tenant must satisfy himself by inspection or otherwise as to the correctness of each of the statements contained in these particulars.”

The case was merely the trial of a preliminary issue in which one of the defendants sought a declaration that the notice took effect to exclude any liability otherwise imposed by The Misrepresentation Act, 1967. The declaration was refused, but this did not mean that the notice was invalid. Fox J. thought that the question could not be disposed of interlocutory proceedings, but only at the full trial when all the facts were known.

The decision of Fox J. was confirmed by the Court of Appeal Bridge L.J., delivering the leading judgement, found himself unable to accept the argument that the effect of the clause was to nullify any representation in the document. He said (at P.551): “If the ingenuity of a draftsman was to devise language
which would have that effect, I am extremely doubtful whether the court would allow it to operate so as to defeat section 3. I should not have thought that the courts would have been ready to allow such ingenuity in forms of language to defeat the plain purpose at which section 3 is aimed.”

The operation of the exemption clause is totally dependent upon the discretion of the court, which may not merely uphold or reject the clause, but uphold it, “in so far as it satisfies the requirements of reasonableness.”

Whether this gives the court a power to rewrite an exemption clause altogether, perhaps by modifying a clause which prevents an award of damages or rescission (as in the Cremdean properties case) by striking out the ban on rescission as being reasonable in the circumstances, remains to be seen.

The statutory form of words would certainly seem to contemplate severance, although, given the court’s well-established reluctance to engage in redrafting exercises on behalf of parties to a contract, it is unlikely that the words would be constructed as permitting any greater modification of clauses.

(B) Indemnity Clauses

By virtue of The Unfair Contract terms act, 1977 s.4(1), any person dealing as a consumer cannot be required, under a term of the contract, to identify another in respect of liability that may be incurred by that other for negligence or breach of contract, except to the extent that the term satisfies the requirement of reasonableness.

An indemnity contract arises between A and B where the indemnifier (A) promises to meet any legal liability which the indemnifiee (B) is held to be under. Therefore, if A, dealing as a consumer, enters into a contract with b (a removal contractor) for the removal of A’s effects a new house, and A, in that contract,
promises to indemnify B against “all claims and demands whatsoever” in excess of a stipulated sum\textsuperscript{108} should A’s goods be damaged as a result of B’s negligence in the course of removal, A would have a claim against B, but B would then be entitled to call upon A to indemnify him and, therefore, the effect of the indemnity clause is to produce a result very similar to an exemption clause. It is, therefore, entirely reasonable that such clauses also be statutorily controlled. The provisions controlling indemnities apply whether the indemnity is given in favour of the other party to the contract or some third person (such as his insurers), and is to operate whether the indemnity is in respect of a liability to the consumer himself or to someone else (such as, to revert to our example, the landlord whose access stairways and common parts have suffered damage as a result of the antics of the removalists attempting to install if the liability to be indemnified is vicarious\textsuperscript{109}.

Section 4 of the 1977 Act does appear, however, to cause certain injustices. First, it only applies where the indemnifier deals as a consumer, so that if the contract is purely commercial and the indemnity is not given by a party dealing as a consumer, the inference is that the clause escapes all statutory control even though, had it been framed as an exemption rather than an indemnity, it might have been subject to the statutory test of reasonableness. This peculiarity is an inevitable result of the failure to appreciate the true role of exclusions and exclusionary devices, as promise – defining terms. A second apparent injustice lies in the fact that, in a consumer context, section 4 only applies a test of reasonableness to an indemnity whereas, had an exemption clause been used instead, the liability in question could not have been excluded at all\textsuperscript{110}.

Technically, section 4 (1) actually applies the reasonableness test on the clause imposing the liability to indemnify, rather than on the terms of the indemnity, which may be set out in another clause of the contract. However, it is likely that a court would rely upon its general powers “to have regard to the circumstances” (s.11(1)), which would clearly include the terms of the indemnity,
when deciding the question of reasonableness in order to deal with any attempt at circumvention of the statutory provisions by splitting the indemnity up into several contractual clauses.\textsuperscript{111}

(C) Guarantees

Although The unfair Contract Terms Act, 1977 s.5 imposes statutory controls over exemption clauses contained in guarantees, it does not do so by subjecting them to a reasonable test.

(D) Terms or Notices Excluding Liability for Loss or Damage arising from Negligence, other than Personal Injury or Death

Although these terms and notices are made subject to the reasonableness test under The Unfair Contract Terms Act, 1977, s.2(2), detailed consideration of the statutory provisions will be deferred until the general question of excluding liability for negligence has been dealt with.

(E) Unfair Terms in Standard Form or Consumer Contracts

As the above heading indicates, this is, in a sense, the real “meat” of the 1977 act and also the part which contains some of the greatest difficulties of construction. Under section 3(1), where one of the parties to a contract deals “as a consumer”, or deals on the other’s written standard terms of business, and that contract contains an exemption clause, then that clause cannot be relied upon “except in so far as” it “satisfies the requirement of reasonableness”. For this purpose, an exemption clause is any clause which (s.3(2)):

(a) excludes or restricts the liability of the party in breach in respect of that breach:
(b) permits the promisor to render a contractual performance substantially different from that which was reasonably expected of him; or
(c) permits the promisor in respect of the whole or any part of his contractual obligation to render no performance at all.

Section 13(1) decrees that any term which makes any liability or its enforcement subject to restrictive or onerous conditions (which are not defined), or which excludes or restricts a right or remedy in respect of liability, or subjects any person to any prejudice in consequences of his pursuing any such right or remedy, or which excludes or restricts rules of evidence or procedure, are all exemption clauses and thus subject to the controls of the Act.

An example of a clause restricting or excluding a remedy would be one that, for example, purported to deny the remedy of repudiation, or limited the damages recoverable to a specified, pre-determined sum.\textsuperscript{112}

An example of a clause making liability or its enforcement subject to restrictive or onerous conditions would be a clause making the promisor’s liability dependent upon his receipt of claims within a short period of time (such as three days).

A clause subjecting a person to prejudice inconsequence of his pursuing his rights or remedies would be one that resulted in a blacklisting or an automatic lesser of future supplies. A clause excluding or restricting rules of evidence or procedure would be one that attempts to reverse the normal burden of proof or provides that particular conduct will be deemed to be conclusive evidence of a fact, eg. “failure to notify the consignors to the contrary within three days of delivery shall be deemed to be conclusive evidence that the goods comply with the contract.”
These clauses are expressed in such a way that the promise is led into thinking that the promisor is undertaking an obligation more valuable to the promise than it in fact is.

Suppose, under standard written terms of business, a security firm agreed with a factory owner to provide security services by way of night patrols at the factory. Suppose also that the factory and its stock are destroyed by a fire started deliberately by a member of the night patrol staff. Suppose finally the contract provided that the security firm would not be liable for any breach of the contract occasioned by an injurious act or default by a member of the patrol staff. This is a clause which purports to exclude the liability of the party in breach (the security firm) and, therefore, could only be relied upon to the extent that it satisfies the requirement of reasonableness within section 3(2)(a) of the 1977 Act.

However, suppose instead of clause is drafted thus (as it was in Photo Production Ltd. v Securior Transport Ltd.):

“Under no circumstances will (the security firm) 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 (security firm) as his employer; nor, in any event, shall the (security firm) be held responsible for... Any loss suffered by the (factory owner) through... fire or any other cause, except in so far as such loss is solely attributable to the negligence of the (security firm’s ) employees acting within the course of their employment.”

Assuming that the patrol officer is a person of satisfactory antecedents who by want of care starts a fire, which then gets out of control and destroys the factory and its contents, would such a clause protect the security company in the light of the 1977 act?
In similar circumstances at least one member of the House of Lords, has taken in the view, that by lighting the fire and destroying the factory, the patrol officer did not put his employer in breach of contract at all. The effect of the exemption clause is not to limit liability in the event of breach, but to prevent certain conduct ever being a breach of contract in the first place.

The effect, then of clause is not exclude liability, but to modify the terms of the promise given in such a way that a much lower standard of performance than perhaps might be expected is necessary before the contract is broken.

It therefore follows that section 3(2)(a) of the 1977 Act cannot assist here, since that only operates on exemption clauses where there has been a breach of contract and on the analysis by Lord Diplock of our example, there has been no breach at all.

However, it is difficult to see how, in the absence of fraud or misrepresentation, the factory owner could “reasonably” expect the security firm to do anything more than they have promised to do. They have only promised to be careful and reasonable employers of patrol staff, not to be absolutely liable for all the consequences of misconduct by their employees outside the terms of their employment. Surely one can only say that the factory owner “expected” any other promise than the one he got; either if one assumes that he misread the contract (which surely cannot be a ground for subjecting a contractual term to statutory control) or one reads the contract without the clause in dispute. This latter solution is fraught with difficulty.

(F) Secondary Contract

Section 10 of The Unfair Contract Terms Act, 1977 while drafted in a somewhat obscure fashion, appears to provide against evasion of the statutory provisions controlling exemption and related clauses by means of secondary
contracts, so that where there are two related or linked contracts the second such contract cannot seek to impose exemptions of duties, rights, liabilities or remedies indirect upon the first contract.

For example, in a consumer contract for the sale of a deep-frezer, there would be implied certain terms as to quality and fitness under section 14 of The Sale of Goods Act 1979 which by virtue of section 6 of The Unfair Contract Terms Act 1977 could not be excluded or restricted. A related contract to supply frozen food, or to provide maintenance on breakdown, made either with the same supplier or some other trader, may seek to exclude or restrict the sellers liability on the sale of the freezer under The Sale of Goods Act 1979. s.14, by providing that the consumer will surrender those rights in consideration of the goods or services provided under the related contract. Such a restriction by means of the secondary contract would be rendered ineffective by section 10 of the 1977 Act.

In the event that the related contract is made with a different supplier from the one with whom the first contract was made, there would need to be an agreement between the two suppliers that the second would indemnify the first should the consumer ignore the contractual exemptions in the secondary contract and sue the first supplier. Otherwise, even apart from section 10 of the 1977 Act, the second supplier would not be able to claim an injunction to restrain the consumer's action against the first supplier, nor be able to recover substantial damages against him in the event of his action against the first supplier succeeding.115

If the primary contracts were, however, a non-consumer sale, then the secondary contract would escape section 10 altogether. This is because section 10 is drafted so as to operate only where the 1977 Act “prevents” the seller from excluding or restricting liability.
The Unfair Contract Terms Act does not “prevent” the exclusion or restriction of liability for breach of section 14 of The Sale of Goods Act 1979 in non-consumer sales, it merely requires the exclusion or restriction to satisfy a requirement of reasonableness before it is upheld.

4.5.3 Statutorily Imposed Exemption Clauses

In a few instances, exemption or exclusion from liability will be statutorily imposed into contracts. Where this is done, the statute will also normally prohibit any further limitation of liability over and above the statutory provisions. So, the liability of a ship-owner for goods exported from the United Kingdom is governed by the Carriage of Goods by Sea Act 1971, which applies to all outward shipments under bills of lading, except for a few minor exceptions, and the parties can not contract out the Unfair Contract Terms Act 1977 (s-29{1}). The responsibilities of the ship owner in respect of the safety of goods entrusted to his care are described in detail in the Hague Rules (Article III is that the ship owner is only liable if acting negligently, but the responsibilities of the ship-owner under the Act are lighter than they are at Common Law, and this is then compensated for by a provision that no contracting out is permitted. In those cases where the 1971 Act applies, the Rules further provide maximum limits for the ship owner’s liability for damage to, or loss of, the goods shipped. These maximum limits if liability may be increased (but not decreased) by agreement of the parties or by a declaration of the nature and value of the shipped goods by the shipper before shipment, together with insertion of this declaration in the bill of Lading.

It is, in theory possible for exclusion clauses to find their way into agreement as a result of the Fair Trading Act 1973, already discussed, though it must be admitted that the practical likelihood of this seems remote. The director General of Fair Trading may include in his recommendations to the Advisory Committee proposals relating to any matters mentioned in schedule 6 to the Act.
These include the prohibition of exclusion clauses but also envisage the imposition of a requirement that specified terms be included. These prohibitions or requirement may be incorporated in the Secretary of state’s order. It is conceivable, therefore, that the Director General would, as a corollary to the imposition of certain statutory obligations (e.g. participation in a compulsory “no-fault” insurance scheme) also recommend the compulsory inclusion of certain limitations on liability on one or other side of a consumer transaction.

In a different way, the Sale of Goods Act 1979 imposes a limitation of liability on the parties in that in one case they are not permitted their own limitations clause but if any reduction of liability on the part of the seller is required the statutory limitation only may be used. Section 12(1) of the Sale of Goods Act 1979 implies into every contract for the sale of goods, other than one to which sub-section (2) applies, an undertaking in the form of a condition given by the seller that he has, or will have at the time when the property is to pass, a good right to sell. It further implies a warranty of quiet possession and a warranty that the goods are free from encumbrances. Section 12(2) now applies where it can be inferred from the circumstances of the contract, or where it is expressly stated, that the seller only undertook to sell such title as he or some named third party, might have. It implies a warranty on the part of the seller that all charges or encumbrances known to him, but not known to the buyer, have been disclosed before the sale. There is a further implied warranty of quiet possession against disturbance by the seller, any third person whose title the seller has supported to transfer, and any person claiming the through or under the seller or that third person claiming title through or under the seller or that third person, subject only to encumbrances already disclosed to known.

There was formerly doubt as to whether the operation of the old, unamended section 12, as it appeared in The Sale of Goods Act 1893, could have been excluded by contrary agreement. This very doubt may itself have discouraged the draftsman of standard form agreements from attempting to
exclude section 12 at all. Section 12 as it now appears in the 1979 Act gives the
draftsmen an alternative. While, no doubt, the intention behind the redrafted
section 12 (2) was to enable sellers to dispose the goods the title to which in
insecure the results may be, in practise, to encourage sellers, as a general rule,
to adopt the less potent warranty in section 12(2) rather then leave the more
onerous implied terms in section 12 (1) inoperative in their contracts. There is
nothing in the legislation to prevent this happening and buyers will, of course
always be the sufferers by it.

Contracting out of section 12 altogether is prohibited in that any term
attempting to exclude the implied undertaking is void. So, either the condition of
good right to sell and the warranties for quiet possession and freedom from
encumbrances apply, or the warranties in section 12(2) apply (Unfair Contract
Terms Act 1977, S.6 (1) (a). It is not possible to exclude both groups of implied
undertakings. There are similar provisions covering hire-purchase (S.6 (1) 6). In
the case of the analogous contracts under which goods pass, section 7 (4) of the
1977 Act provides that exclusion of liability in respect of the right to transfer
ownership of the goods or give possession, or the assurance of quiet possession
given to a person taking the goods under the contract, is subject to the test of
reasonableness.

Problems arise, however when an attempt is made to exclude both
undertakings. Here the question is which of the two sets of undertaking is the
court to imply into the contract having declared the exclusion void? Presumably,
the normal implication would be the undertakings is section 12(1), but these are
not to be implied if it appears from the contract of is to be inferred from the
circumstances that the lesser obligations of section 12(2) to apply. The parties
clearly intend no obligation to be imposed at all but, if that is impossible, their
intention presumably is to take the next best thing. i.e. the limited obligations of
section 12(2). However if the exclusion is void, will the courts still pay any regard
to it? If they do not, then there may well be nothing in the contract or the
circumstances surrounding it to indicate that the parties intended anything but section 12(1) to apply. The result will, therefore in some cases, be the very opposite of that which the parties intended and in commercial sales, insured against. This is one further example of the distortion of bargains from regarding an exclusion clause as something separate and distinct from the “obligation-defining” terms of the contract.

4.6 The Construction of Exemption Clauses

The exemption clause must be constructed so as to determine its impact on the obligation undertaken by the contract as a whole. This raises the first of many problems in this area: to what extent, in constructing an exemption clause, are the other terms of the contract relevant? Is the exclusion clause merely a shield to a claim for damages in which case its construction will be matter totally separate the rest of the contract? Or is it just another means, along with all the other terms of the contract, of delimiting the extent of the obligations undertaken by the agreement?

4.6.1 Defence or definition

The real issue, then, is whether an exclusion clause operates simply as defence breaches of the obligations of the contract, as determined apart from the exclusion clause, or whether the clause has a part to play in defining those obligations in the first place.

The conventional view has been that an exclusion clause operates as a shield to a claim for damages or repudiation. The duties of the promisor are ascertained by construing the contract in ignorance of the exclusion and where there has been a failure to perform one or more of those duties, regarding that as a breach.
The function of the exclusion clause is, then, to bar a claim based on a such a breach. This view was put buy Denning L.J. is Karsales (Harrow) Ltd. V Wallis 123

“The thing to do is to look at the contract apart from the exempting clauses and see what are the terms, expresses or implied, which impose an obligation on the party.”124

There is of course, a grave illogicality in such approach. Why should it be that one clause of the contract should be ignored when construing the rest of the contractual document and then that ignored clause itself be given separate construction? Taken in to its logical conclusion, it could result in a situation in which, viewing the contract apart from the exclusion, the parties have created valid contractual rights and duties, and yet a construction of a separate exclusion clause renders those rights and duties unenforceable.

For example, suppose a seller contracts to sell a blue G.T.Brooklands 2000 special motor car, but provides in the written sale agreement that he accepts no responsibility whatsoever if the vehicle should be of a different colour, model, make and engine capacity and any statements made by the seller as to these matters are not intended to be, and should not be, relied upon by the buyer. There seems little logic in a court holding that the seller had promised to deliver a blue G.T. Brookhands 200 special but that if he delivered a green Boneshaker 1500 he would not be liable because the exclusion provided a defence. The simple fact is that the seller has promised nothing at all in respect of colour, model, make and engine-capacity. He has merely promised to deliver “a car “.125

On this analysis, it is possible to deal with some exclusion clauses in a totally different way. A clause drafted in exceptionally wide terms would not just
be struck out as repugnant to the contract, leaving all the other terms standing and enforceable on both sides.\textsuperscript{126}

Instead it would be seen as a “bargain” in which one party had agreed to be bound to his side while the other party had promised to do nothing whatever. It thus becomes clear that what has been concluded is not a contract at all since party provides no consideration. It is simply as arrangement at will. To use the words of Lord Willberforce in the Susse Atlantique case.\textsuperscript{127}

“one may safely say that the parties can not, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party’s stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intend.”

In extreme cases of this sort, this has always been the attitude of the courts. For instance, unconditional covenants not to sue are taken as a release.\textsuperscript{128}

Until quite recently, however, the judicial attitude towards the function of exclusion clauses in the majority of contracts, where the illusory nature of the promises given was not so apparent, has been to treat them simply as prophylactics, purporting to protect the profaners from the legal consequences of breach of duties otherwise arising under the contract. There is now some evidence of a judicial change of heart.

In addition to the passage from the speech of Lord Willberforce in the Susse Atlantique case quoted above, there are other examples in which judges have been prepared to view exclusion clauses as having a more positive role in the initial formulation of the contractual undertakings given.

In Kenyen, son & Craven v Baxter Hoare & Co.\textsuperscript{129}
“Protective conditions are of three distinct types, namely, first, those which limit or reduce what would otherwise be the defendants duty; second, those which exclude the defendant’s liability for breach of specified aspects of that duty; and third, those which limit the extent to which the defendant is bound to indemnify the plaintiff in respect of the consequences of breaches of duty. A condition which provided that a warehouseman should be under no obligation to take greater care of perishable goods than was appropriate to imperishable goods would constitute a good example of a first category of protective conditions. If, in such case, the warehouseman takes such care of perishable goods as would be appropriate has they been imperishable, and damage results, he will escape liability not because the clause exempts his from liability for breach of contract.... but because there has been no breach of contract.”

Donaldson J. describes such a clause as “a distinct type” rather than citing it as an “example” of judicial construction.

There seems, given that the first two categories are “distinct types”, little difference between them in result. An exclusion of liability for breach of duty is simply another way of limiting the duty itself.

This point was made a year later by Kerr.J. in Trade and Transport Inc. V Line Kaium Kaisha. The rather complex facts of this case turned on whether the owners of a vessel could terminate the charter on the ground of the failure, by the charterers, to produce a cargo before the expiry of a frustrating time, notwithstanding the existence in the charter party of a clause excepting the charterers from liability for failure to provide a cargo in certain specified circumstances including unavoidable hindrance.

Although Kerr.J’s judgement refers extensively to the doctrine of fundamental breach, it is worth setting out his analysis at length, since it explains, succinctly, the point that is here being argued.
Here, then Kerr.J. Displays a willingness to define the extent of the chatterer’s obligation to load and clause 2 together; that is regarding the exclusion clause as a negative way of defining the promises in the contract.

The validity of such an approach has recently been confirmed by the speech of Lord Diplock in Photo Production Ltd. V Securior Transport Ltd. In that case Lord Willberforce (at pp. 852-843) and Lord Diplock (at p.850), though for different reasons, suggest that where the effect of the clause is to relieve the profaners from any obligation to perform at all ( or, if the clause is regarded merely as a defence, to absolve from liability for a total failure of consideration) the value of the promisor’s promise is illusionary and the arrangement is devoid of contractual content.

In some cases this may be a legitimate conclusion. In others, the clause may have quite a different effect, operating at the logically prior stage at which primary obligation are created, even so as to define or modify them ab-initio rather then to vary any secondary duty to compensate for their breach.

This “definitional” approach will clearly have an effect upon the way in which exclusion clauses themselves are constructed as part of the terms setting out the primary undertakings of the contract and, although there is already in existence an impressive array of interpretative devices for containing exemption clauses. the justification for their rigorous imposition is, in some measure, reduced.

There is no reason why exclusion clauses should be subject to different rules of construction from any other terms of contract. This view, however, which is a logical extension of the “definitional” approach, has yet to receive judicial acceptance and hence there is still a need to examine these “interpretative devices” that have been brought to points of high refinement by the courts in their endeavors to contains exclusion and limitation clauses within reasonable bounds.
4.6.2 Interpretative devices

(A) Strict Interpretation of the Clause

In order to gain exemption from a legal liability under a contract, it is necessary for a person to use the clearest possible words (per scrutton L.J. in Alison (J. Gardon) Ltd. v Wallsend Shipway and Engineering Co. Ltd. The clause must exactly cover the liability which is sought to exclude. So, a clause excluding liability for breach of warranty will not cover a breach of condition, and this will be so even where the term broken, although a condition, is treated as a breach of warranty by virtue of acceptance.

Further exclusion of implied conditions and warranties will not exclude an express term. nor will a clause excluding liability for "latent defects" to be construed as excluding the implied condition as to fitness for purpose under section 14(3) of the Sale of Goods Act 1979. The same strictness of interpretation is applied to indemnity clauses as to clauses that more obviously apply exclusions and limitations.

To be effective, therefore, it is necessary for the clause on its true construction, to cover exactly the event which has occurred.

A useful illustrations of this principle, may be found in a case decided under what is now section 15 of The Sale of Goods Act 1979, which deals with the conditions to be implied on a sale of goods by sample where a sale is by sample are implied into contract to the effect that:

(a) The bulk shall correspond to the sample in quality
(b) The buyer shall have a reasonable opportunity of comparing the bulk with the sample and
(c) The goods shall be free from any defect rendering them un-merchantable, which would not be apparent on reasonable examination of the sample.
Whether or not the goods are un-merchantable is to be judged by the reference to the statutory test of merchantable quality in section 14(6) although at the time the case about to be considered was decided, the test of merchantable quality was a matter for the common law.

Further under section 13(2), where there is a sale by sample as well as by description, it is an implied condition of the contract of sale that the goods correspond both with the sample and with the description.

In Nichol v Godts (1854) 10 Exch.191, the seller sold “foreign refined rape oil, warranted only equal to sample.” They delivered oil which did not answer the description of foreign refined rape oil, and was not equal to sample in quality. It was held that the exclusion clause only related to quality; so that while it might have excluded the condition now implied by section 15(2) (c), it could not be construed so as additionally to excuse the sellers from their duty to supply goods answering the contract description.

