Chapter 1

Standard Form Contracts, exemption clauses and problems of consumers.

1 INTRODUCTION:

Law of Contract is the Child of Commerce and has grown with the growth of country from mainly agricultural into a mainly commercial and industrial Nation. Law of Contract is a sub division of the law of property than an independent branch of Law. 1

Law of Contract differs from other branches of law in an important respect. It does not lay down a number of rights and duties which the law will enforce, it consists of a number of limiting principles, subject to the parties may create rights and duties for themselves which the law will uphold. The parties to a contract make the law for themselves. So long as they do not infringe some legal prohibition, they can make what rules they like in respect of the subject matter of their agreement, and the law will give effect to their decisions.

The development of the law of contract has been influenced by a considerable number of factors and they are the moral and the economic or business factor. Law reflects to a considerable extent the moral standards of the community in which it operates. Behind a great deal of the law of contract there lies the simple moral principle that a person should fulfill his promises and abide by his agreements.

1 Anson's Law of Contract, 23 edn. P.No.1
Law has transferred the moral principles into a legal rule, under the exegencies of the business or economic factor.

With the economic and social development of modern societies the need for a law of contract becomes more pressing, for two reasons. First, the division of labour, which is a fundamental feature of modern societies, creates a constant or increasing demand for the transfer of property from some members of the community to others and for the performance of services by some members of the community for others. The legal machinery by which these transfers of property and performance of services is carried out is the law of contract.

The second reason why economic development creates a greater need for an adequate law of contract is the growth of the institution of credit. The emergence of a complex credit economy means that in the process of transferring property and performing services, people have perforce to rely to a far greater extent than before on promises and agreements. A moment's reflection is enough to show to what extent this is true, not only in commercial matters, but in all walks of life. A person's bank account his right to occupy his house if rented or mortgaged, his employment, his insurance, his shareholding, and many other matters of vital importance to him, all depend for their value on the fact that, in the last analysis, the law of contract will enable him to realize his rights. In the striking phase of Roswe Pound "Wealth, in a Commercial age, is make up largely of promises".

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This is the reason why the development of the law of contract has been so largely associated with the development of commerce.

As previously said, that the law of contract is the hilt of commerce, the judge is a sort of umpire whose job it is to respond to the appeal 'How's that?', when something go wrong. As applied to the law of contract these ideas meant encouraging almost unlimited freedom of contracting, and thus the the shibboleths "freedom of contract" and "sanctity of contract" because foundations on which the whole law of contract is built.

The exception or exemption clauses i.e. clauses which excluded or limits the rights of the injured party to bring an action for images are world wide problem. They change the general and normal allocation of risk between the parties. Their purpose is to negative the terms which would normally be implied in favour of a buyer. Prima-facie there is nothing legally objectionable in this. The altitude of courts to these clauses is already one of hostility and it is no exaggeration to say that any loophole will be seized upon if it enables justice to be done.

There is always the problem as to deciding whether an agreement which has the appearance of a legal contract, but contains a wide exclusion clause is or is not intended to be legally binding.

Why, then, are such clauses accepted by the customers whether he accepts them because he regards them as theoretical or he is not in a position to shop around for better terms? Even if a consumer accepts them how far it will bind him? Whether third parties can claim benefit of those clauses and,
If not, whether doctrine of privity of contract is sufficient device for not granting benefit of exclusion clauses to third person?

Besides this, construction of exception clauses is one of the thorny problems in the law of contract. The defendant may be responsible for the plaintiff's damages, but, has he sufficiently excluded his liability to pay for the legal consequences of it?

In this chapter, I have tried to examine all these problems, what the law regarding exemption clause is, have and why it has developed and why certain difficulties have arisen?