Similarly a contract that the goods are to be supplied “with all faults” will not assist a seller in a non-consumer contract who supplies a bulk not corresponding with the sample, although it might be effective to exclude the condition implied by section 15(2) (c).

Any clause, then, will be given to the narrowest possible scope consistent with the intention of the parties. Indeed, the courts may even, on occasion, ignore the obvious intention of a contractual document and adopt a construction even more unfavourable to the preferences.  

This has the consequence for example, than an express warranty will be considered to have been given in addition to (and not in lieu of) any implied warranties, unless there are indications to the contrary. This was the rule at common law. and now has statutory affect by virtue of section 55(2) of the
Sale of Goods Act 1979. On this basis a guarantee or undertaking in a factory, warranty would not oust the implied conditions of merchantability and fitness for purpose otherwise applicable.\textsuperscript{143}

Under the Unfair Contract Terms Act 1977 the operation of exclusion clauses in guarantees is closely controlled. \textsuperscript{144}

Section 5 provides that any contract term or notice contained in a guarantee of goods will be of no effect in so far as it purports to exclude liability for certain loss or damage To come within the section, the loss or damage for which the guarantee aims at excluding liability must be such as arises from the goods proving to be defective while in consumer use, and must also result from the negligence of a person concerned in the manufacture or distribution of goods.

Manufacturers ( Donoghue v Stenvenson)\textsuperscript{145} and distributors ( Fisher v Harrods Ltd.)\textsuperscript{146} are potentially liable to the ultimate “consumer” of the product if they fail to observe the standard of care in the manufacture, storage, assembly or distribution of the product which is reasonably expect of them.

Section 5 (2) provides that “anything in writing is a guarantee if it contains or purports to contain some promise or assurance (however worded or presented) that defects will be made good by complete or partial replacement, or by repair, monetary compensation or otherwise.”

Where the exclusion clause is not in the form of a guarantee, but simply in the form of a notice or warning that damage might result, eg. a notice that the goods may cause injury, that notice will not, by itself, be sufficient to indicate the voluntary acceptance of any risk for the purpose of the principle of volenti non-fit injuria, even when the notice is agreed to S.2(3).
The liability of manufacturers and retailers in negligence for damage caused during use of the goods almost certainly extends to personal injury, or damage to another property, and not to losses incurred solely on account of the goods being defective (i.e. damage to the defective article itself) although the matter is not entirely free from doubt.

This problem would not, of course, have arisen if the exclusions in the guarantee had, instead (but subject to section 2(1)), been made subject to the doctrine of reasonableness.

(B) The Contra-Proferentem rule. 147

If there is any ambiguity as to the meaning and scope of the words used in a clause excluding or limiting liability, the doubt is resolved by constructing them against the party who has inserted them and who is now relying on them, and in favour of the other party.

So, in Webster v Hjiggin 148 in the course of negotiating a hire-purchase agreement for a second-hand car, the owner's agent told the hirer that, if he took the car, the owner would guarantee that it was in good condition and that he would have no trouble with it. The hirer signed a hire-purchase agreement which contained this clause:

“*The hirer is deemed to have examined (or caused to be examined) the vehicle prior to this agreement and satisfied himself as to its condition, and no warranty, condition, description, or representation on the part of the owner to the state or quality of the vehicle is given or implied... any statutory or other warranty, condition, description, or representation, whether express or implied as to the state, quality, fitness of roadworthiness being hereby expressly excluded.*”
The vehicle turned out to be, in the words of Lord Greene M.R. (at P.128) “nothing but a mass of second-hand and dilapidated ironmongery.” The court of Appeal held that the wording of the clause in the hire-purchase agreement was not sufficiently clear to abrogate the separate oral collateral agreement constituted by the offer of the guarantee and the signing of the hire-purchase agreement by the hirer.

Although the principle is confined to cases of ambiguity the courts are not reluctant to discover such ambiguity where to do so would permit them to remove the shield of exclusion.

This to some extent explains why draftsman adopt such apparently verbose and convoluted phraseology in producing the modern exclusion clause, in an endeavor to avoid any ambiguity.

For them avoiding it, however, such proximity sometimes creates ambiguity\textsuperscript{149}, see the opinion expressed by the members of the First Division of the Court of Session in Alisa Craig Fishing Co. v Malvern Fishing Co.

(C) Repugnancy

One effect of constructing contract, including the exemption clause, as a whole, would be the demise of the doctrine of repugnancy i.e. a device which permits the court to disregard the exclusion clause on the ground that if is repugnant to the main purpose of the contract. Until this view receives wide judicial support, however, the repugnancy doctrine is still likely to be canvassed before the courts.

An example is to be found in J. Evans & Son (Portsmouth) v Andrea Merzario\textsuperscript{150} where a clause purporting to exempt a carrier from liability for damage to goods shipped on deck was struck out as being repugnant to a
binding oral promise given by the forwarding agents that the goods would be stowed in a hold.

(D) Important Terms

The courts have always taken the view that the very clearest of language is necessary to exclude liability for important terms of the contract. That is so whether the terms important is to be found and ascertained at the time the contract is made or by reference to the seriousness of the consequences at the time of the breach. The matter was put succinctly by Lord Willberforce in the Suisse Atlantique case.\(^{151}\)

“......it must be questioned of contractual intention whether a particular breach is covered (by the exclusion clause) or not and the courts are entitled to insist, as they do that the more radical the breach, the clearer must the language be if it is to be covered.”\(^{152}\)

(E) Liability for Negligence

In Hall v Brooklands Auto-Racing Club\(^ {153}\) Scrutton L.J.said (at P.213) :

“......in my view, where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort.”

However, there is a significant difference between disregarding the contract altogether and constructing the contract closely to ascertained whether the preference has effectively excluded his tortuous liability by means of contracted exemption clauses. While it is possible for a clause to be drafted in such a way that it excludes tortuous liability (usually for negligence, though the clause be subject to the constraints of the Unfair Contract Terms 1977, S.2(1) (2)
the usual attitude of the court is that it is exceedingly unlikely for negligence unless the clearest possible terms are used.\textsuperscript{154}

As a matter of construction \textsuperscript{155} the courts have establish that unless negligence is the only liability to which the words could apply, general words of exclusion will have no application to negligence. So, where the clause is framed in general terms, eg. a clause exempting liability “for all damage or for loss or damage” it will be first necessary to established whether the head of damage complained of could arise both as a result of negligence and of breach of a strict contractual duty, or whether it can only arise as a result of negligence.

If it can only arise as a result of negligence, then a clause in general term is more likely to be construed so as to protect against liability for negligence.

In Alderslade v Hendon Laundry Ltd. \textsuperscript{156} the plaintiff sent some handkerchiefs to the defendant’s laundry which limited to their liability “for a lost or damaged article” to “twenty times the charge made for laundering.” The handkerchiefs were lost. The question arose as to which particular head of damage the limitation as to "lost or damaged" articles related. The court of appeal held that the only duty in relation to the safe custody of the handkerchiefs was that the laundry undertook to take reasonable care of them that is not to be negligent. So, if the handkerchiefs were lost, the only possible ground upon which the laundry could be held liable was that of negligent, since that was the only possible ground of liability for loss.

Everything ultimately depends upon the wording of the clause. Although liability for negligence may not be excluded in the absence of “very clear words” a widely drawn clause may produce this effect without referring to negligence upon which the profaners might be liable. If liability for negligence is excluded successfully, the injured party has no right of action for negligence either in contract or in tort.
However the sole obligation is to exercise reasonable care the clause should, if it is to be effective, indicates that it is intended to exclude liability in all circumstances, including negligence. Otherwise, is may be constructed as a simple warning that the preferences will not be liable in the absence of negligence.

Being question on construction it will not inevitably be the case that if the only possible liability of the party pleading the exemption is liable for negligence, the clause is bound to be effective.

The operation of this dictum is illustrated by the decision in White v John Warwick & Co. Ltd. The plaintiff who has hired a bicycle from the defendants was injured when the saddle tipped and threw him into the road. The plaintiff sued the defendants alternatively for breach of contract and in tort for negligence, and was met by an exclusion clause in the hire document to the effect that “nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machine hired.” It was clear that damages could be claimed by the plaintiff, either on the ground of negligence, or for breach of the strict contractual duty to supply a machine that was reasonably fit for the purpose required.

The Court of Appeal held that the exemption clause only protected the defendants against strict liability (which was the liability in contract) and not against breach of the duty of care in tort.

Under such a principle it is simply more likely than not that a clause will be held to exclude strict liability for negligence as well where for instance, it is constructed as an indemnity clause.

Where a specific and precise words of exclusion, as opposed to general words, are used, which make it clear that the clause is intended to exempt the
person relying on it from liability in negligence, then effect must be given to it. Such words are, “will not be liable for any damage howsoever caused,” or “will not in any circumstances be responsible,” or “shall be indemnified against all claims and demands whatsoever,” or “all merchandise is expressly accepted at owner's risk.” have all been held to indicate a clear intention to exclude liability for negligence.

In Rutter v/s. Palmer, the plaintiff left his car at the defendants garage for sale on terms that “customers' cars are driven by our servants at customer's sole risk.” The car was being driven. One of the defendants employees when it was involved in a collision and damaged. It was held that the clause effectively placed the risk of negligence on the plaintiff and his claim for damages failed.

The Unfair Contract Terms Act 1977 contains provisions controlling to exclude liability for negligence. The Act's provisions in this regard do not apply to things done or omitted otherwise that by a person in the course of a business or as occupier of premises for business purposes (s.1(3)), so in other “domestic” situations the common law rules are intended to apply.

It does not cover any stricter duty, so there is no control under these provisions over exemptions from liability for breach of such duties as that imposed under Rylands v/s. Fletcher. Of course, if the facts which give rise to liability in negligence the clause exempting liability will come under control to the extent that it is relied upon to exclude or restrict liability for negligence.

4.6.3 GENERAL RULES OF CONSTRUCTION OF CONTRACTUAL TERMS

In addition to the special rules of construction so far considered, there are certain general principle of contractual construction that as apply as much to exclusion clauses as to other written terms of the contract, although, as applied
to exclusion, it is likely that they will generally be used by the courts to cut down the scope of a clause, not increase it.

A. PLAIN MEANING:

Words in a written contract will be given their plain and literal meaning, unless evidence is specifically added to show that the words are to be understood in some technical or special sense. The rule may not be applied where it would lead to absurdity or inconsistency with the rest of the agreement.166

B. UT MAGIS VALEAT QUAM PEREAT:

Where the words are used that are capable of two meanings, the court will give to them the construction which will make the instrument valid rather than void.167 If, however, having adopted a valid construction, there is still further ambiguity, this will be construed contra proferentem.168

C. EXPRESSIO UNIS EST EXCLUSIO ALTERIUS

Where the written contract makes express mention of a certain thing, it will automatically exclude any other thing of a similar nature. So that, while use of general words such as “all the fixtures and fittings therein,” will include all the fixtures and fittings are instead enumerated in the document, all those not specifically, all those not specifically mentioned will not be included.169

D. THE EJUSDEM GENERIS RULE

Where general words follow an enumeration of particulars, those general words must be limited by reference to the preceding particular enumeration, and be constructed as including only all other articles, acts or events of the like nature and quality. So where an exclusion clause in a charter party relieved the carrier from liability to deliver if prevented through “war,
disturbance, or any other cause,” it was held that the words, “any other cause” must be restricted to events of the same kind as war and disturbance and would not therefore, cover delay caused by ice.\(^\text{170}\)

However, this rule of construction is not invariably applied and is, indeed, rarely applied in commercial agreements.

In Henry Boot Construction Ltd. v.s. Central Lancashire New Town Development Corporation.\(^\text{171}\) The contractors contracted to build a large number of dwelling houses, together with ancilliary work, for the employers. In connection with that work three statutory undertakers performed the work of laying the necessary mains for electricity, water and gas. The contractors, who were delayed in the building of the dwellings, alleged that the delay was caused by the failure of the statutory undertakers to complete their works with due expedition, and therefore claimed to be relieved from the penalties imposed upon them by the contract for delay, and additional payments which the contract permitted the contractors to claim where they suffered loss as a result of delay which was not their fault. The rectitude or otherwise of this claim under the contract is not material to the present discussion but, in course of reaching his decision, the judge was required to decide whether the phrase “artists, tradesmen or others engaged by [the contractors] in executing work not forming part of this contract.” included the statutory undertakers. Judge Fry Q.C. (sitting as a deputy High Court Judge) said (at pp. 14-15):

“On the face of it, and approaching it literally, the words are plain enough. An artist is an artist. A tradesman is clearly not the tradesman who calls at the house or keeps a shop. He is the tradesman of the building industry, the skilled worker. ‘Others’ is a word plain enough in the English language, and literally, it seems to me, that although the phrase employs a strange collection of words, on the face of it and to anyone but a lawyer it would present little difficulty. But of course the lawyer sees a phrase of this kind and immediately thinks of the
doctrine of ejusdem generis, and asks himself whether ‘the others,’ the general words following the specific words ‘artist and tradesmen’ ought to be cutdown in order to limit the apparent generality of the word “others” to persons ejusdem generis with ‘artists and tradesman’ fall into [counsel] suggested that it is the category of some minor skilled ancillary worker….they may be. It is not a very lengthy phrase to have to interpret to find the category….and I am disposed to think that if a category has to be found that may be right, but I ask myself does the ejusdem generis rule apply? The rule is ordinarily applied in the case of deeds, wills and statutes. It is of less force when one is dealing with a contract, and of still less force when dealing with a commercial contract…..the argument that ‘artists and tradesmen’ would be surplus age if ‘others’ means ‘anybody has little value in a commercial document. They may be regarded as intrusive or having got there by some historical course which has now been forgotten as the [J.C.T. Local Authorities Building Works Standard Form] has been redrafted from time to time.

Looking at the whole of this contract, I reach the conclusion that the ejusdem generis rule does not apply to this phrase, and there is no doubt that a statutory body corporate is a person for the purposes of interpretation, and it seems to me that the operation of the statutory undertakers in the case therefore fall within the description of work being done by artists, tradesman or others.”

4.7 Some special exclusion clauses

A. “With all faults”

Where the phrase “with all faults” has been employed, or some equivalent, the view seems to be that this relates to merchantability (or satisfactory quality, in its latest formulation) or fitness for purpose, and does not offset the duty to supply which correspond with their description, this being the core of the contract. In Shepherd v Kain, 177 there was a sale of a “copper-fastened vessel,” this being sold “with all faults, without allowance for any defect whatsoever”. The
court held that this did not suffice to protect the seller where what was delivered was not even a copper-fastened vessel.

B. Excluding or limiting the damages recoverable

Where a clause provides for a precise sum to be recovered by way of damages in the event of a breach, that a clause will be enforceable if it is a genuine pre-estimate of the likely loss; but it will be ineffective if is a penalty clause and was inserted \textit{in terrorem}, as an intended punishment in the event of breach.\textsuperscript{178} On the other hand, a clause which places an upper limit on the damages recoverable (such as £- X 1,000 or 20 times the contract price) while still to be construed \textit{contra proferentem} will not be constructed quite as strictly as an exclusion clause properly so-called. This was made clear by the House of Lords in \textit{Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd.} \textsuperscript{179} According to Lord Wilberforce:

```
“Clause of limitation are not regarded by the courts with the same hostility as clauses of exclusion: this is because they must be related to other contractual terms, in particular to the risks to which the defending party may be exposed, the remuneration which he receives, and possibly also the opportunity of the other party to insure.”\textsuperscript{180}
```

Since it is not entirely clear why such considerations are not relevant when considering clauses of exclusion, perhaps more weight should be given to Lord Fraser’s explanation for a more sympathetic view of limitations clauses.

In this case, there was also the special factor that, as a contract clause itself made clear, the potential losses which could derive from negligence were great in relation to the sum that could be charged by the \textit{proferens} for its services.\textsuperscript{181}

Where the clause excludes any right to damages, the tendency is to restrict it, if possible, to minor matters, or to limiting its effect to forbidding rejection or to confining a buyer to claiming a return of the purchase price and nothing beyond. It does seem, however, that of the clause clearly applies to a contractual duty, it will be effective to deny a party any claim to damages.\textsuperscript{182}
C. Consequential loss

Where there is in a contract an exclusion of liability for “consequential” loss or damage, the courts have held that it embraces only loss or damage not resulting directly or naturally from the breach of contract. More specific guidance has been provided in British Sugar plc v NEI Power Projects Ltd where the relevant clause provided that:

“The seller will be liable for any loss damage cost or expense incurred by the purchaser arising from the supply of any such faulty goods or materials or any goods or materials not being suitable for the purpose for which they are required save that the seller’s liability for consequential loss is limited to the value of the contract.”

In BHP Petroleum Ltd v British Steel plc, a clause ran:

“Neither the supplier nor the purchaser shall bear any liability to the other (and each party hereby agrees to indemnify the party relying on this provision) for loss of production, loss of profits, loss of business or any other indirect losses or consequential damages arising during and/or as a result of the performance or non-performance of this contract regard less of the cause thereof but not limited to the negligence of the party seeking to rely on this provision.”

The court ruled that the clause was to be interpreted as though it read “for loss of production, loss of profits, loss of business or indirect or consequential losses of any other kind”. A defective pipeline had been supplied, and part of the claim related to deferral of production. The court said that such a claim was for loss of production or loss of profits or business and, as such, was excluded by the clause.

In Leicester Circuits Ltd v Coates Bros plc, a clause excluded liability for “consequential or incidental damage of any kind whatsoever...including without
limitation any indirect loss or damage such as operating loss, loss of clientele…”

This was held not to exclude liability for loss of profit since, in the circumstances of the case, this would have been within the reasonable contemplation of the parties and hence within the first limb of the rule in Hadley v Baxendale.187

D. Imposing time limits

Clauses which require proceedings to be commenced, or defects to be notified, within a certain time are interpreted strictly. In Atlantic Shipping and Trading v Louis Dreyfus & Co, 188 a clause in a charter party required a claim to be made, and an arbitrator appointed, within three months of final discharge. This was held only to apply to the express terms of the contract and not to those implied by law. It has been maintained that there is:

“no reason why [such clauses] should not be drafted so as to apply to even the most serious breaches, for (unless the period is so short that they effectively bar a right altogether) they do not exclude liability, they simply require that buyers take vigilant steps to finalize the transaction.”

E. Excluding the right to reject

Where clauses purport to exclude an otherwise existing right to reject the goods, it is clear enough that they do not of themselves exclude the right to damages.189 Since the right to reject does not exist in relation to a breach of warranty, it is supposed that the effect of such clauses is to indicate that the terms to which they apply are warranties, not conditions. This is supported by Re Walkers, Winser & Hamm and Shaw,190 in which such a clause was said to prevent and implied condition arising, and to render it a warranty instead.
F. Relevance of contract description

It seems to be established that certain exclusion clauses only operate where goods of the contract description have been supplied. A clause excluding the right to reject the goods “herein specified” is effective only when the goods “herein specified” have in fact been supplied, but not when the goods do not conform with their description. In Aron & Co v Comptoir Wegimont,\textsuperscript{191} the clause ran: “whatever the difference of the shipment may be in value from the grade, type or description specified, it is understood that any such question shall not entitle the buyer to reject the delivery….”. It was held that the terms as to shipment were independent and not part of the description so that rejection was still allowed.

G. Arbitration

The Arbitration Act 1996, provides that the Unfair Terms in Consumer Contracts Regulations shall apply to a term which constitutes an “arbitration agreement”.\textsuperscript{192} This is a reference to “an agreement to submit to arbitration present or future disputes or difference (whether or not contractual)”.\textsuperscript{193} Section 91 of the Act says that an agreement is unfair for the purposes of the Regulations so far as it relates to a claim for a pecuniary remedy which does not exceed a specified amount, currently £ 5,000.\textsuperscript{194}

H. Acknowledgment and declarations of non-reliance

In Lowe v Lombank,\textsuperscript{195} a clause in a hire purchase contract contained an acknowledgement that the goods were examined, found to be free of defects and to be of merchantable quality. It also contained an acknowledgment that the particular purpose for which the goods were wanted had not been revealed to the owner. Such clauses will not be conclusive, unless genuinely representing the intention of the parties. An estoppel might arise against the buyer or hirer,
however, even where he had not examined the goods, provided the seller thought on reasonable grounds that he had.\textsuperscript{196}

4.8 Exemption clauses and Third parties.

Questions can, and frequently do, arise as to whether an exclusion clause can operate to protect a person who is not a party to the contract. This is an issue which needs to be examined both in relation to the common law, and as the latter has been affected by the Contracts (Right of Third Parties) Act 1999.

A. The common law

The basic rule is that the notion of privity of contract prevents non-parties from receiving any benefits or burdens which might be terms of an agreement made between others. In \textit{Adler v Dickson},\textsuperscript{197} a ticket for a sea voyage contained terms exempting the shipping company from liability. One such term provided that “the company will not be responsible for any injury whatsoever…arising from or occasioned by the negligence of the company’s servants”. The claimant, having fallen from the gangway, brought an action against the master and boatswain. The Court of Appeal held that reliance could not be placed on the exclusion clause because, on its true construction, it did not purport to offer exemption to these parties. If the clause had on such a construction extended to the master and boatswain, a majority of the court were still prepared to hold it unavailing. The “company’s servants”, declared Jenkins L.J., are not parties to the contract.\textsuperscript{198}

A similar finding was made in \textit{Cosgrove v Horsfall}.\textsuperscript{199} The claimant had a free pass for buses run by the London Passenger Transport Board, of which he was an employee. The terms of the pass were that neither the Board nor their servants were to be liable to the holder for injuries however caused. The claimant suffered personal injuries as the result of the negligence of the defendant bus driver whom he sued personally. The Court of Appeal held the driver liable. He
could not claim the benefit of the exemption clause as he was not a party to the contract.

This strict view eventually received endorsement by the House of Lords in *Scruttons Ltd v Midland Silicones Ltd.* A contract for the carriage of drum chemicals from the US to the UK contained a clause limiting the liability of the carriers. When the chemicals were being unloaded, they were damaged through the negligence of a firm of stevedores who were employed by the carriers. Lord Denning considered that the appellant stevedores could claim the benefit of the exclusion clause since the respondents, the consignees, had assented to the limitation of liability; but this was a dissenting judgement. The majority held that the appellants could not claim the benefit of an exclusion clause when they were not parties to the contract.

Although “I may regret it,” said Lord Reid:

“*I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even when it is clear from the contract that some provision in it was intended to benefit him.*”

It has been suggested that there are two ways that the strictness of these decisions might be avoided. The first suggestion is that use be made of the concept of agency. The second suggestion relates to an implied contract. In *Pyrene Co v Scindia Navigation Co,* the claimants in England sold goods to parties in India. The latter agreed with the defendants for the carriage of the goods to India. The contract of carriage limited liability to £200. The goods were damaged because of the defendants’ negligence. The claimants sued the defendants for £900. Devlin J. held that the claimants were bound by the clause. Although not parties to the contract, they were entitled to its benefits and so must also accept its burdens. Viscount Simonds later said that the decision could be
supported “only upon the facts of the case, which may well have justified the implication of a contract between the parties”. As Anson says, the implied contract was that all three parties intended the claimants to participate in the contract of carriage.

In addition to such methods of avoiding the decision of the House of Lords, yet other authors have pointed to shortcomings in the judgment itself. In particular, the Law Lords relied on overseas decisions which really rested on the basis that the clauses were inappropriately worded, rather than the clauses did not extended to third parties.

Most importantly, the decision, say these authors is “not easy to reconcile with the earlier decision”, that in Elder Dempster & Co v Patterson Zockonis & Co. Charterers had agreed to carry oil from West Africa to England. They chartered a vessel for this purpose. The bills of lading, made between the claimants and the charterers, contained a term purporting to protect both charterers and shipowners from claims arising out of bad stowage. When the oil was lost because of such stowage, the claimants sued both charterers and shipowners.