Whether section 23 of the Indian Contract Act, and interpreting devices like rule of contra-proferentum, doctrine of fundamental breach and Gibaud rule in England are sufficient to check the abuses of these clauses or some new formula should be invented? Whether control over these clauses is to be exercised by legislature, judiciary or some administrative body should have this power?
A contract is an agreement which will be enforced by the law. There must be an agreement. Since nobody can agree with himself and hence there must be at least two parties to an agreement. One of them will make an offer and the other will indicate its acceptance. The parties must intend their agreement to result in legal relations. This means that the parties must intend that if one of them fails to fulfill a promise undertaken by the agreement, he shall be answerable for that failure in law.

It requires further that there must consideration be present in the contract. The parties must have capacity to contract. The intention to create legal relations is an element necessary for the formation of a contract. It must be in writing. Engagements of purely domestic or social nature are often not intended to be binding in law but are intended to rely on bonds of mutual trust and affection. On the other hand, even if the parties are in a domestic or social relationship but intend their agreement to have legal consequences, an enforceable contract is concluded.

In short, to constitute valid contract there must be two parties, there must be an agreement, there must be offer and acceptance, proposal, consideration, communication etc.
The Writing must be a contractual document

In order that a particular document containing notice of the excluding term may be binding it is essential that writing must be a contractual document. It must have been intended as a contractual document and not as mere acknowledgement of payment. To hold a party bound by the terms of a document which reasonable persons would assume to be no more than a receipt is an affront to common sense. An illustration of the point is afforded by the case of Chapelton V. Barry U.D.C.,

The plaintiff wished to hire two desk-chairs from a pile kept by the defendant council on their beach. The chairs were stacked near a notice which read "Hire of chairs 2d. per session of 3 hours..." and which requested the public to obtain tickets from the chair-attendant and retain them for inspection. The plaintiff took the chairs and obtained two tickets from the attendant and put them in his pocket without reading. When he sat on one of chairs, it collapsed and he was injured. He sued the council, who relied on a provision printed on the ticket excluding liability for any damage arising from the hire of a chair.

The Court of Appeal held the defendant liable. No reasonable man would assure that the ticket was anything but a receipt for the money. The notice on the back, constituted the offer, which the plaintiff accepted when to took the chair and the notice contained no statement limiting the liability of the council.

1 (1940) 1 K.B. 532 also see Henson V. London North - Eastern Rail Co. and Coote V, Warren Ltd. (1946) 1 All E.R. 653.
The defendants has failed to satisfy the preliminary requirement of identifying the ticket as a contractual document and it was superfluous, therefore, to ask if it contained a due announcement of any conditions.

The idea that contracts are based on agreement is, in an enormous number of cases in the modern world, only true in a very restricted sense. It remains true that, the actual creation of a contract require the agreement of the parties, it is no longer true, in many circumstances, that the detailed terms of a contract depend on the agreement of the parties. The reason for this is the development of the standard-form contract. Thus nobody can compel me to travel by train, if I want to do so I must do so on the terms and conditions imposed by the railway authorities. I can not negotiate my own terms. Similarly, if I want to obtain supplies of gas or electricity for my house, I must enter in to a contract on terms laid down by the authorities. Even when the goods or services in question are not a monopoly of a single organisation, it will frequently be found that the terms and conditions which are offered to the public are largely, identical, For instance, if a person wishes to travel by air he may have a choice between a very large number of air lines, but they will all offer him exactly the same terms at exactly the same fare.

These standard-form contracts are rapidly becoming one of the major problems of the modern law of contract, for they are to be found in every walk of life. In most of these cases it is only true to say that the contract is the outcome of agreement in a very narrow sense. There is no opportunity in these cases and hence no freedom to negotiate one's own terms. The terms are imposed by one party, and the other party has no choice but
to accept them or go without. From the very nature of the case, these terms are liable to be far more favourable to the organisation supplying the goods or services in question than the individual receiving them. The insurance policy he takes out on his life will be in a standard-form. When one proceeds to his office or factory the average citizen will still be pursued by standard-form contracts. On the bus or train his ticket is probably issued subject to innumerable terms which the citizen may pursue. In many cases, too, his employment is regulated by a standard contract.