It was held by the House of Lords that both parties were protected by the clause. Precisely why the House thought this to be so is unclear. Indeed, in Scruttons Ltd v Midland Silicones Ltd, no attempt to uncover the ratio was made in view of its very obscurity. Anson states that the most likely ratio appears to be that there was an implied contract between claimants and shipowners, the terms of which incorporated the exclusions and limitations contained in the bill of lading.

An alternative view was that of vicarious immunity, enunciated by Viscount Cave. This approach was to the effect that agents are entitled to any immunity conferred on their principals, and that this applied to the shipowners since they
took possession on behalf of, and as agents of, the charterers.\textsuperscript{211} Certainly, this line appealed to Scrutton L.J., not the least because he had enunciated this opinion in the Court of Appeal in this case,\textsuperscript{212} and which he later repeated, citing the decision of the House of Lords, in Mersey Shipping and Transport Co v Rea Ltd.\textsuperscript{213} Where there is a contract, he said, “which contains an exemption clause, the servants or agents who act under the contract have the benefit of the exemption clause…they can claim the protection of the contract made with their employers on whose behalf they are acting”.\textsuperscript{214}

This particular approach cannot be said to have survived \textit{Scruttons Ltd v Mid and Silicones Ltd.} Even so, it now appears that the courts will strive to bring third parties within exclusion clauses and so bring the law closer to the commercial realities of the situation.

In \textit{Herrick v Leonard & Dingley Ltd},\textsuperscript{215} McMullin J. distinguished the opinion of the Privy Council in that the document before him did not purport to include independent contractors, such as the defendant stevedores; and the stevedores had neither authorized nor ratified any attempt by the carrier to limit the former’s liability to the claimant cargo owner.

Again, in \textit{The Suleyman Stalskiy},\textsuperscript{216} Schultz J. pointed out that in the case before the Privy Council the authority of the carrier to contract as agent of the stevedore was admitted, whereas it was not in the case before him. It has also been suggested that a stevedore who is ignorant of the terms of the bill of lading until after unloading the goods should not be capable of ratifying a contract made on its behalf by the carrier. In the Privy Council case, the stevedore received the bill two weeks prior to unloading: the stevedore was also the owner of the carrier and habitually did the latter’s stevedoring work. A reviewer has thus argued that the opinion of the Privy Council was given on a case resting on an “occasional, and unusual, fact situation”.\textsuperscript{217} It is still thought the better view, however, to
regard the wish of the courts to accord with commercial realities, and hence to give effect to exclusion clauses, as having the upper hand.

B. Statute law

The position above described has been considerably affected by the Contracts (Rights of Third Parties) Act 1999. Section 1 provides that the Act applies in relation to a third party in two cases: where the contract itself expressly so provides; or the relevant term purports to confer a benefit on a third party. Section 1(2) further provides, however, that this latter will not apply if, on a true construction of the contract, it appears that the contracting parties did not intend the third party to have the right to enforce the term. Section 1(3) provides, as a condition for the Act to apply to third parties, that the third party must be expressly identified by name, class or description, but that the third party need not be in existence when the contract is made. This could, for example, allow the Act to apply to a company yet to be incorporated.

C. Application to exclusion clauses

Thus far, the Act would not appear to apply to exclusion clauses, but this position is made good by s. 1 (6):

“Where a term of a contract excludes or limits liability in relation to any matter references in this Act to the third party enforcing the term shall be construed as references to his availing himself of the exclusion or limitation.”

This will, for instance, allow a term of a contract excluding or limiting liability for negligence, and which expressly states that the limitation or exclusion is for the benefit of the other party’s “agents or servants or sub-contractors” to be enforced by such groups.
A third party cannot lose the rights otherwise made available by the Act, unless, in accordance with s.2, the contract is varied with his consent. This is subject to there being an express term in the contract to the effect that such consent is not needed, or that consent is to be required in specified circumstances different to those set out in s.2(1). This latter is a reference to the following:

(a) the third party has communicated his assent to the term to the promisor;

(b) the promisor is aware that the third party has relied on the term; or

(c) the promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.

Section 3 of the Act enables the promisor, in any claim by a third party, to rely on any defence or set-off arising out of the contract and relevant to the particular term, which would have been available had the claim been made by the promisee. Section 3(6) makes it clear that this applies also when a third party seeks to rely on an exclusion or limitation clause, by providing that:

“where in any proceedings brought against him a third party seeks in reliance on section1 to enforce a term of a contract (including, in particular, a term purporting to exclude or limit liability), he may not do so if he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) had he been a party to the contract.”

D. Exemptions form the 1999 Act

Section 6(1) says that the Act does not apply to contract on a bill of exchange, promissory note or other negotiable instrument. There are also exemptions in relation to:

(a) any contract binding on a company and its members under s. 14 of the Companies Act 1985;220

(b) any term of a contract of employment against an employee;
(c) any term of a worker’s contract against a worker (including a home worker); or

(d) any term of a relevant contract against an “agency worker”. 221

Reference


2. The writer once enquired from a shipping Company what would be the position if he refused to sign this statement on the ticket: “I agree to the conditions on which this ticket is issued” and was told he could stay at home. Cf. Denning L.J. in Alder v/s. Dickson (1955) 1 Q.B. 158, at p. 180; Diplock J. in Lowe v/s. Lombank Ltd. (1960) 1 All E.R. 611, at pp. 613-614; and Kahn-Freund’s Introduction to Renner, cited above. See too sales in (1953) 16 H.L.R. 318.


6. To atleast one judge’s regret, see mackinnon J. in Aslan v/s. Imperial Airways Ltd. (1933) 149. L.T.276, at pp. 279-280.


This portion is based on the article of Eike Von Hippel “The control of Exemption Clauses – A Comparative Study,’ 16 I.C.L.C. 591


Atlantic shipping co. v/s Drey fus (1922) 2 A.C. 250 per Viscount Dunedin at p. 258; Woolf v/s Collies (1948) 1 K.B. 11; Coleman Contractors (oxford) Ltd. v/s. Bathavan Rular District Council (1971) 5 Build L.R. 137.


Arbitration Act 1950, s 4(1); Arbitration Act 1975, s. 1; cf. Arbiration Act 1979; s s 3,4.

See, (1856) L.J. Ex. 308.


(1967) 1 A.C. 361.

See the discussion in Rowlinson Construction Ltd. v/s. Insurance Co. of North America (1981) 1 Lloyd’s Rep. 332.

Eg: Maritime Insurance Act, 1906, s. 33(1)

Provincial Insurance v/s. Morgan (1933) A.C. 240, per Lord Wright at P.254.

Re Morgan and another and provincial Insurance Co. Ltd. (1932) 2 K.B. 70., per Scrutton L.J. at p. 80.

Free of Capture and Seizure; the letters are used in policies of marine insurance to indicate that the underwriter is not to be liable for capture or seizure of either the ship or the cargo resulting from the action of enemies, pirates, the owner’s own government or a foreign government.

Anderson v/s. Marten (1908) A.C. 334.


Re. Hooley Mill Rubber and Royal Insurance Co. Ltd. (1920) 1 K.B. 257,
per Duke L.J. at P. 274; Lake v/s. Simmons (1927) A.C. 487 per Viscount Sumner at p. 507.

30 (1933) A.C. 240.
31 (1920) 3 K.B. 669.
33 (1926) A.C. 90.
36 See also Goss v/s. Lord Nugent (1833) 5 B & Ad. 58; Jacobs v/s Batania & General Plantations Trust (1924) 1 ch. 287, per P.O. Lawrence J. at p. 295; Wigmore, 4 Colum, L. Rev. 33-37 (1904); Wederburn (1959) C.L.J. 58.
39 Walker Property Investments (Brighten) Ltd. v/s Walker (1947) 177 L.t. 204; Couchman v/s. Hill (1947) K.B. 554; Ardennes (cargo owners) v/s. Ardennes (owners) (1951) 1 K.B. 55.
40 Roe v/s. Naylor (1918) 87 L.J. K.B. 958.
41 See Grooks v/s. Allan (1879) 5 Q.B.D. 38.
42 This has also been the experince in U.S.A : see 25 Notre Dame Law Review 64.
43 This was clearly the assumption made by the consignors in relation to British Airways terms and conditions of carriage of goods in Victoria Far Traders Ltd. v/s. Roadline (U.K.) Ltd. (1981) Lloyd’s Rep. 570.
44 (1956) L.W.L.R. 461.
46 (1975) Q.B. 303.
49 (1972) 2 Q.B. 71.
50 The clause in this case would, today be subject to a test of reasonableness before it could be upheld, even if it could be establish that it did form part of the contract: Unfair Contract Terms Act, 1977, S.2 (2).
51 (1975) Q.B. 303 at P. 310.


This defence requires the signatory to prove that there was a radical difference between what he thought he was signing and what he actually signed and also that he was not careless in signing it: see sounders v/s. Anglia Building Society Ltd. (1971) A.C. 1004; United Dominions Trust Ltd, v/s. Western (1976) Q.B. 813; Spencer argues in (1973) C.L.J. 104 that a fourth defence to the signature rule, that of mistake ought to be available.

Fong Gaepves Reynolds (1863) 2 w. 2w (L) 80, where a signature by a chairman, who could speak but not read English, was held binding.


Curtis v/s. Chemical cleaning & Dyeing Co. Ltd. (1951) 1. K.B. 805 see Eooldrige v/s Summer (1963) 2 Q.B. 43 per Diplock L.J at p. 69; Nettleship v/s. Weston (1971) 2 Q.B. 691.

eg. Misrepresentation Act 1976, S. 3; Unfair Contract Terms Act 1977, ss. 2(1), 5, 6(2), 7(2).

Unfair Contract Terms Act 1977, ss. 2 (2), 3(2), 4(1), 6(3), 7(3), 8(1),11


(1949) K.B. 532.

(1979) 1 Lloyd’s Rep. 257.


(1971) 2 G.B. 163,

(1977) 2 Lloyd’s Rep. 70.

(1877) 2 C.P.D. 416.

(1964) 1 W.L.R. 125 at p.129.


cf. Smith v/s. South Wales Switchgear Ltd. (1978) W.L.R. 165, where a for more robust approach to incorporation is adopted by Lords Fraser and Keith.


(1930) 1 K.B. 41.

(1940) 1 K.B. 532.


Parker v/s. South Eastern Railway Co. Ltd. (1877) 2 C.P.D. 416; Harling v/s. Eddy (1951) 2 K.B. 739 at p. 746.
77 (1978) 1 All E.R. 18
79 Charles Davis (Metal Brokers) Ltd v/s Gilyott & Scott Ltd. (1975) 2 Lloyd’s Rep. 422.
80 (1968) 1 All E.R. 811.
81 see also Transmotors Ltd. v/s. Roberston, Buckley & Co. Ltd. (1970) 1 Lloyd’s Rep. 224.
82 (1979) 1 W.L.R. 401.
84 See Coote, Exception Clauses pp. 1-18 and post chapters 4 and 7.
86 (1930) 1 K.B. 41.
88 Chalmers (1903) 19 L.Q.R. 10
89 Sale of Goods Act 1979, s.12; Supply of Goods (Implied Terms ) Act 1973, s.8 (as amended); Unfair Contract Terms Act 1977, s.6(1).
91 An illustration of the operation of this kind of invalidity can be found in Rasbora Ltd v/s. J.C.,L. Marine (1977) 1 Lloyd’s Rep. 645, applying Sale of Goods Act 1893, s. 55(4), the foreowner of the Unfair contract terms act 1977, ss. 6(2), 7(2).
See Palmer, Bailment pp. 721-744.

See Law Commission Report No.95, Implied Terms in Contracts for the Supply of Goods. Legislation is, at the time of writing, proceeding through Parliament. It is intended to implement the Law Commission’s recommendations: see the Supply of Goods and Services Bill.

See also eg., Defective Premises Act 1972, s. 6(3).


It will be recalled that in “consumer” contracts, “contracting out” of the implied terms is forbidden: Unfair contract Terms Act 1977, ss. 6(2), 7(2).

Unfair Contract Terms Act 1977, s. 6(3)

Ibid., s 7(3)

See Atiyah and Treitel (1967) 30 H.L.R. 369; Trietel (1967) J.B.L. 200


(1967) A.C. 361.


It would appear that the ostensible authority which an agent would otherwise have may be restricted or excluded by a notice, even if it forms no part of the contract between principal and buyer: Collins v/s. Howell-Jones (1980) 259 E.G. 331; see Murdoch (1981) 87 L.Q.R. 552. Cf. the robust judgement of Dillon J. in Walker v/s. Boyle (1982) 1 all ER. 634; see also National Conditions of Sale (20th ed.) conditions 17(2); law society’s Conditions of sales (1980 ed.), condition 2(5).


(1977) 244 E.G. 547.

See Gilleispie Bros. v/s. Roy Bourles Transport (1973) Q.B. 400, where a similar clause in a non-consumer contract was held to be reasonable in accordance with a common law test of reasonableness (which Lord Denning M.R. has frequently invoked to test the validity of exclusion and related clauses that are not within the statutory test: See also Photo Production Ltd. v/s. Securior Trasport Ltd. (1978) 3 All E.R. 146, 151-152, 153. Leuison v/s. Patent Steam Carpet Cleaning Co. Ltd.

It is difficult to think of practical examples. A contract of employment is one in which the employee “deals as a consumer”. It might therefore seem that the right of indemnity arises from a breach of indemnity arises from a breach of the implied term of reasonable care in the contract (as a result of Lister v/s. Romford Ice & Cold Storage Co. (1957) A.C. 555) falls nominally within s.4. However, since this right of indemnity arises from a
term, implied by law it is unlikely that the courts would regard its inclusion as unreasonable. In any event, there is usually a concurrent right of indemnity under the Civil Liability (Contribution) Act, 1978, s.2(2).

110 e.g. Unfair Contract Terms Act ss. 2(1), 6(2), 7(2). This problem may be more theoretical than real. A court would be unlikely to agree that it is reasonable for an indemnifiee to seek to shift back to the indemnifier a risk, which in other circumstances, has been firmly placed on him by statute. Cf. Smith v/s. South Wales Switchgear Ltd. (1978) 1 W.L.R. 165.

111 This problem cannot be solved by reference to the Unfair Contract Terms Act 1977, s. 13(1), which does not apply to s.4


113 Photo Production Ltd. v/s. Securior Transport Ltd. (1980) A.C. 827.


117 See also Carriage by Air Act 1961, sched. 1, arts 22, 23(1) and 32; Carriage of Goods by Road Act 1965, sched., arts 23, 41; Carriage by Railway Act 1972, sched, arts 13, 16 and 23 (1).

118 See Scruton, Charter Parties (18th ed.) pp. 198-205.

119 Penlde & River Ltd. v/s. Ellerman Lines Ltd (1927) 33 Com.Cas 70. A concise explanation of these provisions can be found in Palmer, Bailment, pp. 616-628.


121 The amendment was first made to the Sale of Goods Act. 1893, S. 12 by the Supply of Goods (Implied Terms) Act 1973, S.1 the amendment was re-enacted when the sale of goods legislation was consolidated by the Sale of Goods Act, 1979.

122 See Coote, Exception Clauses, chap. 1; see also Nicholas, 48 Tul.L. Rev. 946. (1974).

123 (1956) 1 W.L.R. 936 at p. 940.


125 See Coote, op. cit; pp. 4-14.


127 (1927) 1 A.C. 361 at p. 432.

128 Glynn v/s. Margetson & Co. (1893) A.C. 351; Sze Hai Tong Bank Ltd. v/s. Rambler Cycle Co. Ltd. (1959) A.C. 576; Glenville Williams, (1944) 60

129 (1973) 1 W.L.R. 210.
130 (1971) 1 W.L.R. 519 Donaldson J. said at p. 522.
132 But see Nitlam U.K. v/s. Solent Steel Fabrication (1981) 1 Lloyd’s Rep 633 where an insurance policy taken out to cover product liability, and which contained an exclusion for damage caused by failure of the goods to perform their intended function, was not thereby deprived of all contractual content.
133 Coote (1970) C.L.J. 221 at p.238
134 It was the respondent’s apparent failure to appreciate this point that led to the need of the privy council, in Port Jackson Stevedoring Pty, Ltd. v/s. Salmond & Spraygon (Australia) pty. Ltd. (1980) 3 ALL E.R. 257, 262, to emphasise that cl. 17 was “directed towards the carriers obligations as bailee of the goods.”
135 (1927) 43 T.L.R. 323 at p. 324.
136 See the clear and detailed discussion of this doctrine by the court of Session in Ailsa Craig Fishing Co. v/s. Malvern Fishing Co. & Securior (Scotland) Ltd. 1981 S.L.T. 130 The opinion of the First Division has recently been affirmed by the House of Lords, at (1982) 132 New L.J. 14.
137 Wallis, Son & Wells v/s. Pratt & Haynes (1911) A.C. 394.
138 Andrew Bros. Ltd. v/s. Singer & Co. Ltd. (1934) 1 K.B. 17.
142 Bigge v/s. Parkinson (1862) 7 H & N 955.
143 See the judgements of Lord Denning M.R. in Adams v/s. Richardson & Starting Ltd. (1961) 1 W.L.R. 1645; see also Western Tractor Ltd. v/s. Dyck (1960) 7 D.L.R. (3rd) 535, per Brownridge J.A. at pp 543-544; Sutter v/s St. Clair Motors Inc. 194 N.E. 2d 674 (Ill 1963) Factory Warranties may nevertheless, notwithstanding these legal rules, still stipulate that “guarantees” are given in lieu of any other undertakings. For especially blatant examples of this drafting style of consumer or retailer oppression see: Henningsson v/s. Bloomfield Motors Inc. 161 A. 2d 69 (N.J. 1960); Eimco Corp. v/s. Tutt Bryant Ltd. (1970) 2 N.S. W.S.R. 249.

(1932) A.C. 562.

(1966) 1 Lloyd’s Rep. 500


(1948) 2 All E.R. 127.

See the opinion expressed by the members of the First Division of the Court of Session in Ailsa Craig Fishing Co. v/s. Malvern Fishing Co. 1981 S.L.T. 130.

(1976) 1 W.L.R. 1078.

(1976) 1 A.C. 361 at P. 432.

See also Photo Production Ltd. v/s. Securior Transport Ltd. (1980) A.C. 827; Levison v/s. Patent Steam Carpet (Leaning Co. Ltd. (1978) Q.B. 69.

(1933) 1 K.B. 205.


(1945) K.B. 189.


For an interesting discussion of this point, See Hawkes Bay and East Court Aero Club v/s Mc. CLEOD (1972) N.Z.L.R. 289 at p. 308; See also Imperial Furniture Pty. Ltd. V/s. Automatic Fire Sprinkells Pty Ltd. (1967) N.S.W.R 29.


(1922) 2 K.B. 87.

(1868) L.R. 3 H.L. 330.

See Coote (1970) C.L.J. 221, 239
166 See Abbott v/s. Middleton (1858) 7 H.L.C. 68; Watson v/s. Haggit (1928) A.C. 127.
169 Hare v/s. Horton (1835) 5 & Ad. 715.
170 Tillmanns v/s. S.S. Knutsford (1908) 2 K.B. 385.
172 Cross, evidence (5th ed.) pp. 85-109 this may of course be reversed by statute, as in the Misrepresentation Act, 1967 s. 2(2).
174 (1917) 1 K.B. 352.
175 See also the anlysis of devlin j. in firestone tyre co. ltd v/s. vokins (1951) 1 lloyds rep. V/s. f.e. walker ltd. (1946) 79 l.i.r. rep 646; woolmer v/s. delmer price (1955) 1 q.b. 291.
176 (1951) 1 Lloyd’s Rep. 32 at P. 38.
177 [1821] 5 B. & Ald. 240.
181 ibid.
182 See Wilkinson v Barclay [1946] 2 All E.R. 337.
184 Unreported, December 20,1996.
185 [1999] 2 All E.R. (Comm.) 544
186 [2003] EWCA Civ 333.
187 The court expressly approved Croudace Construction v Cawoods Concrete Products, above n. 121 See too The Simkins Partnership v Reeves Lund & Co. Ltd [2003] EWHC 1946, Robertson Group (Construction Ltd v Amey Miller [2005] CSOH 60. See too Pegler Ltd v Wang (UK) Ltd, [2000] EWHC 137, where a clause excluding liability “for any indirect, special or consequential Loss, However arising, including…….loss of anticipated profits……in connection with or arising out of the supply, functioning or use of (the goods or services supplied) was loss under the second limb of Hadley v Baxendale and hence did not cover loss whereas the loss claimed fell under the first limb. A claim for
loss of profits was not within the clause since that clause only covered
loss of profits failing within the second limb.

[1922] 2 AC 250.


Arbitration Act 1996, s 89. For the Unfair Terms in Consumer Contracts
Regulations 1999, see Ch. 10.

[1960] 1 All E.R. 611.

See also Cremdeam Properties v Nash (1977) 244 E.G. 547.


Ibid., at 403.


Ibid., at 10.


Anson, op. cit. p. 184.

Cheshire, Fifoot and Frumston, (14th ed.) 184.

The cases are: Krawill Machinery Corp v Herd [1959] 1 Lloyd’s Rep.
305(USA); Wilson v Darling Island Stevedoring [1956] 1 Lloyd’s Rep. 346
(Australia).


[1962] 1 All E.R. 1 at 7, per Viscount Simonds.


[1923] 1 K.B. 420 at 441-442.


Ibid., at 378.

[1975] 2 N.Z.L.R. 566


The Act implements, with some amendments, the recommendations of the
law Commission in its Report on Privity of Contract. Contracts for the

For authorities on the application of s. 1 see Nisshin Shipping Co. Ltd v
Cleaves and Co. Ltd. [2004] 1 Lloyd’s Rep 38, Laemthong International
Lines Co. Ltd. v Abdullah Mohammed Fahem & Co. [2005] EWCA Civ
519.

Section 14(1) of the Companies Act States: “Subject to the provisions of
this Act, the memorandum and articles, when registered, bind the
company and its members to the same extent as if they respectively had
been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles."

221 This has the same meaning as in s. 34(1) of the National Minimum Wage Act 1998.
Chapter 5

Avoidance and Qualification of Exemption Clauses

5.1 Introduction

In this chapter, we discuss the methods by which the courts seek to avoid giving full effect to exclusion clauses, notwithstanding that the clauses has been incorporated into the contract and is apt to covet the damage which has occurred.

5.2 Onus of proof

In Levison v Patent Steam Carpet Clearing Co, the terms of a contract for the clearing of the carpet contained a clause reading “All merchandise is expressly accepted at the owner’s risk”. The carpet was lost, presumably stolen. The defendants, pointing to the exclusion clause, argued that it clearly covered the case in hand because, on the balance of probabilities, the loss was due to their negligence: and that the burden of proof lay on the claimants to prove their case that the carpet had been lost because of fundamental breach, the later not been covered by the exclusion clause. The court of Appeal held unanimously that the burden of proof in this case lay upon the defendants. A bailee, Lord Denning M.R. said, must prove all the circumstances in which the loss or damages occurred. If no explanation is forthcoming, then it is quiet likely that the loss or damage was due to a fundamental breach of contract such as theft or delivery to the wrong address. The defendants were in the best position to provide an answer and onus of proof, which they had failed to discharge, accordingly lay on them.

This was assented to by Orr L.J. who found that, as a matter both “of justice and of common sense”, the burden properly rested on the defendants who were “both more likely to know the facts and in a better position to
ascertain them than the bailor”.\(^3\) Similarly, it was the view of Sir David Cairns that “however difficult it may sometimes be for a bailee to prove a negative, he is at least in a better position than the bailor to know happened to the goods while in his possession”\(^4\)

In reaching this decision, the court had to face certain difficulties caused by the decision of an earlier court of Appeal in Hunt & Winterbotham V. BRS (Parcels).\(^5\) Goods which had been entrusted to a carrier were lost. It was held that the carrier could rely on the limitation clause without disproving fundamental breach. In Woolmer V. Delmer Price Ltd,\(^6\) on the other hand, the defendants had agreed to store a fur coat “at customer’s risk”. The coat was lost in the way not explained and the defendants were held liable as the duty was on them to show that the loss was not due to their fundamental breach.

Some doubt was cast on the correctness of this decision on the Hunt & Winterbotham case, although distinguished on the slender ground that it was a case of deposit not carriage.\(^7\) Furthermore, the court there left open the possibility that were fundamental breach was specifically pleaded, as most significantly it was not in the hunt V. Winterbotham case, the onus falls upon the bailee.\(^8\) Sir David Cairns found this important in Levis V. Patent Steam Carpet Cleaning Co,\(^9\) while Lord Denning M.R. and Orr L.J found nothing in the hunt & Winterbotham case to prevent them funding as they did.

It is significant that Sir David Cairns drew attention to Lord Denning’s remarks in Spurling v. Bradskaw,\(^10\) where he said:

“A bailor by pleading and presenting his case properly, can always put the burden of proof on the bailee.”\(^11\) This, the best answer to the problem, is supported by the Treitel: “It may be doubted whether a claimant can throw the burden of proof on the defendant by merely pleading fundamental breach. The burden might, however, pass to the defendant if the claimant could support his allegation by some evidence that the defendant might have been guilty of a fundamental breach.”\(^12\) This is just what happened in the Levinson case.\(^13\)
5.3 Liability for fraud

In Pearson & Son Ltd v. Dublin Corporation,\(^{14}\) Lord Loreburn had said that “no one can escape liability for his own fraudulent statements” by inserting in a contract a clause that the other party shall not rely on them.\(^{15}\) Lord Halsbury agreed that “no craft or machinery in the form of contract can stop a person who complains that he has been defrauded from having that question of fact submitted to a jury”,\(^{16}\) Lord James adding that: “When the fraud succeeds, surely those who designed the fraudulent protection cannot take advantage of it…. As a general principle I Incline to the view that an express term that fraud shall not vitiate a contract would be bad in law.”\(^{17}\)

In that case, an action had been brought against the Corporation for deceit by its agent in misrepresenting the nature of the works to be undertaken under a particular contract. The Corporation had relied on the provision in the contract to the effect that the contractor should satisfy itself as to the nature of all existing works and all other matters relating to the contract works. The House of Lord concluded that the Contract contemplated honesty on both the sides, so that the clause relied on could not exclude liability for deceit.

In WRM Group Ltd v. Wood,\(^{18}\) however, the Court of Appeal said that this case did not establish the proposition that it is not open to the parties to a contract to exclude the remedy of set off in relation to allegedly fraudulent misrepresentations. It pointed to Society of Lloyds v. Leihgs\(^{19}\) where Savile L.J. had said: “We know of no principle of law that should lead us to construe the words of the clause so as to exclude from its ambit any claim based or allegedly based on fraud.”\(^{20}\)

The Pearson Case was subject to further critical analysis by the House of Lords in HIH Casualty and General insurance Ltd & ors v. Chase Manhattan Bank & ors.\(^{21}\) Lord Bingham said this:
“It is clear that the law, on public policy grounds, does not permit a contracting party to exclude liability for his own fraud in including the making of the contract. The insurers have throughout contended for a similar rule in relation to the fraud of agents acting as such. After a very detailed examination of such authority as there is, both the judge… and the Court of Appeal… decided against the existence of such a rule. It is true that the ratio of the leading authority on the point, S Pearson & Son Ltd v. Dublin Corporation, despite the distinction and numerical strength of the House, which decided it, is not easy to discern. I do not however think that the question need be finally resolved in this case. For it is in my opinion plain beyond argument that if a party to the written contract seeks to exclude the ordinary consequences of fraudulent or dishonest misrepresentation or deceit by his agent, acting as such, including the making of the contract, such intention must be expressed in clear and unmistakable terms on the face of the contract.”

Lord Wilberforce added: “There is no doubt that a party cannot contract that he shall be liable for his own fraud”

In Frank Maas (U.K) Ltd v. Samsung Electronics (U.K) Ltd. The relevant clauses provided: “Company’s Liability howsoever arising and notwithstanding that the cause of the loss or damage be unexplained shall not exceed….” Further clauses in the contract provided as follows:

24. The Company shall perform its duties with a reasonable degree of care, diligence, skill and judgement.

25. The Company shall be relieved of liability for any loss or damage if and to the extent that such loss is caused by:

(A) Strike, lock-out, stoppage or restrain of labour, the consequences whereof the company is unable to avoid by the exercise of reasonable diligence;
(B) Any cause or event which the Company is unable to avoid and the consequences whereof the Company is unable to prevent by the exercise of reasonable diligence.”

The relevant goods were stolen from a warehouse by persons unknown. Accepting that the clause had to be construed contra proferentem, the court pointed out that Clause 24 covered not just negligence but also willful default. It could not possibly be the case that the disputed clause did not have the effect of limiting any such liability. To argue the contrary would be “to render clause 27A inapplicable in an important, common place respect. As a matter of contractual scheme, that seems unlikely”.

It had been argued that “howsoever arising” used in Clause 27A amounted to “shorthand” for the bases of liability contemplated under Clause 25. That approach was rejected by the Court. Clause25 contained an exhaustive statement as to when Mass would be relieved of liability. It did not deal with the basis of any liability. It was, the Court said, understandable that Mass should be relieved of liability in certain limited circumstances. It did not follow from this, though that clause should be restricted likewise. As the Court said, if the Clause were co-extensive with Clause 25, it would have no point. It saw the scheme of the Contract as contemplating circumstances in which Mass would be unable to obtain relief under Clause 25, but could then limit its liability under the Clause in question.

The argument had been put to the Court that, if the clause were interpreted as covering willfull default on the part of Mass’s employees, then it would also cover fraud on the part of Mass itself. The Court replied that, when it comes to personal fraud of a party, then, whether as a matter of public policy or construction, “Fraud is indeed a thing apart”. So far as concerns constructions, even with regard to the invocation of a limitation clause in the course of the performance of an otherwise valid contract, the Court said that the parties couldnot contemplate that one of them may take advantage of personal fraud. The various considerations already discussed (as to risk allocation, clarity of language and contexts) which point to the disputed clause
extending to Mass vicarious liability for willful default, suggest a different conclusion where personal fraud on FM’s part is concerned.23

5.4 Liability for the breach of fiduciary duty

Treitel argues that any attempt by a person under a fiduciary duty to contract out of liability for a willful default in that duty would be ineffective.24 This argument is based on the fact that the promoter of the Company, who is under a fiduciary duty not to profit from the promotion without disclosing it, cannot contract out of that duty.25 It was, however, held in Armitage v. Nurse26 that it was not contrary to public policy for a trustee to exclude liability for gross negligence.

5.5 Liability for breach of rules of Natural Justice

Treitel also cites a number of dicta of Lord Denning to the effect that the rules of domestic tribunals purporting to oust the rules of natural justice would be ineffective.27 Although Treitel offers no comment on this dicta, it is thought that Lord Denning’s views are right.28

5.6 Oral undertakings

This method of evading the full impact of exemption clauses can be introduced by reference to Couchman v. Hill.29 The catalogue for a sale by auction described certain heifers as “unserved”. The document also contained an exemption clause, stipulating that “All lots must be taken subject to all faults or errors of description (if any) and no compensation will be paid for the same”. Similar terms were contained in the conditions of sale exhibited at the auction rooms. The Claimant orally requested the defendant to confirm that a particular heifer was unserved, which confirmation was duly given. After the sale, the heifer was found to be in calf and died as a result of carrying a calf too young. It was held that the oral declaration overrode the exemption clause that the claimant was entitled to damages.30
A similar decision was reached in SS Ardennes (Cargo owners) v. Ardennes (owners). The Claimants shipped cargo to England from Spain on the defendant’s vessel. An oral promise was made by the later to the effect that the voyage would be direct to England. The written terms of the bill of lading allowed the defendants to reach London “by any route and whether directly or indirectly”. In fact, the vessel did not proceed directly to London, going instead via Antwerp. It was held that the oral promise was binding.

In both these cases, the oral promises directly contradicted the written exemption clauses. It is clear, however that the courts are still prepared to find that an exemption clause has been overridden by an oral promise, even where that contradiction is not so glaring.

Mendelssohn v. Normand sets a good example. The claimant left his car at a garage owned by the defendants. An exemption clause disclaimed liability for any loss, however caused; it was further provided that the terms of the agreement could only be varied if made in writing and signed by the management. On the relevant occasion, the attendant told him that the doors were not to be locked and that he, the attendant, would lock them himself. He did not and the luggage was stolen.

It was held that the attendant’s promise was not within his actual authority: It never lay within his ostensible authority, and hence bound his employers, the garage owners. It was held that this rendered the exemption clauses ineffective. The reason was that:

“the oral promise or representation has a decisive influence on the transaction- it is the very thing which induces the other to contract and it would be most unjust to allow the market to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation”. 
5.7 Misrepresenting the effects of a term.

Where, the full effects of an exclusion clause have been misrepresented, that misrepresentation will be effective to qualify the terms of the clause as it originally stood. This may be looked upon as a spice of the oral undertakings discussed immediately above.

The leading case in Curtis v. Chemical Cleaning and Dyeing Co. The claimant took the defendants shop a white satin wedding dress for cleaning. She was asked to sign a receipt which contained a clause exempting the defendants from all liability for damage to articles cleaned. She was given a document which she was asked to sign. She asked for an explanation of its contents and was told that it exempted the defendants from certain risks, and, in the present instances, from the risk of damage to the beads sequins on the dress. The claimant then signed the document, which in fact contained a clause exempting the defendants from liability for “any damage how ever caused”. When the dress was returned, it was stained, in the subsequent action, the defendants placed reliance on this clause. The Court of Appeal held that the defendants were liable to damages, and that no regard could be placed on the exemption clause. According to Somervell L. J, “owing to the misrepresentation the exception never became part of the contract between the parties”. Denning L.J. made the further point that it was quiet irrelevant whether the misrepresentation was innocent or fraudulent.

In L’ Estrange v. Graucob, Scrutton L.J. had noted that a signed contract was binding on the signatory, regardless of whether he had read its terms or not. This the Lord Justice said, applied provided there was no fraud or misrepresentation.

In Dennis Reed v. Goddy, he appeared to take the view that if a person believes that a contract contains no exceptional clauses when it does, and the other party offers no explanation of the contract, this is tantamount to a misrepresentation of the terms. In Jacques v. Lloyd D Georage & Partners
Lord Denning made it clear that such indeed was his view. If an estate agent, he said, seeks to depart from ordinary and well-understood contractual terms, he must take care to explain the effect to the client. In the absence of such explanations, the estate agent would be precluded from enforcing a term which is “unreasonable or oppressive”. 40

It was held in The Strasin,41 that were the typed entry on the face of bills of lading was inconsistent with the printed conditions on the back, the typed entry should prevail in determining whether bills were owners’ or characters' bills.

5.8 Fundamental terms and fundamental breach

For a number of years, what was virtually substantive rule of law grew up to the effect that no exclusion clause was valid where a defendant was in fundamental breach of contract, or in a breach of fundamental terms. In Karsales (Harrow) v. Wallis,42 Denning L.J regarded it as:

“now settled that exempted clauses of its kind, no matter how widely they are expressed, only avail the party when he is carrying out the contract in its essential respects… they do not avail him when he is guilty of breach which goes to root of the contract….If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses.” 43

The effect of such cases, it was said, was that a person in fundamental breach of contract could not rely on an exemption clause inserted in a contract to protect him.44 The House of Lords, however attempted to reinterpret the doctrine of fundamental breach as one of construction, so that it should be viewed strictly as an application of the principle that an exclusion clause should not, in the absence of clear words, be construed as applying to breaches tending to defeat the main purpose of the contract. It was accepted though, that, as a matter of drafting, there was no reason why a properly
drafted exclusion clause should not apply to some instances of a fundamental breach.  

In subsequent cases, however, the Court of Appeal “behaved as if the House of Lords had never spoken at all” and appeared to reinstate the proposition that, as a rule of law, no exclusion clause could offer protection against a fundamental breach of contract.

The House of Lords, however, sought, and it would now appear successfully, to reimpose its views that everything depended on the construction of the clause in dispute. In Photo Production Ltd v. Securior Transport Ltd, Lord Wilberforce referred to Lord Denning’s declaration that Suisse Atlantique had affirmed the view that:

“when one side has been guilty of fundamental breach of contract…and the other side accepts it so that the contract comes to an end…then the guilty party cannot rely on the exception or limitation clause to escape from liability for his breach.”

Suisse Atlantique Societe d’Armement maritime SA v. NV Rotterdamsche Kolen Centrale. Lord Wilberforce replied, was “directly opposed” to any such interpretation and the effect of the judgments in that case was “to repudiate it”. He declared that:

“He had no second thoughts as to the main propositions that the question, whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or to a breach of fundamental term, or indeed to any breach of contract, is the matter of construction of a contract.”

These strictures appeared now to have had effect, in Ormsby v. H & H Factors Ltd, it was said that attempts had in the past been made to “circumvent exemption clauses by the doctrine of fundamental breach. These attempts have been laid to rest by the House of Lords.”
(Chesterhall) Ltd v. Finney Lock Seeds Ltd,\textsuperscript{54} the Court of Appeal accepted that the question as to whether an exclusion clause covered a fundamental breach was a matter of construction; and in Edmund Murray Ltd v. BSP International Foundation Ltd, the Court of Appeal specifically stated that:

\begin{quote}
“It is always necessary when considering an exemption clause to decide whether as a matter of construction it extends to exclude or restrict the liability in question, but, if it does, it is no longer permissible at common law to reject or circumvent the clause by treating it as inapplicable to fundamental breach.”\textsuperscript{56}
\end{quote}

It is further more accepted that enactment of the unfair Contract Terms Act, 1977 has undermined the need for any separate doctrine relating to fundamental breach.\textsuperscript{57} In what is almost a statutory reversal of the old rule of law approach, S.9 of the 1977 Act provides that, where the test of reasonableness is to be applied to any term, that term may be given effect whether or not the contract has been terminated; nor will affirmation of itself affect the applicability of that test.

5.9 Position as to fundamental breach

By discussing such cases, we can conclude that fundamental Breach relives the parties from performing their obligation. Such life as there might be in the row discredited approach to fundamental breach lies with those cases where the clause seeks to allow a party not to perform the contract at all. In Suisse Atlantique, Lord Wilberforce said that the parties to a contract cannot contemplate so wide and ambit to an exclusion clause as to deprive the contract of meaning so reducing it to a “mere declaration of intent”. To that extent, he concluded, it may be “correct to say that there is a rule of law against the applications of an exception clause to a particular type of breach.”\textsuperscript{58} Lord Diplock also took the view that the parties to the contract were free to modify their obligations to whatever degree they choose”within the
limits that the agreement must contain the legal characteristics of a contract."59

Reference

1. {1977} 3 All E.R. 498
2. ibid., at 505
3. ibid., at 506
4. ibid., at 508
5. [1962] 1 All E.R. 111
6. [1955] 1 All E.R. 377
7. [1962] 1 All E.R. 111 at 115, per Lord Evershed M.R.
8. ibid., at 119, per Lord Evershed M.R.
9. [1977] 3 All E.R. 498 at 508
11. ibid., at 125. See also [1977] 3 All E.R.
13. The Levison case was accepted as correctly decided in Euro Cellular (Distribution) Plc v Danzas Ltd. [2003] ewhc 3161 (Comm).
15. ibid., at 353.
16. ibid., at 356.
17. ibid., at 362
20. ibid., at 1407.
29. [1947] 1 All E.R. 103
30. ibid., at 105, per Scott L.J.
32. [1969] 2 All E.R. 1215.
33. ibid., at 1218, per Lord Denning M.R.
34. ibid., at 1218.
35. [1951] 1 All E.R. 631.
36. ibid., at 633.
37. [1934] 2 K.B. 394.
38. ibid., at 403. This case is discussed in Ch.1 at p.32. if there has been a misrepresentation including a contract, the fact that the printed terms and conditions clarify the point does not alter the fact that the misrepresentation did induce the making of the contract nor affect the remedies available under the Misrepresentation Act 1967: Peekay Intermark Ltd and another v Australia & New Zealand Banking Group Ltd. [2005] EWHC 830 (Comm).
40. [1968] 2 All E.R. 187, CA. The question of reasonableness is discussed in greater detail in Chapter 9. See also the discussion of Interfoto Picture Library Ltd. V Stilleto Visual Programmes Ltd at pp.13-14 above.
42. [1956] 2 All E.R. 866.
43. ibid., at 868.
51. ibid., at 561.
52. January 26, 1990, CA.
53. This was stated by the country court judge in remarks not commented on by the Court of Appeal.
55. (1992) 33 Con LR 1.
56. In Carter v Emin (unreported, February 15, 2001. Mayor, s and City of London County Court, the District Judge said that there had been a fundamental breach and that the particular exclusion clause would not protect the defendants. This appear to refer, however, to his findings that the clause was unreasonable, and not that it automatically failed to cover such a breach.
57. See [1980] 1 All E.R. 556 at 564, per Lord Wilberforce. See also George Mitchell (Chesterhall) Ltd v Finney Lock seeds Ltd [1983] 2 All E.R. 737 at 739, per Lord Diplock.


Chapter-6
Harsh and Unconscionable Bargains

6.1 Introduction

There is a definite, if slender, line of authority (as far as English law is concerned) showing that an agreement fairly stigmatized harsh and unconscionable may well be declared unenforceable in the courts. Should this prove too drastic in the individual case, there is nonetheless a degree of precedent, founded principally on certain remarks by Lord Denning, that if an individual clause (more often than not an exclusion clause) is unreasonable it well be struck down. This is in addition to ss. 137-140 of the consumer Credit Act 1974 which permit the reopening of credit agreements where the credit bargain is extortionate.

6.2 Unconscionable Bargains

In the leading case of Fry v. Lane\(^1\) claim was made that the sale of reversionary interest should be set aside. Reviewing the earlier decisions, Kay J. observed that three criteria had to be fulfilled before equity would set aside a particular bargain. First, the victim must be “poor and ignorant”; secondly, the sale must be at an under value; thirdly, the victim must have had no independent advice.\(^2\)

This was up-dated by the judgement of Megarry J. in Creswell v. Potter.\(^3\) A matrimonial home had been conveyed to a husband and wife as joint tenants, at law and equity. The marriage broke down and the wife was handed a document to execute, described as a conveyance. In fact, it released to the husband all wife’s interest in the home. She received no consideration other than an indemnity against the liabilities under a mortgage of property. She had believed that the document made it possible for the property to be sold without her rights being affected.
The Judge assessed the case against the three criteria laid down by Kay J. There was no doubt but that the disposition had been at an under value. It was also a fact that the wife had received no independent legal advice. As for the final requirement, that the claimant be “poor and ignorant”, Megarry J. gave this a modern tone. More appropriate terms, he said, would now be “member of the lower income group” and “less highly educated”. Furthermore, this latter was to be construed in a relative sense: while the wife needed alertness in her career as a telephonist, in the context of property transactions she could fairly be described as “ignorant.”

This approach to the third condition clearly gives the courts considerable scope. While the better-off may obtain independent legal advice, they are as capable as the impoverished of believing independent legal advice to be unnecessary.

Although no reference was made to the above cases in Jones v. Morgan, the formulation there adopted was broadly to the same effect. The Judge in the lower court had referred to the three elements which the High Court had identified, in Alec Lobb (Garages) Ltd and others v. Total Oil Great Britain Ltd, as characteristics of a case in which the court would interfere to relive a party of a bargain on the ground of unconscionability: (i) that one party was at a serious disadvantage to the other, “whether through poverty or ignorance or lack of advice or otherwise”, so that circumstances existed of which unfair advantage could be taken; (ii) that the weakness of the one party had been exploited by the other in some morally culpable manner; and (iii) that the resulting transaction has been, not merely hard and improvident, but overreaching and oppressive. The lower court had also referred to the observation in Multiservice Bookbinding Ltd v. Marden where it had been said that “a bargain cannot be unfair and unconscionable unless one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say in a way which affects his conscience.”

In the instant case, the Court said that the law on unconscionable bargains was not “in dispute”. It agreed with what had been said in the
Marden case, adding that the observations in that case had been approved in Alec Lobb (Garages) Ltd v. Total oil Great Britain Ltd⁷ where it had also been said that: “there must...be some impropriety, both in the conduct of stronger party and in terms of transactions itself (through the former may often be inferred from the latter in the absence of an innocent explanation) which in the traditional phase ‘shocks the conscience of the court’, and makes it against equity and good conscience for the stronger party to retain the benefit of a transaction he has unfairly obtained.”⁸

That the law is not confined to the impoverished is readily deductible from those early cases where reversioners of no small means were relieved from the consequences of their improvident agreements.⁹ It is better, then, to read the expression “poor and ignorant” as now meaning “incapable of coping with the individual transaction without independent legal advice”¹⁰.

A strong boost of the relief that grossly inequitable contracts are unenforceable was provided by the House of Lords in Schroeder Music Publishing co Ltd v. Macaulay.¹¹ The Contract was one whereby a young and unknown songwriter entered into an agreement with a music publishing Company, whereby the latter engaged his services exclusively for the period of five years. Such was the stringency of the contract in favour of the publishers (they were, for example, under no obligation even to publish any of the songwriter’s publications) that it was urged that the contract was void for being an unreasonable restrain of trade. Lord Reid stressed that this particular contract one cast in standard form, was not made freely by parties bargaining on equal terms, nor molded under the pressure of negotiation, competition and public opinion.¹² This being so, he held the agreement unenforceable. Lord Diplock took a robust line. In cases, he declared, the court intervenes to protect those “whose power is weak against being forced by those whose bargaining power is stronger to enter into bargains which are unconscionable”.¹³ His Lordship continued by dividing standard form contracts into two categories. One such category related to contracts molded and produced by parties of equal bargaining power. Here a strong presumption is
raised that the contract is fair and reasonable. Such contracts include bills of lading and policies of insurance.¹⁴

This presumption, Lord Diplock maintained, does not apply to the more modern category of standard contracts of which the nineteenth century ticket cases are probably the best examples. These have not been subject to negotiation between the parties. They have been imposed by parties whose bargaining power enables them to say: “if you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it”.¹⁵

Such cases raise no presumption of unconscionability, but the court must all the terms of agreement to determine the issue of enforceability.¹⁶ The vital factor to note was that, although this was a case involving an alleged restrain of trade, lord Diplock pushed the discussion beyond such confines. His clear belief was that any standard form contract imposed upon a party of weaker bargaining power could be void for unconscionability, regardless of the nature of contract. Indeed there is no reason to suppose that Lord Diplock would, if pressed, confined himself to standard terms contracts. A verbal contract, or a written contract produced for the particular occasion only, can equally be imposed on weaker parties.