Standard-form contracts have the advantages of saving time, trouble, and expense in bargaining over terms. Legal decision in one case will provide a guide to disputed problems in other cases.
Cases :

(1) The Case of Mecutcheon V/S David Machrayne Ltd.

The case of Mecutcheon V David Machrayne Ltd. affords a second illustration.

M arranged for his car to be taken in D's ferry from Islay, in the Hebrides, to the mainland. The contract was made orally without anything being said about exemption of from liability for the car, but on previous occasions M had been given on conclusion of the contract a note stating that the carriage was at owner's risk. Owing to the negligence of D's servants, the ferry sank and the car was lost.

The defendants pleaded terms, excluding liability for negligence, contained in twenty-seven paragraphs of small print displayed both outside and inside their office. The terms were also printed on a "risk note" which customers usually asked to sign. On this occasion the defendants omitted to ask M to sign the risk note. All they did was to give him, when he had paid in advance the cost of carriage, a receipt stating that "all goods were carried subject to the conditions set out in the notices". The House of Lords M had not read the words on the notices or on the receipts and there was in truth no contractual document at all. The risk note was not presented to M and receipt was given only after the oral contract had been concluded.

\[\text{(1964) 1 W.L.R. 125 (1964) 1 AH E.R. 430}\]
Incorporation of Exemption Clauses.

If a seller relies on an exemption clause, he will first have to show that the clause was incorporated in the contract, i.e., that it was part of the offer which was accepted by the buyer. Moreover, the clause must be so drafted as to cover the loss or damage suffered. In considering the problems of the incorporation of exemption clauses into the contract, a distinction must be drawn between signed and unsigned documents. As case of a signed document, it will be very difficult to deny its contractual effect. In trenchant words of Scrutton L.J.:

"When a document 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." ¹

Admittedly, in rare cases a plea of no est fa::e factums might be raised, but as Saunders v. Anglia Building Society, emphasized, it is unlikely that the plea would be available to a person who signed a document without informing himself of its meaning.²

The other way in which an exemption clause can be incorporated is by notice, and this raises or number of points. First, the document must be a contractual one and not a mere voucher or receipt.³

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¹ Estrange v. F. Graucob Ltd. (1934) All E.R. at P.19
² (1970) 3 All E.R. 961, 1058
³ Mecutcheon v. David McBryne Ltd. (1964) 1 All E.R. 430.
Documents such as railway and railway clock room tickets are contractual because it is well known that they generally contain contractual terms, the issue of the ticket being regarded as the offer.¹

Secondly, the person seeking to reply on the exempting conditions must give reasonable notice of its existence to the other person: "The more reasonable a clause is, the greater the notice which must be given of it"².

Thirdly, notice of the condition must be given before or at the time of contracting, a belated notice is valueless. This requirement is illustrated by the well known case of Olley v. Marlborough Co. Ltd.³

A recent discussion of familiar problems in a court setting is to be found in the case of, Thorton v. Shoe Lane Parking Ltd. This case throws new light on the problems. Although it is a case possessing unusual features, the facts were simple⁴.

The plaintiff wished to park his car in the defendant's automatic car park. He had not been there before, outside the park was a notice, stating the charges and adding the words, "All cars parked at owner's risk". As the plaintiff drove into the park a light turned from red to green, and a ticket was pushed out from a machine. Nobody was in attendance. The plaintiff took the ticket and saw the time on it. He also saw that it

¹ Thompson v. London Midland and Scottish Railway (1930) 1 K.B. 41 at P. 46.
³ (1949) 1 All England Report 127.
contained other words, but put it into his pocket without reading them. Those words in fact stated that the ticket was issued subject to conditions displayed on premises. To find these conditions the plaintiff would have had to walk round the park until he reached a panel on which they were displayed. The plaintiff never thought to look for them. One condition purported to exempt the defendants from liability not only for damages to the cars parked but also for injuries to customers, however, caused. When the plaintiff returned to collect his car, there was an accident in which he was injured. The defendants pleaded the exempting term.