The decision of the House of Lords was applied in the not dissimilar case of Clifford Davis Management Ltd v. WEA Records Ltd¹⁷ Composers of popular songs signed publishing agreements with music publishers. Among the terms of agreements were clauses assigning copyright in the songs to the publishers and giving the publishers the right to reject any work without payment. Even when a work was retained, the publishers were under no obligations to exploit it. The present action was for an interlocutory injunction to prevent the composers from breaking the agreement. Since this was the nature of the action, no firm rule of law was required or given. Lord Denning, however, quick to point to the words of Lord Diplock in the House of Lords. He found it clear on the evidence that the composers have received no independent legal advice: it may well be said that “there was such inequality
of bargaining power that the agreement should not be enforced…”18 Certainly, the balance of convenience was that the injunction ought to be discharged.19

The Court of Appeal had enunciated similar principles in Lloyds Bank v. Bandy.20 The owner of land had mortgaged his property to support a business venture of his son. The bank had foreclosed and sought possession of the land. The evidence showed that the owner was an elderly man not well versed in business affairs. Nor did he receive any independent advice. Reviewing the cases, including Fry v. Lane, Lord Denning found the principle to be that relief I given to one:

“who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of another.”21

Sir Eric Sachs was only concerned with the fact that the bank, by failing to ensure that the mortgagor had independent advice, was in breach of its duty to take fiduciary care.22

This particular case is extraordinarily close to one which it did not cite, the decision of Crisp J. in Harrison v. National bank of Australia Ltd.23 An elderly woman, without legal advice, gave a bank security over land. The money was to aid her son in law in a business venture. She knew that she would be liable should the business fail, although she was completely ignorant of the business matters. Crisp J. set the agreement aside, noting the court will set aside a bargain entered into “without due deliberation, without independent advice and not knowing its true effect”.24

In Lloyds Bank v. Bundy, Lord Denning recognized that not “every transaction is saved by independent advice”.25 This had already been attested to in Grealish v. Murphy.26 A settlement of land and money was made by a
person suffering from some degree of backwardness. He received independent legal advice, but the solicitor neither knew all the facts nor gave the settler a complete explanation of the nature and the effect of the settlement. The solicitor was also unaware of the full extent of the Settlor’s backwardness. In such circumstances, and despite the independent advice, the court set the agreement aside.27

These cases indicate a willingness to accept that contracts may become unenforceable if harsh and unconscionable, particularly where independent advice has not been obtained.28 While exclusion clauses were not an issue in any of these cases, it still seems safe to say that the measure and extent of any exclusion clause will be relevant factor in determining whether a contract may be so inequitable as to be unenforceable. Although a decision has never yet had to be cast in such terms, it must be possible that a consumer contract or a business contract for the hire of television, the purchase of goods, or the leasing of the equipment, will be declared void, not least because of the harshness of the exclusion clauses.

Mere harshness, however, would never suffice. In Boustany v. Piggot,29 it was said that, for the contract to be set aside in equity as unconscionable, the behaviour of the stronger party must be characterized by some moral culpability or impropriety. He must be guilty of some actual or constructive fraud. It is not enough to prove that a bargain in harsh, unreasonable or foolish.

Reference

6. [1979] Ch 84 at p.110 per Browne-Wilkinson J.
8. ibid., at p.95 per Millet L.J.
9. see, for example, Everitt v Everitt [1870] L.R. 10 Eq. 405.
12. ibid., at 622.
13. ibid., at 623.
14. ibid.,
15. ibid.,
16. ibid., at 623 and 624.
18. ibid., at 240.
19. ibid.,
21. ibid., at 765.
23. (1928) 23 Tas. L.R. 1.
24. ibid., at 8.
28. except where the advice was refused: Harrison v Guest (1855) 6 De G.M. & G. 426; (1860) 8 H.L.C. 481.
Chapter 7
The Effect of Discharge by Breach on Exemption Clauses

7.1 Introduction

It was perhaps never very likely that the proponents of fundamental breach would allow their doctrine to die just because of some obiter dicta on the subject from the House of Lords.¹

In that respect, therefore, the recent decision of the court of Appeal in Harbutt’s “Plasticine” Ltd. v Wayne Tank and Pump Co. Ltd.² need cause no surprise. What had happened in that case, was that the defendants had agreed to manufacture some equipment and to install it in the plaintiff’s factory under a contract, clause 15 of which limited the defendant’s liability to the amount of the contract price. (£ 2,330). A small and easily corrected defect in the equipment caused a fire which destroyed the factory and resulted in a loss to the plaintiff’s of some £ 1,50,000. The Court of Appeal held (Lord Denning M.R. dubitante) that on its true construction clause 15 covered the loss in the events which had occurred. The whole court nevertheless joined in holding that the destruction of the factory and consequent discharge by breach of the contract had the effect of making clause 15 is applicable. Judgement was given for the full amount of the loss.

It is surprising about Harbutt’s case that at least to a contract lawyer, is its findings that a contractor can be impressed with a liability even though he has adopted the correct formula for excluding it. It is rather odd and one may be forgiven for suspecting that somehow or somewhere, something has gone wrong. The Court of Appeal justified their decision by reference to discharge of the contract for breach.
7.2 The Ordinary Law of Discharge by Breach

For some time now, the common law had recognized that the conduct or non-performance of one party to a contract may be such that the conduct or non-performance of one party to a contract may be such that, in justice, the other party ought to be allowed to recover damages without himself having first to perform his own side of the bargain.\(^3\) That is the question with which discharge by breach is concerned, and it has two aspects: the conditions under which the remedy arises, and the incidents of the remedy when it applies. Unfortunately, in both cases there is some degree of uncertainty. Writing in 1916, Morison said the situation was an "embarrassment" to every practicing lawyer.\(^4\) If the position is any better today it is mainly because, since then, trends and tendencies have had longer to develop.

A. The conditions of the remedy

The conditions for discharge by breach exist at common law when one party to a contract has by the default of the other been denied, the substance serious degree, the substance of what he bargained for.\(^5\)

Two methods have been used for fixing the appropriate measure of seriousness

1. Reference to the character of the term broken or not performed. Eg. divisions of contractual terms into dependant and independent covenants, conditions precedent and concurrent and conditions and warranties.
2. Reference to the quality or scale of the breach eg. the concepts of failure of consideration, self-induced frustration and repudiation.\(^6\)

Experience has shown that neither of these two approaches is sufficient by itself. Thus, the dependent – independent covenant test has to be
modified by the introduction of a test of substantial performance. The question whether a term were a condition precedent tended at times to be decided ex post facto by reference to the scale of the breach. For much of this century, the condition—warranty test was thought of as exclusive. In practice, it too was modified by the device of characterizing the term broken by reference to the importance of the breach rather than by reference to the intention of the parties at the time they entered into the contract. Another device was to allow the existence of a class of conditions, only the more extensive breaches of which could give rise to discharge. The significance of the Hongkong Fir Case when it appeared was not that it evolved a new category of term so that it divided warranties into two classes. It was that it reaffirmed what seemed to have been forgotten, that the nature of the term broken and the scale of the breach can, each of them, be relevant to the question whether a discharge by breach is justified.

Equally, the Hongkong Fir case, did not establish that discharge by breach can occur only on a breach of condition or on the frustration by delay of a commercial adventure. All the following approaches (and it is not claimed that the list is exhaustive) still retain some degree of life:

- Breach of condition
- Failure of condition precedent
- Non-performance of a dependent covenant
- Breach of fundamental term
- Repudiation
- Anticipatory breach
- Failure of consideration
- Self-induced frustration
- Self-induced impossibility
- Fundamental breach

While these approaches are all of them directed to the same object, it would be a mistake to regard them as incidental. Thus, breach of a condition is the breach of a term so fundamental that any default gives a right to elect a discharge. Fundamental terms, it was at one time suggested, are more
fundaments even that. Repudiation denotes words or conduct evincing an intention not to perform. That intention may be deliberate, or it may be deliberate, or it may be forced upon the defaulter by his inability to perform, despite his best endeavors. Failure of consideration may embrace anything from a relatively slight breach of an entire contract to a gross breach which leaves the injured party with substantially nothing of what he bargained for. Self-induced impossibility occurs when further performance passes beyond the powers of the parties, as for example when a master aborts a contract affreightment by scuttling his ship and cargo. On the other hand, self-induced frustration can occur when performance of a kind may still be possible but would be commercially different from what was contracted for.

The two avenues of approach to discharge by breach, by way of the term broken and by way of breach itself, are occasionally given the labels of fundamental term and fundamental breach. Those words, however, acquired overtones before the Suisse Atlantique case which since then are no longer, justified. Moreover they tend to obscure the fact that there are more than two approaches to the problem. On both these grounds, it is submitted their use in this way is undesirable.

B. The incidents of discharge by breach

A description of the incidents by breach presents rather more difficulty through, fortunately, strong trends have become apparent in the law.

The initial problem is whether discharge by breach operates automatically when a sufficient breach occurs, or whether it is in the election of the innocent party. Outside, the field of anticipatory breach, there is very little indication in the nineteenth century cases of any need for an election and, as late as, 1916, Morison felt able to argue that discharge was automatic on breach of condition or on failure of consideration. Since then, however, the trend has been very strongly towards assimilating discharge by breach to anticipatory breach by requiring an election by the innocent party and a communication of
that election by the innocent party and a communication of that election to the wrongdoer.\textsuperscript{33} The reason usually given is that allow a wrongdoer unilaterally to terminate the contract would be to allow him to profit by his wrongdoing.\textsuperscript{34} This argument depends on the hypothesis that the effect of discharge by breach is a termination of the contract, a point which will be dealt with separately. In practical terms, however, it does seem good sense to allow the injured party a choice in cases where the possibility of an acceptable degree of performance or substituted performance remains. 

On the other hand, it would not be hard to imagine cases where it would be otiose to require an election because further performance would literally have become impossible.\textsuperscript{35} The scuttling of a ship and cargo has already been instanced. The destruction of both factory and equipment in the Harbutt’s “Plasticine” case is another example and the Court of Appeal was no doubt correct in dispensing, as they did, with the need for an election in that case. On the other hand, it is doubtful whether, as dicta in that case seem to suggest, mere frustration as distinct from impossibility would be enough. If it were, there would be practical difficulties for both parties on the facts of cases like that of the Hongkong Fir.\textsuperscript{36}

The other requirement under this head, that the election must be communicated to be effective,\textsuperscript{37} is again good sense, in that it would be undoubtedly be unfair to the party in breach to leave him uncertain whether or not a discharge had taken place. Here, again the law seems to allow for some degree of flexibility and it looks as though the requirement of communication will be dispensed with in cases where the wrongdoer has deliberately made communication impossible.\textsuperscript{38}

The next problem is whether or not discharge by breach results in a termination of the contract. Many observers may find it surprising that this should be regarded as a problem at all.\textsuperscript{39} What makes it so is that termination of the contract is not in any way necessary to what discharge by breach seeks to achieve, which is to release the injured party from any further obligation to
perform his part And to enable him, nevertheless, to recover damages from the other side. The only termination that involves is of the injured party’s obligations and of the wrongdoer’s power to perform, 40 except by way of reduction of damages.41 Moreover, it is commonly insisted that the contract survives for purposes of recovery of damages by the injured party42 and, as an aspect of that, arbitration clauses normally continue to apply.43 What, it is submitted, discharge by breach really does is not so much to “terminate” as to “truncate”. Its function is, notionally at least, to take the parties direct from the point of termination to the point where the completion is due. 44 In doing so, it gives the injured party a immediate right of action. It deprives the wrong doer of any rights or advantages which might have accrued to him during that interval, and by removing any further possibility of completion, prevents his enforcing the obligations of the party injured, including for example those arising under covenants in restraint of trade.45

Nevertheless, despite protests in the House of Lords that the contact does not terminate 46 and despite the evidence for its survival after discharge, it has to be admitted that many would say a literal termination does occur. On this theory such things as demurrage clauses, 47 exception clauses48 and covenants in restraint of trade are rescind beyond recall, while other parts of the contract including arbitration clauses, some how manage to retain after rescission the same effect they would have had without it.

If, however, it is accepted that discharge by breach does effect an actual termination of the contract, the next question is the point from which that termination operates. Theoretically, there are several possibilities; in particular, the point at which the contract is entered into, the moment of election and the moment of communication of election. The first of these, termination ab-initio, does in fact exist as a remedy under the name of rescission49 but it is to be distinguished from discharge by breach, more especially because it involves a surrender by the injured party of his rights to recover damages.50 The real choice lies between the moment of breach on the one hand and the election, or its communication on the other.
In those cases where the breach renders an election otiose, termination and breach are no doubt simultaneous. On the other hand, in cases where an election is required, termination would have to be retrospective if it were to date back to the breach. The question has practical consequences only where the wrongdoer after breach continuous to perform and this may explain why it has been so little discussed in the cases. Nevertheless there does seem to be wide agreement that discharge by breach is prospective rather than retrospective in its effect.\textsuperscript{51} This in fact is what would be expected, consistency with the idea of discharge by breach as a decision by an injured party thenceforth no longer to be bound to perform his side of the bargain. And though there is apparently no case on the point, it would seem fait to assume that, in those cases where communication of the elections is required, termination will date from the communication. The consequence of all this would be that the contract would govern the dealings of the parties down to the moment of termination, but would have no application, but would have no application to what took place thereafter.

7.3 Exemption Clauses and Discharge by Breach

There is a distinction, essential to any understanding of the effect of discharge on exemption clauses, which needs to be made at once. It is between exemption clauses directed to the very breach upon which the claim to discharge is based and clauses directed to other breaches or obligations. On facts like those of Harbutt’s “Plasticine”,\textsuperscript{52} it is the difference between an exception clause purporting to govern the destruction of the premises by fire and say, a clause dealing with other matters such as compliance with specification, liability for theft or vandalism and so on. To claim that on discharge for a breach not itself the subject of an exception clause, the wrongdoer lost the benefit of his exemption clauses, would be one thing. To say that a contract could be discharged despite an exemption clause covering the very point, and that the discharge would in turn cause the clause to become inapplicable, could be quite another.
A further point that has to be made, however apologetically, is that the effect of discharge by breach may depend very materially on what the function of an exemption clause is conceived to be. If exemption clauses have a bearing on the obligations of the parties the answer is one thing; if they have nothing to do with obligation, but operate merely well be another. The jurisprudential arguments for the former view have been canvassed at length elsewhere. What the theory says, though, is that exemption clauses have a substantial effect in any of several different ways. Thus, an exemption of an implied term by law prevents the implication of that term into the contract. When a contractor follows one of his promises by an exemption clause saying he will not be liable in certain circumstances for failure to perform it, what he is really doing is to qualify his promise. And this is to whether he excluded his liability altogether or merely limits it to a given amount or imposes a time limit on claims against him. What he says in effect is “I undertake this liability, as limited by my exemption clauses.” And he says this as he enters into his contract. Accordingly, this is the measure of his obligations from the start, so that at no stage can it ever be possible to decide what he has undertaken by referring to his promises alone, without taking into account the qualifications he has placed upon them.

While this theory has attracted a measure of judicial support since 1964, it is still far from gaining universal acceptance. The excuse for resurrecting it here is that the Harbutt’s “Plasticine” case demonstrates as clearly as may be the extra ordinary consequences which can be made to flow from an adherence to the rival approach. While it will be argued that even on that approach, Harbutt’s “Plasticine” was wrongly decided; the “exceptions-as- qualifications” theory offers a much more direct path to that result. It is proposed first to consider the effect of discharge on exemption clauses on the assumption that such clauses qualify obligations and then to return to the other approach.
A. Exemption Clauses as substantive

On the assumption that exemption clauses have a qualifying effect on obligation, certain of them at least can have a crucial relevance to the first question with which discharge by breach is concerned, which is whether the conditions for the remedy exist.

Some clauses go to the very question whether the term broken or the breach alleged is of a kind upon which discharge can be founded. A clause which, for eg prevented the implication of any condition as to title under section 12 of The Sale of Goods Act1983 would have the effect that failure to pass title could not be the breach of a condition of the contract. Similarly, a limitation of the right to reject goods could (though not necessarily would) have the effect of reducing what would otherwise be a condition to the status of a warranty. Less obviously, an exemption of all liability for breach of what would otherwise be a promissory condition could have the effect of preventing the promise operating as a ground for discharge by breach, even though it might not stop failure to perform operating as the failure of a contingency under the contract. These, presumably, were the types of clause Lord Wilberforce held in mind when, in the Suisse Atlantique case, he said:

“An act which, apart from the exemption clause, might be a breach sufficiently serious to justify refusal of further performance, may be reduced in effect, or made not a breach at all, by the terms of the clause.”

Clearly, discharge by breach can have no effect if the “breach” upon which the claim to discharge is founded falls within the scope of the clause. The reason is that the conditions for discharge by breach are prevented by the exemption clause for ever arising. Whether such exemption clauses would be affected by a discharge founded on some other breach not covered by them would depend upon the effect of a valid discharge by breach on
exemption clauses generally, and the solution here turns to some degree on the view taken of the ordinary incidents of discharge by breach.

In the first place, if the effect of discharge by breach is not a termination of the contract but, as has been claimed in the House of Lords, a termination only of certain obligations and rights; the position is quite straightforward. Upon the discharge, the injured party acquires an immediate right to recover damages from the wrong-doer for his breach and the contract remains alive for that purpose. It then becomes a matter for the court to determine what the obligations of the wrongdoer are and the recoverable damages flowing from such breach of those obligations as he has committed.

The measure of those obligations is not to be found merely by reference to the contractor’s promises in isolation from the qualifications he placed upon them. The promises and the exceptions must be looked at together, and this is as true of partial qualifications as it is of total exclusions. This being so, discharge by breach as such would have no effect whatever on exception clauses. Whether the wrongdoer would be impressed with liability would depend solely upon the interpretation of the contract, upon whether the acts complained of fell within the contractor’s promises and outside the qualifications or limitations he had placed on those promises.

The other possible view of discharge by breach is that it literally terminates the contract, albeit only in future. Since displacement is only as to the future, it would follow that the exception clauses would apply in full force until the moment of termination. Again the result is that, at least until that point, whatever breaches occur happen subject to the exemption clauses and it is only acts committed after termination which would be unprotected. The result in the Harbutt’s “Plasticine” case Would be that at the point of time when the factory was destroyed by fire, the obligations of the contractor were limited to payment of not more than £2,330 that was what the parties agreed when they entered into the contract, and it was still their contract at the point when the loss occurred.
There is another way of reaching the same result, even assuming that the effect of discharge by breach is a literal termination of the contract. Even on that assumption, the contract remains alive for the purpose of recovery by the injured party. This must mean that the contract remains alive for the purpose of assessing the wrongdoer's liabilities and these in turn depend upon his obligations. Once again, the exemption clauses are just as essential a part of the definition of those obligations as are his positive promises. It would be extra-ordinarily difficult to justify the survival of the one without the other.

The result of all is that there is nothing magical about discharge by breach; nothing in it to justify any disregard of the terms of the contract. The determinant of whether an exemption clause protects a party to a contract remains in every case whether remains in every properly bears such an interpretation.

B. Exemption Clauses are procedural

While it is submitted that the exemption clauses-as-qualifications theory offers a solution to the difficulties raised by Harbutt’s “Plasticine” it would be a pity if the case against that decision were seen to rest solely on a particular and possibly over-subtle academic argument. Even on the other approach, Harbutt’s “PLasticine” raises doubts.

The finding in that case, that discharge by breach prevents reliance on a clause which directly covers the events which occurred, could be justified on four possible grounds.

1) One would be that, as a matter of substantive law, exemption clauses can have no application to breaches of the type which ordinarily justifies termination. This of course is the “fundamental breach” principle which the House of Lords rejected in the Suisse Atlantique case.
2) The second ground can be disposed of as quickly. It would be that as a matter of construction the exemption clauses were subject to a condition that they would not apply in the event of what, apart from them, would be a repudiatory breach. This was the sort of approach the House of Lords rejected in Hain v. Tate & Lyle 61 when they held that there was no warrant for a finding that the exemption clause in that contract was alone subject to a “no-deviation” condition. In any event, it was not the construction adopted by the Court of Appeal in the Harbutt’s “Plasticine” case.

3) One is that, on a discharge, the exemption clause terminates retrospectively to appoint before the breach occurs. This of course runs counter to the predominant view that discharge by breach operates only in future. More than this, Lord Denning himself, in the course of his judgement, accepted that the discharge operated “for the future”.62

4) The last possibility and; though it was never declared in the judgements, undoubtedly the one on which the Court of Appeal based their reasoning is that the exemption clause had no relevance or effect before termination occurred and that, after that point, it could not take effect because the contract of which it was part had been rescinded. Superficially, perhaps, that approach looks attractive enough. On any analysis, though, it tends to breach down.

For one thing, it assumes that when the parties exclude or limit liability for breach, the liability refereed to is one declared and imposed at the point of adjudication. But a much more natural interpretation is that the liability concerned is liability for breach of contract and that, of course, accrues at the moment of breach.63 At that particular moment, on any view of the effect of discharge by breach, the contract (including the exemption clause) is still in existence.

Again, the approach carries the surely uncomfortable consequence that despite assertions in the Suisse Atlantique case that liability for fundamental breach can be excluded, 64 that rule would have no effect unless the injured party after breach elected that it should.
Just as difficult is the fact that it involves in effect the partial rescission of the contract. Here again, it is not just that the House of Lords has rejected any suggestion that the injured party has a right to both approbate and reprobate, to affirm some parts of the contract and terminate others.65

The Court of Appeal would no doubt claim that the contract as a whole had been terminated. The fact remains that, somehow, the contract does survive for the purpose of fixing the wrongdoer’s responsibility and for assessing the damages recoverable by the injured party. Even if exemption clauses were not qualifications attached by the wrongdoer to his undertakings and were not procedural obstacles to recovery, they would still be relevant to the purposes for which the contract survives.

Thus, if a party to a sale of goods is charged that he has not given title, it must be germane, even as only a procedural defence, that the contract expressly provides that no undertaking as to title is given or is to be implied.

Equally, if the contract is to be referred to in order to assess damages payable for its breach, it is surely relevant that the parties have agreed that damages should be limited to a stated amount.

Even assuming that discharge brings about a total termination of the contract, there needs to be some explanation of why only some of the relevant parts of it take part in the subsequent revival.

For eg no self-evident justice in the suggestion that liquidated damages clauses lack this capacity for revival, with the result that injured parties lose the benefit of them if they elect a discharge.66 A partial explanation which might conceivably be advanced would be that on termination the wrongdoer loses the capacity to compel performance by the injured party.
The answer to that is that on any view of the nature of exemption clauses they are not promises or obligations which can be enforced or performed. Indeed, they have nothing whatever to do with the injured party’s promises or obligations.

At the risk of over emphasizing the point, it needs to be repeated that the real test of the applicability of an exemption clause, on discharge, by breach or at any other time, is quite simply whether on its proper construction the clause covers what has occurred. On the facts of the Harbutt’s “Plasticine” case, this means that the liability of the contractor would have been limited to £2,330, always provided that the exemption clause did in fact, on its proper construction, cover the events which had occurred.

In the Suisse Atlantique case, the House of Lords, went a long way towards reaching this sort of conclusion. It is at least conceivable that they would have gone the whole way had it not been for two factors;

1) The agreement of counsel appearing before them that discharge by breach makes an exemption clause to apply and
2) The line of cases on deviation and quasi-deviation on which, it seems certain, counsel’s agreement was based.

7.4 The Effect of the Deviation Cases

In the strict sense, deviation is what occurs when a carrier of goods, without lawful excuse, departs from the contract route. But the incidents of deviation are found in connection with other types of bailment, in which context they are usually referred to as “quasi-deviation”.

These incidents occur whenever a bailee, without lawful excuse, disregards limitations upon his authority as bailee, as for example when he holds goods in a place, for a purpose, or at a time when he has no mandate to do so. When that happens, he automatically becomes an insurer
against loss or damage to the goods and in so doing loses the protection, not only of his contractual exemptions, but even of the common law exemptions of the Act of God and of the Queens enemies. His only available defence is to show that the loss or damage would have occurred anyway.

The explanations for these phenomena come from the nature of bailment itself. When a bailee’s authority to hold the bailed goods has been limited in particular ways and he then fails to observe those limitations, he ceases to hold the goods within the ambit of the bailment and is reduced to the status of a mere detainor. As such, he loses the benefits of the bailment relationship and thereafter has to carry the risk of loss or damage to the goods.

An alternative partial explanation is that when a bailee, by altering the nature of an adventure, alters the risks, he automatically loses the protection of his exemption clauses because they are directed only to the risks which attend the bailment itself. But whichever way they are to be explained, the important points are that deviation and quasi-deviation are peculiar to bailment, and that they are unique in bringing about an automatic non-application of the exemption clauses as from the moment the deviation commences, without the need for an election to that effect by the injured party. It is this features which have caused difficulty in relation to discharge by breach.

As might be expected, the origins of these phenomena in the law of bailment were lost sight of as the nineteenth century advanced and by 1890 the courts had begun to seek explanations in the law of discharge by breach.

At that time, the requirement that the injured party elect a discharge had not fully emerged, so that the absence of any such election in typical deviation cases was not seen as embarrassment.
For a similar reason, the fact that on a deviation, the exemption clauses cease to apply from the moment the deviation commences was not seen to raise any problem either. But because the non-applicability of the exemption clause was thought to depend on recession for breach and because there is no warrant for a selective that the contract as a whole, and just he exemption clause, was rescinded from that moment.\textsuperscript{83}

This in turn caused embarrassment over the question of freight in cases where goods had been delivered in good time at their port of destination, notwithstanding an intermediate deviation. If the contract terminated, it seemed, freight caused to be recoverable, even though, in commercial circles, it had always been regarded as payable in such cases.\textsuperscript{84}

The courts had to turn round and invent devices which would have been quite unnecessary under the ordinary rules of discharge by breach.\textsuperscript{85}

Under those rules in the absence of any earlier election by the injured party, a timeous delivery of the goods would have been a substantial performance and no question of discharge by breach would have arisen.

Once the need for an election became establish under the ordinary law of discharge by breach, further distortions were found to be necessary in the deviation cases.

The question of election was one of the problems of the House of Lords had to contend with in Hain v. Tate & Lyle in 1936. The solution they adopted was to hold that termination of the contract operated automatically from the moment of breach, unless the injured party chose to affirm it. This can be contrasted with the ordinary rule, that on a discharge by breach, the contract remains in being unless and until the injured party elects to terminate it. There were other distortions forthcoming.

It was assumed by the House in the Hain case that it was termination of the contract which prevented the exemptions applying. A corollary to this
was that, if the contract was affirmed, the exception would protect the wrongdoer. In truth, though affirmation by itself can never have that effect. 86

Exemption clauses can only take effect if they are drawn widely enough to do so. Prima facie, exemption clauses in contracts of affreightment are not to be interpreted as applying to the risks of a deviation. They could be made to apply an affirmation only if the contract were varied to that effect, whether by an agreed alteration to the contract route or by an alteration to the exemption clause itself.

No doubt, on the facts of Hains v. Tate & Lyle, 87 it would be easy enough to imply such a variation, but in principle there is no reason why the owner of goods which have been damaged during a deviation should, by subsequent affirmation, be denied the right to recover his loss. These two beliefs, that it is termination which denies the wrongdoer the protection of his exceptions, and that affirmation of the contract gives him back that benefit, eventually caused trouble during the heyday of the fundamental breach theory.

In Charterhouse Credit v. Tolly, 88 the hirer of a vehicle under a hire purchase agreement had affirmed his contract, notwithstanding that the owner had committed a fundamental breach. This affirmation, it was thought, would prevent the hirer's recovering damages because it meant that the exemption clauses now protected the wrongdoer. The apparent problem would never have arisen had the inquiry been directed to the question whether the exemption clause, on its proper construction, covered the breach complained of. The Court would have decided that the exemptions did not cover delivery of an unroad worthy car. 89

There is one solecism, though, from which the deviation cases seem to have remained free. Nowhere has it been held that discharge by breach for deviation prevents reliance upon a liberty clause directed to the question of deviation itself.
It is this, as much as anything, which sustains the myth that exemption clauses are somehow different in function from the rest of the contract and that, on discharge by breach, the obligations of the wrongdoer can be defined and enforced without reference to any qualifications the contract, may have placed upon them.

It was deviation which in turn, led to and sustained the concept of a fundamental breach the effect of which was to disqualify a wrongdoer from relying on his exemption clauses, however widely drawn.90

In the earliest stages in the development of that doctrine, it was recognized in some degree that the fundamental (deviation) type of breach must be different from breach of a condition (the ordinary discharge by breach) since, maintaining, promissory conditions could successfully be excluded. Hence the characterizations of the new breach as “fundamental” and as something narrower that breach of condition.91 Inevitably though, the existence of the cases identifying deviation with discharge by breach meant that sooner or later the distinction would be lost. Deviation equals fundamental breach; discharge by breach equals deviation. The circle was finally completed when, in the Suisse Atlantique case, the House of Lords categorized “fundamental terms” and “fundamental breach” as shorthand expressions for the circumstances given rise to discharge by breach.92

In sum, what bedevils the common law of discharge by breach, it is submitted, is this existence, parallel to each other, of two mutually inconsistent streams of authority, discharge by breach proper and deviation. That would be a difficult enough position by itself but it is made worse by itself but it is made worse by the fact that, between them, the two streams have spawned a spurious third. It is a situation in which one might not be surprised to find a near flood of cases, comments and articles in which judges and academics resorted to one refinement after another in vain attempt to reconcile the irreconcilable.
Reference

1. Suisse Atlantique Societe d’Armement S.A.v N.V. Ropterdamsche Kolen Centrale (1967) 1 A.C. 361
2. (1970) 1 Q.B. 447; (1970) 2 W.L.R. 198 and see note, ante, pp.189-194
3. Williams notes on Pordage v Cole (1669) 1 Wms.Saund. 319, form whichmost modern discussions starts, date from the end of the 18th century.
6. A third approach, the nature of the event which results from the breach, was suggested by Diplock L.J. in the Hongkong Fir Case (supra) at pp.66 et seq., but his point there was to demonstrate the similarity for some purpose of discharge by breach to frustration. As he pointed out (at pp.69-70) the character of an event as one giving rise to discharge is to be determined by reference to the term in some cases and to the breach in others.
7. Boone v Eyre (1779) 1 H.B.i 273.
8. Contrast poussard v Spiers (1876) 1 Q.B.D. 410 with Bettini v Gye (1876) 1 Q.B.D. 183.
9. See the Hongkong Fir Case (supra) at p.69, per Diplock L.J. It is interesting to find Lord Devlin still favours the view that breach of the type which gives to discharge is always the breach of a condition or fundamental term: “The treatment of Breach of Contract” (1966) C.L.J.192,202,204.
11. Tramways Advertising pty.Ltd. v Luna park (N.S.W.)Ltd. (1938) 38 S.R.(N.S.W) 632,641-642,Per Jordan C.J.
12. Hong Kong Fir Shipping Co. Ltd. V/s. Kawasaki kisen kaisha (1962) 2 Q.B. 26 (C.A)
14. The judgement of Diplock L.J. might appear to suggest that frustration and discharge by breach always arise from the same events, the difference between the two being in the presence or absence of fault (supra at pp. 68-69).
18. Devlin, Loc. Cit (supra) at n. 9; Suisse Atlantique Societe d' Armement Maritime S.A. v/s. N.V. Rotterdamsche Kolen Centrale (1967) 1 A.C. 361 (H.L.)
23. Salmond and Williams, op. cit; p. 543; Anson, op. cit., pp. 488-489; Sutton and Shannon, op. cit; p. 315.
25. Wallis v/s. Pratt (1911) A.C. 395 (H.L.); Hong Kong Fir Shipping Co. Ltd. V/s. Kawasaki Kisen Kaisha (supra).
28. Glanville Williams, op. cit., pp. 2 et Seq.
29. Salmond and Williams, op. cit., p. 560.
30. As in the Hong Kong Fir case (supra).
32. Morison, op. cit., p. 18
33. Heyman v/s. Darwins (1942) A.C. 356 (H.L.); Mason v/s. Clouet (1924) A.C. 980 (H.L.) Thorpe v/s. Fasey (1949) Ch. 649. This is the view found in current English textbooks on contracts.
34. Heyman v/s. Darwins (supra.) at p. 373.
39. It seems, for example, to have been taken for granted that there was a literal rescission (at least as to the future) both in the Suisse Atlantique case (supra) and in the Harbutt's "Plasticine" case (supra)
42. Chitty, op Cite; Col-I p. 624; Sutton and shanon, op. Cite; p. 298; Salmond and Williams, o. cit; p. 562; Anson op. cit., pp. 157, 482; Bines v/s. Sankey (1958) N. Z. L.R. 886.
46. Viz. in Heyman v/s. Darwins (supra) at n. 40.
47. Suisse Atlantique Societe d’Armement Maritime S.A. v/s. N.V. Rottlerdamsche Kolen Centrale (1967) 1 A.C. 361 (H.L.)
49. Smith’s L.C., 13th ed. (1929), pp. 46-47. Though it holds that recission of initio is not necessary to recovery in quasi-contract, Fibrosa Spolak Akeyjina v/s. Fairbairn Lawson Combe Barbour, Ltd. (1943) A.C. 32 (H.L.) does not exclude the possibility of a rescission in the full sense.
59. Heyman v/s. Darwins (1942) A.C. 356 (H.L.)
64. At 392, per Viscount Dilhorne; 399, 405, per Lord Reid; 410, per Lord Hodson; 427, per Lord Upjohn.
65. Hain v/s. Tate & Lyle (1936) 2 all E.R. 597 (H.L.); Heyman v/s. Darwins (1942) A.C. 356 (H.L._ Suisse Atlantique Societe d’Armement Maritime S.A. v/s. N.V. Rotterdamsche Kolen Centrale (supra) at p. 398, per Lord Reid.
66. Cf. the Suisse Atlantique case (supra) at p. 405, per Lord Reid.
67. This ultimately was the emphasis in Heyman v/s. Darwins (supra), in relation to arbitration clauses.
69. Ibid 419, per Lord Upjohn, A similar concession was apparently made by counsel for the defendants in Harbutt’s “Plasticine” Ltd. v/s. Wayne Tank and Pump Co. Ltd. (1970) 1 Q.B. 447; (1970) 2 W.L.R. 1981 (C.A.)
70. Ibid. 372, where counsel for the appellants submitted that fundamental breach and repudiation by breach were the same “animal” as deviation.
72. There is a full discussion of deviation and quass deviation and their effect upon exception clauses in Coote, op. Cite., chapt.6
73. Lilley v/s. Doubleday (1881) 7 Q.B.D. 510.
76. Ellis v/s. Turner (1800) & T.R. 531; Davis v/s. Garrett (1830) 6 Bing. 716; Lilley v/s. Doubleday (1881) 1 Q.B.D. 510.
77. Davis v/s. Garrett (supra); Morrison v/s. Shaw Saville (1916) 2 K.B. 783 (C.A.)
78. This explanation is discussed more fully in Coote, op. Cite., pp. 89-93.
79. Rendal v/s. Arcos (1973) 43 Com. Cases 1, 15 (H.L) per Lord Wright, delivering the opinion of the house. And see also the Suisse Atlantique case (supra) at p. 434, per Lord Wilberforce.
80. They do not occur when a carrier of passengers departs from the contract route, Hobbs v/s. L.S.W. Railway Co. (1875) L.R. 10 Q. B. 11. See also Mc Mohan v/s. Field (1881) 7. Q.B.D. 59. for another act which would have been deviation, had there been a bailment.
81. The possible uniqueness of deviation is recognised in Chitty, op. cit; Vol.1 p. 333 and Anson op. cit., p. 157. See also the Albion (1953) 1 W.L.R. 1026 (C.A.)
82. Balian v/s. Joly (1890) 6 T.L.T. 345 (C.A.); Thorley v/s. Orchis (1907) 1 K.B. 660; Morrison v/s. Shaw Saville (1916) 2 K.B. 783 (C.A.)
83. Hain v/s. Take & Lyle (1936) 2 All E.R. 597 (H.L.)
84. Hain v/s. Tate &Lyle (supra) at p. 612.
85. These device are discussed in Goff and Jones, The Law of Restitution (1966), pp. 354-355.
87. (1936) 2 All E.R. 597 (H.L.).
89. Similar difficulties were experienced in John carter v/s. Hanson Havlage (1965) 2 Q.B. 495 (C.A.) and by Windeyer J. in Thomas National Transport (Melbourne) pty. Ltd. v/s. May and Baker (Australia) pty. Ltd. (1966) 115 C.L.R. 353.
90. The origin of the doctrine can be traced through Chandris v/s. Isbrandtsen Moller (1951) 1 K.B. 240 and Alexander v/s. Railway Executive (1951) 2 K.B. 882 in both of which Devlin J. referred back to Hain v/s. Tate & Lyle (supra). to Smeaton Hanscomb v/s. Sasson J. Setty (1953) 2 All E.R. 1471 where it emerged as a distinct new doctrine. In The Albion (1953) 1 W.L.R. 1026 (C.A.) the Court of Appeal tried to confine it to deviation and quasi-deviation.
92. Suisse Atlantique Societe d'Armement Maritime S.A. v/s. N.V. Rotterdamsche Kolen Centrale (1976) 1 A.C. Fundamental terms were described as those underlying the whole contact, so that any breach would give rise to a right to elect termination of the contract (see p. 422, per Lord Upjohn) Five kinds of fundamental breach were identified viz. (i) performance totally different from that contemplated by the contract (p. 393, per viscount Dilharne, p. 397, per Lord Reid, p. 409, per Lord Hodson, p. 431 per Lord Wilberforce); (ii) breach entitling the injured party to terminate (pp. 397-398, per Lord Reid, p. 410 per Lord Hodson, pp. 418, 422, per lord Upjohn, p. 431, per Lord Wifferforce); (iii) repudiatory conduct evidencing an intention by the wrongdoer no longer to be bound. (iv) breach going to the roof of the contract (v) breach amounting to self-induced frustration or impossibility. These are, all of them, readily identifiable examples of the circumstances under which discharge by breach can occur.
8.1 Fair Trading Act 1973

Prior to its repeal by the Enterprise Act 2002 \(^1\). The Fair Trading Act 1973 set out a procedure for the control of undesirable “consumer trade practices”. Section 13 defined a consumer trade practice as one carried out in connection with the supply of goods, or services, to consumers and which related:

(a) to the terms or conditions (whether as to price or otherwise) on or subject to which goods or services are or are sought to be supplied; or

(b) to the manner in which those terms or conditions are communicated to persons to whom goods or are sought to be supplied; or

(c) to promotion (by advertising, labeling or making of goods, canvassing or otherwise) of the supply of goods or the supply of services; or

(d) to methods of salesmanship employed in dealing with consumers; or

(e) to the way in which goods are packed or otherwise got up for the purpose of being supplied; or

(f) to methods of demanding or securing payment for goods or services supplied. If such a practice can be identified, s.14 gives to the Director General of Fair Trading, to the Secretary of State, or any other Minister, the power to refer to the Consumer Protection Advisory Committee (established by s. 3 of the Act) the question whether the particular practice “adversely affects the economic interests of the consumer”.

If the Committee found that the consumer was adversely affected, there was nothing in the Act to determine the appropriate consequences. No s.14 references were ever made. There were, however, four s. 17 references to the Committee. These were references made by the Director General under s.14 (and only by the Director General) but where it appeared to him that the
particular trade practice had, or was likely to have, any of the following effects as set out in s.17(2):

(a) Misleading consumers as to or withholding from them adequate information as to, or an adequate record of, their rights and obligations under relevant consumer transactions.

(b) Otherwise misleading or confusing consumers with respect to any matter in connection with relevant consumer transactions.

(c) Subjecting consumers to undue pressure to enter into relevant consumer transactions.

(d) Causing the terms and conditions on, or subject to which, consumers enter into relevant consumer transactions to be so adverse to them as to be inequitable.

Then the Director General could (he was not obliged to) attach to his reference proposals recommending to the Secretary of State that the latter use the powers of the Fair Trading Act to control the particular trade practice.

It was the task of the Committee, under the terms of s. 21, to report on whether the practice did adversely affect the economic interests of consumers and whether it did so by reason, or partly by reason, that it had, or was likely to have, one or more of what may be called the s.17(2) effects. If the Committee reported affirmatively on these questions, it had then to state whether it agreed with the Director General’s proposals as set out in the reference, or would agree if those proposals were modified in a manner specified in the report, or whether it disagreed with the proposals but made no modifications. In this last case, the proposals for reform could not be treated as effectively at an end. If, though, the Commission had taken either of the two other paths the issue would then be remitted to the Secretary of State under s.22. Where the Committee accepted the Director General’s proposals, the Secretary of state could, but did not have to, give effect to the proposals through an Order made by statutory instrument. If the
Committee had accepted the proposals, but with modifications, the Secretary of State again had an absolute discretion either to implement the original proposals or the proposals as modified, or, of course, to decline to do anything. An Order made by the Secretary of State had to be approved by both Houses of Parliament. At this stage, the Director General’s proposals, in their original or amended form, achieve the force of law.

Reference 17(1) of April 24, 1974

The first of the four s.17 references so far made to the Committee, and the only one relevant to exemption clauses, has its origins in the provisions of the Supply of Goods (Implied Terms) Act 1973. The provisions of this Act, now contained in the Unfair Contract Terms Act 1977, rendered void those terms in consumer transactions which sought to exclude the implied terms relating to title, fitness for purpose, satisfactory quality and correspondence with description, including the terms as to title and satisfactory quality and correspondence with description, including the terms as to title and satisfactory quality implied by s. 4(1) of the trading Stamps Act 1964.

In his reference, the Director General specified three practices which caused him concern. The first practice concerned the wording of notices displayed on trade premises or vehicles, in advertisements or catalogues, or in documents furnished to consumers acquiring goods, when the wording purports to exclude or restrict the implied terms which had been rendered inalienable by the Supply of Goods (Implied Terms) Act. The relevant terms are now, of course, implied by the 1964 Act, the 1973 Act and the Sale of Goods Act 1979.

The second practice dealt with written statements furnished to consumers by suppliers of goods relating to the consumers rights against suppliers, but which fail to advise the consumers of rights implied by law in their favour. The last practice was also concerned with written statements furnished to consumers
by suppliers of goods which fail to advise consumers of their implied statutory rights against suppliers. In this case, however, the written statements covered by the practice related to the rights of consumers against third parties, such as manufacturers, or to the obligations of such third parties to consumers. In other words, this practice dealt with what are commonly referred to as manufactures “guarantees”.

The Committee’s report contained the conclusion that each:

“consumers trade practice adversely affects the economic interests of consumers in the United Kingdom, and does so by reason that it has, or is likely to have, the effects…. Of misleading consumers as to their rights under relevant consumer transactions or otherwise confusing them as to the terms of the transaction”.

The Committee suggested some modifications to the Director General’s proposal, but otherwise gave them complete support. An order contained in a statutory instrument reflecting the modified proposals was laid before, and approved by both Houses of Parliament.

8.2 Consumer Transactions (Restrictions on Statements) Order 1976 (SI 1976/1813)

The first practice

The first practice was covered by a fourfold prohibition. Article 3(a) rendered it unlawful for persons in the course of a business to display at any place where consumer transactions are effected (wholly or partly) a notice containing statement purporting to apply, in relation to consumer transactions effected there, terms rendered void by s.6 of the Unfair Contract Terms Act 1977, which refers to the implied terms of correspondence with description, satisfactory quality and fitness for purpose and the implied terms relating to title. The same
prohibition applied where the notice purports to exclude the warranty of satisfactory quality implied by s.4(1)(c) of the Trading Stamps Act 1964. Following the repeal of the 1964 Act, the prohibition now applies in relation to exclusion of the conditions as to fitness for purpose and satisfactory quality implied on the redemption of trading stamps for goods under the Supply of Goods and Services Act 1982. 6

It is worth pointing out that those places are within the prohibition when transactions are only “partly” effected there. Hence places are caught when goods are selected from one establishment or store, but the sale is concluded in another. A notice at either place is within the order.

It should also be remembered that it is enough for the notice to contain a statement which “purports” to apply to a particular exclusion clause. In other words, a notice drawn insufficiently to the consumer’s attention after the contract was made, nevertheless falls within the Order.

The second practice

This practice is not concerned with void terms or with the display of notices on trading premises, but only with written statements furnished by suppliers of goods to consumers which purport to set out the rights and obligations of the parties and which fail to advise consumers of their rights to goods which are of satisfactory quality, are reasonably fit for the purpose, and which conform to their description.

Article 4 of the 1976 Order provides that in two instance a criminal offence arises unless the relevant statement is qualified by another in close proximity which is clear and conspicuous and to the effect that the relevant statement does not or will not affect the statutory rights of a consumer.
The two instances embodying the relevant statement are as follows. First, the supply to a consumer, pursuant to a consumer transaction, of goods bearing (or goods in a container bearing) a statement about the rights that the consumer has against the supplier or about the obligations to the consumer accepted by the supplier. The article spells out those rights and obligations which "arise if the goods are defective or are not fit for a purpose or do not fit for a purpose or do not correspond with a description ". The Article also stresses that the offence arises whether or not those rights or obligations are legally enforceable. Yet again, therefore, statements brought to the consumer’s notice too late to became a term of the transaction are within the prohibition.

The other instance relates to documents being furnished to a consumer transaction in the course of a business or to persons likely, as consumers, to enter into a consumer transaction where the documents contain statements as described above. The Article also provides that the Order covers documents furnished to consumers likely to enter into consumer transactions through the agency of the person supplying the document. The doorstep seller is covered by this provision: so also, one imagines, is the dealer who arranges a hire purchase contract with a finance house.

The universal commercial purpose is, in these cases, to add the words:

“This does not affect your statutory rights.” The Order, however, does not make these words mandatory: it states only that there must be a statement that the statutory rights of the consumer are unaffected. Since few consumers will know what these rights are, it may be wondered if such commercial practice is within a fair interpretation of the Order. It certainly accords more with its spirit to interpret the requirement of the order as meaning that the particular document, goods or container ought to give a summary in some form or other of those statutory rights.
Article 2 of the Order actually defines “statutory rights” as being rights arising under the 1973, 1979, and 1982 Acts, other than the implied terms as to title, and it seems a fair conclusion that this indicates the way that the wording of a statement that such rights are unaffected ought to be drafted.7

The third practice

The third practice, in essence, involves manufacturers’ guarantees. The Committee cited with approval the following extract from the Moloney Report. 8

“The important general considerations is that the issue of guarantees enables and encourages the retailer to lead the customer into thinking that the manufacturer alone is liable to attend to defects and thus permits him to avoid his responsibilities. We adopt the view that the consumer is widely ignorant of his legal rights and in this state readily accepts that any guarantee reaching him indicates the sum total of the redress he is entitled to claim.”

The Committee itself concluded that :

“the wording used in “guarantees” and similar undertakings by manufacturers (where no reference is made to the rights of the consumer against the supplier) reinforces these beliefs….“9

Article 5 tackles this problem by first defining the situation to which the penal provisions are directed. This is the supply of goods in the course of a business to another where, at the time of supply, the goods were intended by the supplier to be, or might reasonably be expected by him to be, the subject of a subsequent consumer transaction. Note that the supplier is caught even though he did not intend the goods to be the subject of a consumer transaction and did not concern himself with whether they would be. It is enough that, judged
objectively, it was reasonable to expect him to foresee a subsequent consumer transaction. Note too, the expression “subsequent consumer transaction”. It is this which prevents Article 5 from applying to retailer-consumer transactions and so limits it to manufacturer’s guarantees.

In cases covered by Article 5, the supplier must not supply goods which bear, or are in a container which bears, a statement setting out, describing or limiting the obligation accepted by the supplier, or to be accepted by the supplier, in relation to the goods, whether legally enforceable or not. The qualification to that is that no offence arises where there is in close proximity to the above statement another which is clear and conspicuous and to the effect that the statement does not, or will not, affect the statutory rights of a consumer vis-à-vis description, satisfactory quality and fitness for purpose, subject to the same qualification, it is also an offence to furnish a “document” in relation to goods containing an exemption or limitation clause as just defined.

Article 5 makes further provisions for two cases in which no offence is committed. In the case of goods or containers, no offence arises where the goods have not become the subject of a consumer transaction. It appears from this that no offence arises in the case of goods or containers of they are only likely to be the subject of a consumer transaction, but have not yet so become. Doubtless exemption clauses in such cases are not usually to be seen until after purchase, but this need not always be so. It is, for instance, quite likely that for display purposes a particular good will stand outside its container.