The Court of appeal gave judgement for the plaintiff. The first question raised was the moment at which the contract was made.

It was not easy to apply the long time of "ticket cases" reaching back for a hundred years, to mechanism of an automatic machine, Lord Denning said, Mocatta J. found that the defendants were 50 per cent responsible for the accident, and awarded Thorton $3,638 damages. The defendants appealed on the ground that they were protected from liability by the exemption clauses.

To succeed, they had to show that the condition had been incorporated in the contract and that it covered the claim. The notice displayed outside garage entrance merely said, "All cars parked at owner's risk". The clause on which the defendants relied as exempting them from liability for the plaintiff's personal injuries was not displayed there, it was displayed

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1 Mocaw L.J. while he concurred in the decision, reserved his opinion as to the precise moment when the contract was made.
The ticket issued by the automatic machine attempted to incorporate these conditions by reference.

In the Court of appeal, Lord Denning M.R. referred first to the ticket cases from Parker v. South-East Railway Co¹ to Cutcheon v. David MCBrayne Ltd; He took the view that the theory that the customer, on being offered the ticket, could refuse it and decline to contract on those terms, was a "fiction". In any event, he thought that those cases could not apply to a ticket issued from a machine, because "client can not refuse it. He can not get his money back". In his opinion, the ticket was a mere voucher, or receipt, because the contract has already been made².

"The offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot. The terms of the offer are contained in the notice placed on or near the machine stating what is offered for the money. The customer is bound by those terms as long as they are sufficiently brought to his notice, before-hand, but not otherwise. He is not bound by the terms printed on the ticket, if they differ from the notice, because the ticket comes, too, late".

¹ (1877) 1 C.P.D. 416
² (1964) 1 All E.R. 430
He referred to LiIey v. Marlborough Court Ltd.\textsuperscript{1} and to Chapelton v. Barry U.D.C.\textsuperscript{2}

On this approach (although this point was not in issue) it is thought that the notice outside the car park saying, "All cars parked at owner's risk", would have been effective to exclude liability for loss of or damage to the motor vehicle itself. But clearly the exemption could not extend to liability for personal injuries (and that was the basis of the plaintiff's claim in Thorton) unless the condition displayed in the building were incorporated by reference.

The Master of the Rolls then went to consider what the position might be if, "an automatic ticket machine is a booking clerk in disguise, so that the old fashioned ticket causes still apply to it". He referred to a dictum of Mellish L.J. in Parker v. South Eastern Railway.

"If the person receiving the ticket did not see or know that there was any writing on the ticket, he is not bound by the conditions, if he knows that there was writing and knew or believed that the writing contained conditions, then he is bound by the conditions, if he knows that there was writing on the ticket, but did not know or believe that the writing contained conditions, nevertheless he would be bound if the delivering of the ticket to him in such a manner that he could see there was writing on it was reasonable notice that (it) contained conditions".

\textsuperscript{1} (1949) \textit{1 All England Report} 127.

\textsuperscript{2} (1940) \textit{1 All England Report} 356.
Lord Denning M.R. summarised this statement of principle in these words, "The customer is bound by the exempting conditions if he knows that the ticket is subject to it, or, if the company did what reasonably sufficient to give him notice of it". The use of the singular (condition) is a subtle difference in approach, which was echoed by Megaw L.J., it is "the exempting conditions that is important. It is no use telling the customer that the ticket is issued subject to some 'conditions' or other, without more" he said, "for he may reasonably regard 'condition' in general as merely regulatory and not as taking away his rights, unless, the exempting conditions is drawn specifically to his attention". With respect, this seems a somewhat harsh approach to the realities of commercial affairs. Nonetheless, even on the basis of ticket cases, Thornton was not bound and the trial judge had not found that the plaintiff "knew or believed that the writing contained conditions".