In the other case, which relates to the furnishing of documents, no offence arises unless the particular goods were the subject of a consumer transaction, or the document was supplied to a person likely to become a consumer, pursuant to the particular transaction.
Guidelines published by the Office of Fair Trading for manufacturer's guarantees suggest that manufacturers should avoid the use of undesirable restrictions in their guarantees. For instance, it would be better if a guarantee were not to require that goods be returned in their original packing; were not to leave it to the guarantor to decide whether or not the goods are defective; and were not to require the return of a guarantee card as a condition of claiming under a guarantee when a reasonable time is not allowed for the return of the registration card. These are, however, only guidelines and no penalty attaches to their breach. 11

8.3 Assurances as to Future Conduct

At one time, The Fair Trading Act 1973 allowed the Office of Fair Trading to seek assurances from traders persistently in breach of their obligations to consumers. Accordingly, it was possible for an assurance to be obtained from those infringing the provisions of the 1976 Order. The provisions of the 1973 Act were, however, repealed and replaced by the powers given to “enforces” under the Enterprise Act 2002. 12 Under the Act, an enforcer can seek a court order, if no undertaking is given, to the effect that the particular trader will not engage in conduct which amounts to a “domestic infringement”. 13 Breach of the 1976 Order is specified as a “domestic infringement”. 14

8.4 Defences

Section 25 of The Fair Trading Act 1973 provides a defence modeled on s.24 of the Trade Descriptions Act 1968. The person charged can provide a defence if he can show that the offence was:

(1) due to a mistake, or to reliance on information supplied to him, or to the act or default of another person, or an accident or some other cause beyond his control; and
(2) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

The use of this defence, where it rests on the act or default of another person or on reliance on information supplied, is restricted: the person seeking to employ the defence shall not, without leave of the court, be entitled to the defence, unless within a period ending seven clear days before the hearing, he has served a notice in writing on the prosecutor, giving such information identifying or assisting in the identification of that other person as was then in his possession. The courts have made it very plain that the defence, with particular regard to the need to show due diligence, is far from easy to establish. 16

8.5 Innocent publication of an advertisement

Where proceedings are brought for an offence arising out of the publication of an advertisement, the person charged has a defence under s.25(3) of The Fair Trading Act 1973 if he can prove that:

(a) it is his business to publish or arrange for the publication of advertisements; and
(b) he received the advertisement for publication in the ordinary course of business; and
(c) he did not know and had no reason to suspect that publication would amount to an offence.

This defence is applicable to the media, radio, television and newspapers: it is not usually available to advertising agencies. It will only be available to agencies when the advertisement was received by them for publication. Since it is, in fact, their task to prepare the advertisement, this will hardly ever happen, if at all.
8.6 Trade Descriptions Act 1968

Section 1 of The Trade Descriptions Act 1968 prescribes both the application of false trade descriptions to goods and the supply, or offer to supply of goods bearing false trade descriptions. In numerous cases, these provisions have been held to apply to cars bearing false milometer readings. It has also been accepted that it is possible to “disclaim” or exclude, liability of a false milometer, hence avoiding liability under the Act. Where a note of caution has been sounded in this context is that the disclaimer itself could be an illegal, because false trade description. As was said by Donaldson L.J. in Corfield v. Starr, “in appropriate cases those whose duty it is to enforce consumer protection legislation may like to consider laying alternative information based upon the disclaimer itself.”

Reference

2. The Trading Stamps Act was repealed as from April 6, 2005 by the Regulatory Reform (Trading Stamps) Order 2005 SI 2005/871.
4. A “consumer transaction” is a consumer sale within s.55(7) of The Sale of Goods Act 1893 (now s.12 of The Unfair Contract Terms Act 1977); a hire-purchase agreement which is a consume agreement within s. 12 (6) of the 1973 Act (s. 12 of the 1977 Act); agreements to redeem trading stamps under a trading stamp scheme within s. 10(1) of The Trading Stamps Act 1964. This last provision continues to have effect for the purposes of The Consumer Transactions (Restrictions on Statements ) Order notwithstanding the repeal of the Trading Stamps Act: see Regulatory Reform (Trading Stamps) Ordern 2005, si 2005/871, art.3(2).
6. See the Regulatory Reform (Trading Stamps) Order 2005, SI 2005/871, art.4(b). The explanatory note to the Order states that, where goods are received on the redemption of stamps accompanied by cash, the implied terms of The Sale of Goods ct 1979 will apply. Even if this view is not correct, the issue will be academic, because such a transaction would fall instead within the identical provisions of the 1982 Act.
7. Art.2 is as amended by the Regulatory Reform (Trading Stamps) Order, above n.2.
9. See the report at para.52.
10. See pp.108-109, for the interpretation of "statutory rights".
11. It was at one time uncertain whether manufacture’s guarantees could be enforced by a consumer, since there was no contract between the parties. Consumer guarantees were, however, given legal status by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045.
but serves more to amplify that description: Lewin v Purity Soft Drinks Ltd [2004] EWHC 3119 (Admin).

19. ibid., at 87
Chapter 9
Void and Ineffective Exemption Clauses

9.1 Introduction

In certain cases, Parliament has provided that certain exclusion and limitation clauses are to be void and of no effect. It must be realized that such legislation does not render the continued use of such clauses unlawful. It merely means that they have no legal validity. It is true, however, that the continued use of void exemption clauses does mislead those contracting parties who are ignorant of the law into believing that particular claims cannot be maintained. It was because there was evidence of this happening that the Director General of Fair Trading referred to the Consumer Protection Advisory Committee the practice of traders continuing to use those exemption clauses which had been rendered void by the supply of Goods (Implied Terms) Act 1973.

9.2 Consumer Credit

The Consumer Credit Act 1974 contains a considerable number of provisions which can fairly be regarded as inserted into the Act for the protection of the debtor (where the contract relates to the provision of credit) or the hirer (where the contract is one of rental or hire). ¹ Section 173(1) of the Act provides that any term in a regulated agreement or linked transaction is void if, and to the extent that, it is inconsistent with a provision “for the protection of the debtor or hirer or this relative or any surety contained in the act or in any regulation made under this Act.”

The Subsection bites not only on exemption clauses contained in regulated or linked agreements. It applies also to clauses contained in regulated or linked agreements. It applies also to clauses in “any other agreement relating to an actual or prospective regulated agreement or linked transaction. “ This appears to be essentially an anti-avoidance device. It means that a separate contract, one which is not itself a regulated agreement,
cannot provide that such protective measures as are inserted into the agreement by the Consumer Credit Act 1974 are themselves to be excluded. Were it otherwise, the relevant terms of the Consumer Credit Act 1974 could easily be avoided.

Section 173(2) takes the matter further by recognizing the provision that a provision of the Act may, in certain circumstances, impose duties or liabilities upon a debtor or hirer, or his relative, or any surety. Where this is so, subsection (2) continues a term is inconsistent with that provision if it purports “to impose, directly or indirectly, an additional duty or liability on him in those circumstances.”

Section 173 (3) provides that, notwithstanding s.173(1), nothing in the Act operates to prevent a person consenting to a thing being done which could otherwise only be done on an order of the court or the Office of Fair Trading. The person’s consent, according to subs. (3), must be given at the time the particular thing is to be done.

There is nothing specific in the 1974 Act regarding the use of unfair terms in consumer credit agreements. Such matters are dealt with by the general law (notably the Unfair Terms in Consumer Contracts Regulations) and also by the power of the OFT to take account of contract terms in the course of its deciding whether to grant, withhold or revoke the license required by consumer credit and consumer hire businesses.

The European Commission has, however, produced plans to update the laws of the EU states on consumer credit, and these contain specific proposals on the unfair terms. It proposes that the following terms will be automatically unfair. Those which:

(a) impose on the consumer, as a condition for a drawdown, a requirement to leave as surety, in full or in part, the sums borrowed or granted, or to use them, in full or in part, to constitute a deposit or purchase securities or other financial instruments, unless the consumer obtains the same
rate for such deposit, purchase of surety as the agreed annual percentage rate of charge;

(b) oblige the consumer, when concluding a credit agreement, to enter into another contract with the creditor, credit intermediary or a third party designated by them, unless the costs thereof are included in the total cost of the credit;

(c) vary any contractual costs, indemnities or charges other than the borrowing rate;

(d) introduce rules on the variability of the borrowing rate that discriminate against the consumer;

(e) introduce a system involving a variable borrowing rate which does not relate to the net initial borrowing rate proposed when the credit agreement was concluded and which would exclude all forms of rebate, reduction or other advantages; or

(f) Oblige the consumer to use the same creditor to refinance the residual value and, in general, any final payment on a credit agreement for financing the purchase of movable property or a service.

It must be borne in mind, however, that so far these are only proposals.2

9.3 Transport

Section 151 of The Road Traffic Act 1960 renders void exclusion clauses purporting to negative or restrict liability for death or personal injury to a passenger in a public service vehicle. Any antecedent agreement or understanding between the user of a motor vehicle and his passenger(s) which purports to restrict the driver’s liability to that passenger in respect of risks for which compulsory insurance cover is required (as to which, see s.143 of the Road Traffic Act 1988) is void under s.149(2) of that Act.

Section 29 of The Public Passenger Vehicles Act 1981 invalidates a provision contained in a contract for the carriage of a passenger in a public service vehicle where that provision purports to restrict the liability of person in
respect of a claim which may be made against that person in respect of the
death or personal injury to a passenger while being carried in, or who is
entering or is alighting from the vehicle, or which purports to impose any
conditions as to the enforcement of such liability.\textsuperscript{3}

The carriage by Air Acts (Implementation of the Monetral Convention
1999) Order 2002,\textsuperscript{4} under the heading “Liability of the Carrier and Extent of
Compensation for Damage” provides that any provision tending to relieve the
carrier of liability or to fix a lower limit than that which is laid down in this
convention shall be null and void. An identical provision also applies in
relation to combined carriage (that is carriage partly by air and partly by some
other mode).

9.4 Housing

Section 11 of the Landlord and Tenant Act, 1985 implies into certain
leases covenants by the landlord to repair. By virtue of s.12, these terms can
be excluded but only by court order made with the consent of the parties.

The Defective Premises Act 1972 imposes a liability on local
authorities, their builders, sub-contractors and architects if they fail to build in
a professional or workmanlike manner (as the case may be) with proper
materials, or fail to ensure that the dwelling is fit for human habitation. By s.6
(3) of the Act, it is not possible to exclude or restrict the operation of such
provisions by any agreement.

Section 25 of The Landlord and Tenant (Covenants) Act 1995 states
that any agreement which has the effect of excluding, modifying or frustrating
the operation of the Act is void.

Section 179 of The Housing Act 1985 provides for the unenforceability
of provisions affecting the right to buy.
Section 24-28 of The Landlord and Tenant Act 1954 provide in certain circumstances for security of tenure. Originally, a clause providing for contracting out was valid only if authorized by court order. The new procedure requires a landlord to serve a prescribed notice on the tenant at least 14 days before the parties enter into such an agreement. The tenant must sign a simple declaration that he has received and accepted the consequences of the notice. If the parties wish to waive the 14 day period, the tenant will have to sign a statutory declaration rather than a simple declaration, that he has received and accepted the consequences of the notice. In the case of an agreement to exclude security of tenure, the declaration must be made before the tenant enters into the tenancy or becomes contractually bound to do so. In the case of an agreement the declaration must be made before entering into the agreement.\(^5\)

9.5 Seeds

The warranties arising from the statutory statements required under regulations made under the Plant Varieties and Seeds Act, 1964 ss.16 and 17, in relation to seeds cannot be excluded.

9.6 Patents

The Patents Act, 1977 s.45 repeats the provisions formerly contained in s.58 of The Patents Act 1949, enabling contracts relating to patents to be determined by either party an three months notice after the patent or all patents by which the article or process was protected at the time of making of the contract has or have ceased to be in force. Contracting out is expressly said to be of no avail.

9.7 Feeding Stuffs

Section 73(2) of The Agriculture Act 1970 provides that the warranty of fitness of animal feeding stuffs implied by the Act has effect regardless of any
contract or notice to the contrary. Similarly, the warranties arising from the statutory statements required to be given by the Act cannot be excluded.

9.8 Consumer Safety

Part I and II of the Consumer Protection Act 1987 deal with product liability and consumer safety, respectively. Section 2 of the Act provides that the producer of a defective product is liable for the damage which it causes. Section 7 provides that liability cannot be limited or excluded by any contract term, by any notice or by any other provision. Part II of the 1987 Act makes provision for the enactment of safety regulations. Section 41(1) provides that a person affected by breach of a safety regulation will have a right to bring an action as on a breach of statutory duty. Subsection (4) provides that, except as may be provided by the relevant safety regulation, the rights granted by subsection (1) cannot be limited or excluded by any contract term, by any notice or by any other provision. Safety regulations made under the Consumer Protection Act 1961 are deemed to be made under the Consumer Protection Act, 1987.6

9.9 Disability Discrimination

Part III of The Disability Discrimination Act 1995 prohibits discrimination on the grounds of disability in relation to the supply of goods, facilities and services.

Section 26 provides that any term in a contract for the provision of goods, facilities or services or in any other agreement is void if it: -

(a) requires a person to contravene this Part;
(b) attempts to limit or exclude the operation of this Part; or
(c) attempts to prevent a person from making a claim under this Part.

An exemption is made in the case of an agreement to settle a claim.7
9.10 Social Security

Section 91 of The Pensions Act, 1995 provides for the inalienability of certain rights under an occupational pension scheme and provides that an agreement contravening such inalienability shall be enforceable.\(^8\)

9.11 Solicitor and Client

Section 60(5) of The Solicitors Act 1974 provides that a term in an agreement in relation to contentious business to the effect that a solicitor shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would as a solicitor otherwise be subject, is void.

9.12 Employment

Section 1(3) of the Law Reform (Personal Injuries) Act 1948 invalidates any provision contained in a contract of employment or apprenticeship, or in any collateral agreement, in so far as it has the effect of excluding or limiting any liability of the employer in respect of personal injuries caused to the particular person by the negligence of persons injuries caused to the particular person by the negligence of persons in common employment with that person.

Section 203 of The Employment Rights Act 1996 contains a general restriction on contracting out of the Act’s provisions. Section 14 of the Employment Relations Act 1999 applies broadly similar controls in relation to those of its provisions dealing with the right to be accompanied at disciplinary and grievance proceedings.

Section 49 of The National Minimum Wages Act 1998 provides that any attempt to contract out of the provisions of the Act has no legal effect, nor is it possible to preclude a person from bringing proceedings under the act before an employment tribunal. The two exceptions to this are where an agreement
has been reached where a conciliation officer has taken action under the 1996 Act; and where a compromise agreement has been agreed between the parties.

Regulation 35 of The Working Time Regulations 1999 provides that any provision in an agreement (whether a contract of employment or not) is void in so far as it purports:

(a) to exclude or limit the operation of any provision of these Regulations, save in so far as these Regulations provide for an agreement to have that effect; or

(b) to preclude a person from bringing proceedings under these Regulations before an employment tribunal 10

The Transfer of Undertakings (Protection of Employment) Regulations 1981,11 are designed to protect the rights of employees on a change of employer. Regulation 12 provides that any agreement which is designed to exclude or limit the operation of the Regulations is invalid.

9.13 Late Payment

The Late Payment of Commercial Debts (Interest) Act 1998 provides for interest to be added to qualifying debts which are paid late. Section 14 of the Act applies S.3(2)(b) of the Unfair Contract Terms Act 1977.12 to any contract term which purports to have the effect of postponing the time at which a qualifying debt would otherwise be created. This is stated to be the case whether or not the relevant contract is on written standard terms, and will thus have the effect of applying the reasonableness test to all such contract terms. 13

9.14 Distance Selling

Under The Consumer Protection (Distance Selling) Regulations 2000, 14 certain measures are enacted for the protection of consumers entering into a
distance contract. Regulation 25 provides that there can be no contracting out of these provisions. Regulation 25 also provides that, the Regulations impose a duty or liability on a consumer, no term can impose a further duty or liability.\textsuperscript{15}

Reference

1. See generally F.Bennion and A.Dobson, Consumer Credit Control (Sweet & Maxwell,2000.)
6. Details of the current safety regulations can be obtained from the Consumer and Competition Policy Directorate, 1 Victoria St, London SWIH ONN, 020 7215 5000 or from www.dti.gov.uk/Cacp/ca.
7. Disability Discrimination Act,S.26(2)
8. See also Social Security Act 1973, Sch.16 and Pension Schemes Act 1993, ss 77-80.
10. Certain exceptions are given in reg.35(2).
12. See pp.149-154.
13. The Act implies to all commercial contracts for the supply of goods and services, regardless of the size of the relevant enterprise: see The Late Payment of Commercial Debts (Interest) Act 1998 (Commencement No. 5) Order 2002 No. 1673.
14. SI 2000/2334
15. There is an exception to this in the case of term which requires the consumer to return any goods supplied to him under the contract if he cancels it under reg. 10:reg.25(3).
Chapter 10
Conclusion

Sir David Hughes Parry observed in his address to the Holdsworth Club:-

“All this abide me to the view that we must at all times keep in mind the question whether the time is not approaching when the whole structure of contract law with its preconceived ideas and nineteenth century doctrine, has not become so rigid and static that it cannot be expected to bear on all fronts the strains and stresses of modern economic and social pressures.”

It has to be admitted that the changes in social and economic spheres have been so fast that law should not be allowed to lag behind. On the other hand, it is necessary to recognize the importance of preserving the integrity of agreements and the fundamental rights of the parties to deal, trade, bargain and contract while on the other hand illiterate individual who is the victim of gross inequality of bargaining power usually being the poorest member of the community.

It was said of Aristotle that whenever he set up a theory he begin, like an oriental despot, by killing off all possible rivals. And this seems to be the fashion in the peaceful world of scholarship. It has not been my object to rebute various theories discussed above and to find out some another one. The task of formulating a comprehensive theory of contract that shall do justice to its many sources and various phases, is one that I shall not undertake here. No one of the theories discussed above covers the whole field of contract.

The modern law of contract does not altogether erase the concept of agreement and intention. The ancient too much emphasis on intention of the interests of justice. Parties have now a right to vary or exclude the normal rules by express agreement. The classical principles are yet there. Modern laws weakness is that the changes are only piece meal here and there. The basic principles of 19th century as revealed by the judgments of that period do
remain in main. Intention is yet divined by judges to decide many issues. There is no doubt that to treat standard form contracts or exemption clauses as normal is to be depreciated. Traditional theories of contracts does not apply to them.

The complexity of modern activities makes it also difficult to provide for all eventualities. It is, therefore, difficult to solve the riddles of the law of contract overnight. It is still a problem. The existence of the problem is a sure indication of the growth of that law. Mr. Justice Holmes\(^1\) rightly observed:

“The law is always approaching and never reaching, consistency. It is for ever adopting new principle from life at one end and it always retains old one from history at the other …. It will become entirely consistent only when it ceases to grow.”

Sir David Hughes Parry\(^2\) took into account the opinion of Morris, L.J., \(^3\) that though the history of the law of contracts fascinates and the theory and principles of its philosophy are rich in interest, “the interest of the litigation is in his own case.” Parry then observes:

“All this abide me to the view that we must at all times keep in mind the question whether the time is not fast approaching when the whole structure of contract law with its preconceived ideas and nineteenth century doctrine, has not become so rigid and static that it cannot be expected to bear on all fronts the strains and stresses of modern economic and social pressures.”

One features of the past in Common Law has been the stability and fixity of its legal machinery. The rule of precedent has come to stay. Rightly, Judge Cardozo has declare:

“what has once been settled by precedent will not be unsettled overnight, for certainly and uniformity are gains not lightly to be
sacrificed; above all is this true when honest men have shaped their conduct upon the faith of the pronouncement.”

But it has to be admitted that the changes in social and economic sphere have been so fast that law should not be allowed to lag behind.

There is no doubt that traditional theories of contract does not apply to standard form contracts. The concept of agreement, and intention is yet relied by judges to decide many issues. It is submitted that under certain circumstances law must also go beyond the original intention of the parties to settle controversies as to the distribution of gains and losses that the parties did not anticipate in the same way. Some recognition must always be given to the will or intention of those who made the contract, but the law must always have regard for the general effect of classes of transaction and it cannot free man from necessity of acting at their peril when they do not know the consequences that the law will attach to their acts - and this needs to be emphasized in any attempt to formulate a rational theory.

The important question that has arisen from this study is whether freedom of contract is still relevant? The case law answer is “yes, it is relevant.” It is still a basic tenet of contract law that the parties to a contract may, absent statute, control and establish their contractual rights and obligations unless a court refuses to enforce such contract because it is deemed “unconscionable” or it is against “public policy and good morals” or it will amount to a “fundamental breach of contract”.

The Forgoing brief survey reveals that there are two fundamental and opposing principles competing for supremacy: (1) that it is in the interest of the society that contracts made of persons of full age, understating and capacity ought to be enforced and (2) that this principle ought not to be made a tool in the hands of hard bargainers strength to impose unreasonable terms on the less favourably situated parties. It is in other words, the conflict between of contract and restraint that should be placed on
such freedom to ensure its availability to all the members of the society. It has been stated:

“In actual life real freedom to do anything in art as in politics, depends on acceptance of the rule of our enterprise. As has been remarked elsewhere, the rules of the sonnet do not hamper real poets but rather help weak ones. Real or positive freedom depends upon opportunities supplied by institutions that involve legal regulation.”

From this point of view, the movement to standardize the forms of contract even to the extent of prohibiting variations or the rights to “contract out” is not to be viewed as a reaction to, but rather as the logical outcome of, a regime of real liberty of contract. It is a utilization of the lessons of experience to strengthen those forms which best serve as channels through which the life of the community can flow most freely.

It is said that standardization of contracts is inimical to real freedom. But it is a fallacy. By standardizing contract the law increases that real security which is the necessary basis of initiative and the assumption of tolerable risks.

It is also submitted that a review of typical and representative cases illustrate that the courts have not and are not applying with supine indifference and slavish devotion the traditional concept of freedom of contract. Cases that have been reviewed indicates that there has been no wholesale deviation from the freedom of contract doctrine and that much judicial restraints has been exercised in those cases which on their “peripheral foils” the courts have felt justified in a qualifying freedom of contract.

(The courts have reflected enlightened concern for the delicate balance between the unquestioned need to preserve integrity of agreement and the
desirability to require basic fairness in order that ‘mutual assent’ is equated to meaningful assent)

It is also evident that courts have been anxious to get at the real intention of the parties to a contract and give effect to that even though the process might cause some hardship to same one or the other. One might recall the observations of Lord Wright in Sacmmel v. Ouston.⁴

The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention. Looking at substance and not mere form. It will not be deferred by mere difficulties of interpretation.

The rules adopted by our superior courts had not been different. Thus by respecting the intention of the parties and giving effect to that, the judicial tribunals have shown their anxiety to hold the torch of freedom of contract high up inspite of all the present incussions made upon that freedom from several directions.

Lord Denning expressed the opinion that an unreasonable onerous term in a standard form contract would not be enforced by courts, for “there is a vigilance of the common law which, while allowing freedom of contract, watched to see that is not abused.” ⁵

It is submitted that in placing judicial restraint on freedom of contract when the contract is drafted beyond the age of minimal requisites of fairness, the courts are fostering the preservation and not the emasculation of contract law. Freedom of contract is not an illimitable concept. Courts have been determined to find out whether there was in reality, “mutual assent” between the parties. Courts have reflected enlightened concern for the delicate balance between the unquestioned need to preserve integrity of agreements and desirability to require basic fairness in order that “mutual assent” is equated to meaningful assent.
It is fallacy to say that exemption clauses contained in standard form of contracts are imimical to real freedom. By standardized contracts, the law increases that real security which is the necessary basis of initiative and the assumption of tolerable risk. As has been remarked elsewhere, the rules of the sonnet do not hamper real poets but rather help weak ones.

The movement to standardize the forms of contract even to the extent of prohibiting variations or the right to ‘contract out’ is not to be viewed as a reaction to, but rather as the logical outcome of, a regime of real liberty of contract. It is a utilization of the lessons of experience to strength in those forms which best serve as channels through which the life of the community can flow most freely.

Courts in England, and India have tried to hold the torch of freedom of contract by respecting the intention of the parties and giving effect to it.

It is very clear that exemption clauses in ‘standard form contracts’ are very preformulated stipulations in which the offeror’s will is predominant and that conditions are dictated to an undetermined number of acceptants and not to one individual party. The party can ‘take it or leave it’ but cannot negotiate its terms and conditions. It has become a device for adjustment of law to the needs of society. These contracts represent a new trend in contract branch and society as a whole has been benefited for them. The purpose of these contracts was to encourage business activity. Kessler has also remarked:-

“In so far as the reduction of costs of production and distribution thus achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts.”

There is no doubt that with the change in social structure, standard form contracts have become tools of oppression and misconduct. The general situation everywhere is one of continuing abuses by trade and industry, ineffectiveness of judicial and self-imposed contracts, and an absence of
There is no doubt that standardized contracts, like other laws, serve the interests of some persons better than those of others, and the question of justice thus raised demands the attention not only of legislature but also of courts that have to interpret them. The important lacuna is that no special methods have been used in England and India to cope with the problems of these contracts.

Common Law of England is highly contradictory and confusing and potentialities to cope with the problems of exemption clauses in standard form contracts have not been fully developed. However, as a result of prolix and persistent litigation, it is possible to hazard certain conclusions.

British Legislation has tended either to forbid specific terms, or to require delivery of a specific form giving details of the transaction (as in the Money Lending Act), or to lay down guidelines within which and by reference to which a tribunal may determine what is fair (as in Restrictive Trade Practices Legislation). Legislature in England has tried to remedy the individual cases but they could not enact a general act (as has been in Israel and Sweden) or a general provision that could meet with the abuses of these clauses. The approach that has been followed by British Legislation is no doubt a pragmatic one yet it is submitted that it is a slow process and will take too much time to check the abuses of standard form contracts and exemption clauses.

So far as the English Courts are concerned, they have developed some covert techniques to control these unfair clauses e.g. Doctrine of Fundamental Breach, Gibaud Rule, Four Corner Rule, and certain maxims etc. Courts can construe language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses and throw out the troublesome one. It can even reject a clause as counter to the whole purpose of the transaction. It can reject enforcement by one side for want of mutuality, improper notice etc. Clause can also be rejected on grounds of inequality or because the clause is unconscionable. Such clauses are excluded where the document did not appear to be contractual in nature,
where the offerees attention was not adequately drawn to the conditions, or where the notice of them was given after the contract was concluded. But all these covert techniques adopted by the courts have failed to meet the problems arising out of these contracts in England. Courts still apply traditional principles in interpreting these contracts and their attention has been confined to find out defects in the formation process of the contracts rather than its contents. British Courts have failed to develop general criteria for marking out a clear boundary between admissible and inadmissible clauses. And since they all rest upon the theory that the clauses in question are permissible in purpose and contents, they invite the draftsmen to return the attack. Courts are empowered to cancel any clause but are still not empowered to rewrite it so as to do equity between the parties.

The Law of Commercial Contracts does not effect only the relative economic strength of various groups operating on the economic market, but also their standards of social conduct and it is in these standards which exemption clauses in standard form contracts seeks to change.

A fundamental breach of contract is true not simply the terms of an individual contract, but a fundamental deviation of the values which those names represent and which reflect as much the degree of honesty in commercial dealings of the quality of the goods which one may expect to find on the economic market. We should not forget that allocation of risk affects the character of a contract and, therefore, terms in contracts cannot be regarded as merely “a convenient means of repairing an obvious oversight.” Fair conduct is expected from parties and exemption clauses are not an open “seasame” which provide “the correct formula” for exclusion of contractual liability and a free pass to deviation without limitation from the legal norms.

By eliminating the necessity of resorting to fictional interpretation, the doctrine of fundamental breach has made its greatest contribution. Because of its flexibility, judges (and scholars) are now unleashed to develop a common law capable of striking down clauses which do not square with the fundamental obligations of their contracts. Although Llewellyn did not draw on
the English precedents for his comments, he made his final plea for commercial law “decencies” in language remarkably identical to fundamental breach terminology:

(A) Transaction-type which had an iron essences that neither form nor formula could reach ……. An essence which contains a minimum of balance, a core without which the type fails of being …… the doctrine of “repugnancy”……. Kills off the clause which will not square with the iron core.8

So far as the English Law is concerned, the judgement in the Suisse Atlantique case and attacks made by various jurists on it, the doctrine has suffered a set-back and its further development has come to stand still at the hands of judiciary. It is submitted that the doctrine has value in it. It has become a great source of protection to the consumers in various types of contracts. Legislation in England has recognized the importance of it by passing the Supply of Goods_ Implied Terms Act, 1973.

In India importance of this doctrine has been recognized partially. Decisions are generally given on the basis of Section 23 of the Indian Contract Act dealing with public policy.

There is no doubt that the Doctrine of Fundamental Breach of Contract has been of much use to the courts in England and partially in India in preventing Exemption Clauses from becoming an instrument of oppression, exploitation and justice. Fundamental Breach is not simply the Breach of the terms of an individual contract, but a fundamental deviation of the values which those norms represent and which reflect as much the degree of honesty in Commercial dealings as the quality of the goods which one may expect to find on the economic market. Fair conduct is expected from parties and exemption clauses are not an open “seasame” which provides for “the correct formula” for exclusion of contractual liability and a free pass to deviation without limitation from the legal norms. It is this element of fair conduct which Professor Coote in his learned attack on the doctrine of
fundamental breach has consistently tried to exclude from the law of contract, although he appears to acknowledge its significance outside legal relation.

By eliminating the necessity of restoring to fictional interpretation, the doctrine of fundamental breach has made its greatest contribution. This doctrine has curtailed the liberty of parties to blow hot and cold. Consumers had great protection under it. It has been of great help in controlling abuses of exemption clauses in various branches of law.

But now in England judicial controversy has started regarding the true nature and function of this doctrine. After the judgement in Suisee’s case, fundamental breach of contract by one party may exonerate the other from the burden of exemption clauses but only as a matter of construction of the contract. If a clause is properly drafted then according to this decision even fundamental breach may be covered. This judgement brought the doctrine to a stand still although Lord Denning’s judgement in Harbutt’s case still supports the view that it is a rule of law. It is submitted that instead of going into a judicial battle over the function and effect of this doctrine, it will be better if the solution is left to the parliament.

Under English law, it can be said that term which is, undue, inappropriate, unjustifiable, unwarrantable, unseemly or, as it is generally called improper.

A contract term may typically be regarded as improper towards consumer if, deviating from valid dispositive law, it gives entrepreneurs an advantage or deprives consumers of a right and in that way produces a weighting of the parties rights and obligations so lopsided that a reasonable balance between the parties no longer exists.

This thesis also attempts to speak about what is reasonable. As a test, Speidel suggests that after the buyer has established a prima facie case of oppression, the seller should have the burden of proving that the term is commercially reasonable.
Spiedel test of commercial reasonableness has one major flow. It has been pointed out that all business pursue profits and those tactics which maximize profit are by definition commercially reasonable. The contract model relies upon bargaining to insure the fairness of the exchange: a bargained for clause is commercially reasonable. Speidel must look to other safeguards, but he fails to provide any.

Slawson⁹ retains the need to inquire into what would have been the result had there been bargaining or at least complete and understandable disclosure of terms. Slawson fails to develop standards for determining which terms should be enforced. His views are that Buyer’s expectation should govern the terms.

Beside all these, there may be other reasons for oppressive contract terms. As Kessler has suggested one cause of oppressive contract may be market concentration or the presence of monopoly power. Unconscionable clauses may also be found among contracts drafted in apparently unconcentrated markets. It may be that low income consumers are too uneducated and ill-informed to act rationally.

The way out of all this difficulty is not a particularly hard one to find. The chief step of course would be to recognize that deviation and quasi-deviation generic and are to be kept distinct from discharge by breach. The second necessary step would be to allow the substantive doctrine of fundamental breach to remain where the Suisse Atlantique case left to it, decently interred. The third step would be to complete the process begun by the House of Lords in that case and more directly to the acceptance of a universal rule that the effect of exemption clause depends in their proper interpretation, and on that alone (questions of travel illegality, and the like, apart.)¹⁰

No doubt, same would object that do all this would be to reduce the courts to a state of impotence. Such a result, it is submitted, need not follow at all. There is already in existence an impressive array of interpretative devices.
for containing exemption clauses, and they are open to still further development. It is worth remembering what some of them are:

(1) Every exemption clause is to be interpreted, in case of ambiguity, contra proferentem.\(^{11}\)

(2) Only in the clearest circumstances will general words of exemption be interpreted to cover important terms or liability for serious breaches.\(^ {12}\) The more important the term or the breach, the clearer those circumstances must be.\(^ {13}\)

(3) Exemption clauses are to be interpreted consistently with the main objects of the contract, and under this head, the literal meaning can be modified substantially.\(^ {14}\)

(4) In case of genuine inconsistency with the positive parts of the contract, exemption clauses can be modified or ignored altogether on grounds of repugnancy.\(^ {15}\)

(5) Exemption clauses have no application to acts falling beyond the contemplated ambit of the contract.\(^ {16}\)

(6) General words of exemption have no application to negligence unless negligence is the only liability to which they would apply.\(^ {17}\)

(7) In bailment contracts, exemption clauses have no application once the bailor exceeds any limitation on his authority.\(^ {18}\)

(8) A suggestion by Kito J. that the courts extend to exemption clauses the rule that a release should ordinarily be limited to those things, which were specially in the contemplation of the parties at the time release, was given.\(^ {19}\)

(9) A suggestion from another Australian judge, Bright J., that the presumption of an intention to do justice, used in the interpretation of statutes, be adapted to exemption clauses.\(^ {20}\)

(10) There is already a presumption that commercial parties intend their agreements to have contractual effect.\(^ {21}\) On the existing authorities, this could well be extended to a presumption that particular promises within contacts are also intended to have enforceable contractual content.\(^ {22}\)
(11) There is the rule, long propounded, but overlooked during the fundamental breach era, that the onus is upon the proferens so to word his exceptions as to make them clear to class of persons to whom they are addressed.\textsuperscript{23} This must give at least some scope for consumer protection.

Properly applied and developed rules of interpretations such as these would achieve virtually all that fundamental breach could have done and more besides. Importantly, they would make for considerably more flexibility, allowing, for example, differences to be drawn between consumer transactions on the one hand and commercial ones on the other, or between transactions commonly or not commonly the subject of insurance cover in this way the law would be enabled to come to the aid of the “little” man without incurring risk of being the destroyer of commercial bargains. All of this could be achieved without distortion of the law of contract as a whole. The reproach against fundamental breach is not just that it was a concept arbitrary in its application.\textsuperscript{18} And distorting in its influence inimically, enough, it is also served to divert attention from other hand and, it is submitted effective ways of achieving the objects it was intended to serve.

The pursuit of elegance for its own sake would be an object unworthy of any system of law. On the other hand, that doctrinal coherence has its advantages no law teacher and, one suspect, few legal practitioners would deny. The common law of discharge by breach, it is submitted, is one field where a return to first principles would be not unjustified.

In the amended section prepared by law commission it has to be expanded and a list should be added with it enumerating various “obvious cases” or “offensive Terms” or “unconscionable clauses”. In the preparation of such a list help can be taken from the Israel Code of standard form contracts. Definition of these terms used in drafting standard form contracts can be as follows:-
(1) Terms which exclude or limit the liability of the supplier towards the receiver, where such liability would arise either by virtue of a contract or statute, but for the existence of the restrictive conditions.

(2) Terms which entitle the supplier to cancel or change the conditions of a contract or to delay its execution in his sole discretion, or to bring about otherwise the termination of the contract or of rights arising from it or the right to decide unilaterally whether the goods are defective and whether the defect comes within their responsibility. The termination mentioned above should not depend on the fact the receiver broke the contract or depend on the fact that the receiver broke the contract or depends on circumstances independent of the supplier.

(3) Terms which permit the receiver to exercise a right arising out of a contract only after having obtained the consent of the supplier or of someone else on the latter’s behalf.

(4) Terms which contain the clause ‘in existing condition’ or ‘as is’ for the sale of factory new goods.

(5) “Force Majeur” terms which give a party the right to postpone indefinitely full performance of his obligations on grounds of circumstances outside his control.

(6) A term which gives the performing party the right to raise the contract price because of circumstances within or outside his control.

(7) Terms which force the receiver to deal with the supplier in matters not directly concerned with the object of the contract or restrict the liberty of the receiver to deal in such a matter with a third party.

(8) Term which forms a waiver declared beforehand on the part of the receiver in regard to rights which would arise out of the contract, but for the existence of such a waiver.

(9) A term which empowers the supplier or somebody else on his behalf to act in the name of the receiver in order to realize a right of the supplier towards the receiver.

(10) A term which establishes that the books or other documents made by the supplier or on his behalf should be binding upon the receiver or impose otherwise upon the receiver the burden of proof in regard to
matters where such burden of proof would not exist, but for the said term.

(11) A term which makes the right of the receiver to obtain relief in legal proceedings dependent upon the fulfillment of a condition precedent or limits the said rights by fixing the said rights by fixing a time-bar or otherwise. Submission to arbitration is, however, valid.

(12) A submission to arbitration if the supplier has a greater influence than the receiver upon the appointment of the arbitration or in regard to the fixing of the place where the arbitration is to take place, or a condition which entitles the supplier in his sale discretion to select a court for the decision of a dispute.

Explanation – If any one of the above mentioned conditions has been invalidated by the court, this does not necessarily entail the invalidity of the other conditions or terms contained in the contract.

It will also apply to cases in which state is a supplier. These clauses are given merely for the guidance and are certainly not comprehensive examples or in any way limitation on the powers of the courts.

So far the Indian scene is concerned, we should be aware that modernization and industrialization of the country has given birth to the standard form contracts in various spheres of trade and commerce. In our daily life they have been indispensable. But it is highly surprising and unfortunate that courts are not serious new challenge. Their decisions show complete indifference of the efforts made and techniques developed by the English courts which are, in essence, of the nature of private legislation.

There have been few cases and that too have been decided with reference to Section 23 of the Indian Contract Act. Even the present Law Commission of India that has submitted its 13th Report on the Law of Contract has neglected to refer to this burning problem of the Law of Contract which is today challenging its very basis mutuality.
It is submitted that the Law of contract in India with its preconceived ideas and the 19th century doctrines must change in response to the socio-economic changes in the country and ideological revolution which is engulfing the entire nation, otherwise it will collapse under the strain and stresses of the modern social and economic pressure. In a democratic set up governed by the rule of law, it is of the highest importance that law should be certain and should provide proper protection to its citizens. The task of judiciary to quote Justice Bhagwati: 24

We must remember that the law must adopt itself to the changing needs of society and whenever it is possible we must not hesitate to adopt new principle for otherwise law will become “antiquated straight Jacket and then dead letter”, and “the judicial hand would stiffin in mortmain if it had no part in the work of creation.”

Of course, we must be prepared to pass through the travails of the emergence of the modern law of contract. It is submitted that a new section should be added after section 23 of the Indian Contract act. This section should have general application to all commercial transactions and courts should be empowered to declare any bargain unconscionable under it. For the time being it will be a sufficient check on the abuses of Standard Form Contracts and Exemption Clauses.

To conclude it can be said that exemption clauses are an international phenomena and an international problem. In both the countries under study, it has been realized that a certain control of exemption clauses, is indispensable. The reason for this is the protection of weaker party. As has been pointed out already, the “freedom of contract” which the supplier invokes, has become a fiction, the customer is usually neither able nor competent to bargain, and that remedy has to be provided either by legislature or judiciary.
As a result of prolific and persistent litigation it is possible to hazard certain conclusions which can help to control the unfair exemption clauses in standard form contracts.

Exemption Clauses change the general and normal allocation of risk between the parties and apart from exceptional cases there is no legitimate reason for the insertion of exemption clauses in standard form contracts. It may be legitimate to stipulate exemption where choice of rates is provided, where risk is difficult to calculate, unforeseen contingencies affecting performance, such as strikes, fire and transportation difficulty etc. But such clauses as ‘as is clause’ terms in non-compliance with mandatory legislation, warranty clauses, clauses providing for fundamental breach of contract or which are against the main purpose of the contract are not admissible and will not be enforced by courts.

All the judgments indicates to the fact that in order that condition laid down in standard form contracts may be binding it is essential that it should be reasonable and particular notice of them is required to the customer.

As regards incorporation of exemption clauses in standard form contracts and their binding effect on the customer certain conclusions can be drawn from the cases already decided:-

(1) Exempting condition must be reasonable and must come within four corners of the contract.
(2) The exempting conditions, in specific terms, must be drawn specially to the other party’s attention at, or before, the time of contracting.
(3) Some important clauses may be printed in red ink with red hand pointing to it before notice could be held sufficient.
(4) Where the conditions purports to exclude a statutory liability, “there must be clear indication which would lead an ordinary sensible person to realize that a term (exempting from liability for personal injuries) as a result of negligence on the part of the occupiers of the premises” is incorporated.
Any particularly drawn clause which is destructive of rights should be incorporated by signature.

So far as the construction and interpretation of exemption clauses is concerned, attitude of the courts has been one of hostility.

A court can construe language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses, and throw out the troublesome one; It can even reject a clause as counter to the whole purpose of the transaction. It can reject enforcement by one-side for want of mutuality, improper notice etc. Clause can also be rejected on grounds of inequality or because the clause is unconscionable.

Besides, party can avail of the exemption clauses only when he is carrying out his contract in its essential respect. He is not allowed to use them as a cover for his misconduct or indifference. They do not avail him when he is guilty of fundamental breach of contract.

But, it can be said that common law of standard form contracts is contradictory and confusing because of diverse judgement given by the courts. The techniques e.g. Doctrine of fundamental breach of contract, Gibaud rule, four corner rule, followed by the courts to control exemption clauses are not sufficient. The objection to such techniques is obvious. They fail to develop general criteria for marking out a clear boundary between admissible and inadmissible clauses. And since they all rest on the theory that the clause in question are permissible in purpose and content, they invite the draftsman to return to the attack. Covert techniques followed by the courts in England to control unfair exemption clauses cannot be relied on. Instead there should be direct control of the clauses.

The basic weakness of this provision is that it has failed in laying down a standard on the basis of which court can deal and determine the meaning of the terms unconscionable.
The need of the day is the protective legislation for controlling unfair exemption clauses not in any particular branch, but in general.

Thus, it would seem that in the area of law there is room for much development and change. Critics of the present position point to the rigidity of law and the absurd results it has led. There can be little doubt that some alteration of the law is overdue and needed.

Reference

1. On law and public opinion’ at P.3 (Address to the Holdsworth Club).
3. 1941 A.C. 251
4. John Lee and Sons (Grau ham) Ltd. v Railway Executive (1949) 2 All E.R. 581 at P.584
8. Slawson, Standard Form Contracts and Democratic Control of Law making powers, 84 Harv. Law Review (1971) 529
9. Compare the decision of the High Court of Australia in the Council of the City of Sydney v West (1965) 1 C.L.R. 481. And is there, one wonders, any significance in the fact that since the Harbut’s “Plasticine” case, Lord Denning has, in Farnworth Finance Facilities v Attryde (1970) 1 W.L.R. 1053 (C.A.) at least partially returned to a construction approach?
10. One striking example is Webster v Higgin (1948) 2 All E.R. 127 (C.A.)
11. See Coote, op.cit., 114 and case there cited at n.75
14. Suzuki v Benyon (1926) 42 T.L.R. 269, 271 (H.L.); Forbes v Git (1922) 1.A.C.256,259, (J.C.) and see Coote, op.cit;5, 98.
15. Gibaud v Great Eastern Ry. (1921) 2 K.B. 426 (C.A.); Alderslade v Hendon Laundary (1945) K.B. 189 (C.A.)
16. Rutter v Palmer !1922) 2 K.B. 189 (C.A.)
17. This is the deviation rule discussed supra.
18. Miller v Australian Oil Refining Ltd. (1968) 117 C.L.R. 288, 293-294 and see also his judgement in Davis v Commissioner for Main Roads (1968) 117 C.L.R. 529,533-534.
20. Hillas v Arcos (1932) 147 L.J. 503 (H.L.); Suisse Atlantique Societe d
Armament Maritime S.A. v N.V. Rotterdamsch Kolen Centrale (1967) 1
A.C. 361, 432 (H.L.), per Lord Wilberforce and see also p.427, per Lord
Upjohn.
Wallis v Pratt (1910) 2 K.B. 1003, 1016 (C.A.); Firestone Tyre &
Rubber Co. v Vokins (1951) 1 Lloyds Rep. 32,39.
22. Waikato v N.Z. Shipping Co. (1889) 1 Q.B. 56,58; Eldersile v
294 ,300,301; Philip son v Imperial Airways (1939) 1 All E.R. 761 (H.L.)
779.
23. This was the criticism leveled against fundamental breach by Lord.
Reid in Suisse Atlantique Case (Supra) at p.406
BIBLIOGRAPHY

- Chitty on Contracts – 23rd Edition
Dias – Bibliography of Jurisprudence – 3rd Edition – Butterworths
Indian Contract Act – Allahabad Law Agency
K.P. Chakrabarthi, Jurisprudence and Legal Theory – Eastern Law House
Lloyd Denis, Introduction to Jurisprudence with selected texts – 2nd Edition
Mallick. M.R. (Justice), Commentaries on Indian Contract Act –
- Mani. Tripathi.B.N. (Dr.) – Jurisprudence
- Pollock and Mulla, Indian Contract Act and Specific Relief Acts - 12th Edition - Tripathi
- R.S.Sin and V.Powell-Smith – Case Book on Contract – Butterworths
- Robert,Rao and Wintraub, Contracts – Cases and Material – American Casebook Series
- Singh Avtar, Law of Contract –
- Stone Richard – Contract Law – 1994 - Cavendish Publishing Ltd. - Britain
- Sujan.M.A., Law relating to Frustration of Contract –


LIST OF JOURNALS

- All India Report
- Annual Survey of Indian Law Institute
- Australian Law Journal
- Business Law Journal
- Cambridge Law Journal
- Columbia Law Review
- Cornell Law Review
- Current Legal Problems
- Harvard Law Review
- International Comparative Law Quarterly
- Jaipur Law Journal
- Journal of Business Law.
- Journal of Indian Law Institute
- Law Quarterly Review
- Michigan Law Review.
- Modern Law Review.
- Newzealand University Law Review
- Ottawa Law Review
- The Modern Law Review
- The Practical Lawyer
- Tulan Law Review
- Yale Law Journal
LIST OF ARTICLES

- Bhat A.S., Ouster Clauses, Annual Survey of I.L.I. 1999 p.188
- Canaglen D.G., Duress, Undue influence and unconscionable bargains-
- The theoretical Mesh Mathew, 1999 : 18 Newzealand University Law Review. 509-45.
- Duncan Kennedy Lon Fullers, From the Will Theory to the Principal of Private Autonomy, 2000: 100 Col.L.R. 94-175.
- Ehrenzweing A.E., Adhesion Contracts in the Conflict of Laws,
53 Col. L.R. 1072
- Fuller, Freedom – A suggested Analysis, 68 H.L.R. 1305
- Glanville Williams, Doctrine of Repugnancy, 60 L.Q.R. 69.
- Malbourne University Law Review 92-111.
- Kessler, Contracts of Adhesion, 43 Col. L.R. 1404.


Ramchandran. V.G., Conflict of Laws as to contracts, 12 J.I.L.I.269.


Singhvi.S.S. (Dr.), The Doctrine of Fundamental Breach-A Conceptual Analysis, AIR 1980 Journ. 9


LIST OF WEBSITES REFERRED

- http://www.megalaw.com/
- http://www.legalserviceindia.com/
- http://www.laws4india.com/
- http://lawmin.nic.in/
- http://lawcommissionofindia.nic.in/
- http://ashoklawhouse.com/
- http://www.manupatra.com/
- http://www.allindiareporter.com/