Megaw L.J. expressed no opinion on the question at what moment in time the contract was concluded. He decided the case in the plaintiff's favour on the basis of the particular conditions on which the defendant seek to rely, and not of the condition in general, on that particular condition, it weighed heavily with him that the exempting phrase was part of a very lengthy clause. He pointed out that the defendants were seeking to exempt themselves from a liability that was otherwise imposed on them by the occupier's liability Act 1957. He went on; "before it can be said that a condition of that sort, restrictive of statutory rights; has been fairly brought to the notice of a party to a contract, there must be clear indication that would lead an ordinary sensible person to realise, at or before the time of making the
contract, that a term of that sort, relating to personal injury, was sought to be included." In his view, the defendants had not taken adequate or proper steps fairly to bring the plaintiff's notice to the fact that "any special conditions were sought to be imposed." It was a fiction to suggest that a customer could leave his car blocking the entrance to the garage, whilst going off in search of the conditions referred to on the ticket. Sir Gordon Willmer delivered a short concerning judgement, again expressing no opinion as to when the contract was made. Thus Thornton's claim for damages for personal injuries was successful.

For all that it decided, Thornton V. Shoe Lane Packing Ltd; raise a number of queries. Would the action have been successful how it related, not to personal injuries, but to damage to the vehicle itself? There was a notice displayed at the point of contracting, conched in general terms. On a common sense view, the statement that "All cars parked at owner's risk" should be taken to exclude liability for damage to the vehicle itself, but because of possible ambiguities and the operation of the contra-profercentem rule, even this is not certain.

Lord Denning indicated that wholly "unreasonable" conditions will not be enforced. He said that he did not "pause to inquire whether the exempting condition is void for unreasonableness" \(^1\).

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\(^1\) Thompson V. L.M.S. Railway Co. (1930) 1 K.1341 at P. 53.
Thus whether or not an exempting condition could be void for unreasonableness remains undecided. It seems that these dicta mean no more that particular notice is required. Indeed, Lord Denning M.R. added, "All I say is that it is so wide and so destructive of rights that the Court should not held any man bound by it unless it is drawn to his attention in the most explicit way. It is an instance of what I had in mind in J. Spurting Ltd. v. Bradshaw. His Lordship said that, "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".

On this basis of Thornton v. Shoe Lane Packing Ltd; one can summarise the position in this way:

(1) The exempting condition, in specific terms, must be drawn specifically to the other party's attention at or before the time of contracting.

(2) Alternatively, if the plural 'condition' are used, it would be better prefaced with the 'exempting' per Lord Denning M.R.

(3) Where the conditions purports to exclude a statutory liability. There must be some clear indication which would lead an ordinary sensible person to realise 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 per McJaw L.J.

¹ (1956) 2. All England Report 121 at p. 125.
(4) It can not be safely assumed that, as a matter of general knowledge, custom or business practice, exempting or limiting conditions will be implied, save in those exceptional cases where the reasonable man expects to receive a document with conditions in it.¹

(5) Any particularly broadly drawn clause "destructive of rights" requires emphasised notice and best of all should be incorporated by signature.

Exemption Clauses When Permissible.

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:

A 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 if 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 risks are undeterminable or unusually high, or is often true with regard to consequential damages, a limitation, perhaps even an exclusion of the liability may be adequate e.g. by the manufacturer of 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.

1 This portion is based on the article of Eike Von Hippie "The Control of Exemption Clauses - A comparative study", 16, I.C.L. 591.
(C) **Offer of "Choice of Rates"**.

The factor "Choice of Rates" has played a part in the United States. Thus it has been recognised 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 a lower price coupled with a limited liability and a higher price coupled with an unrestricted liability. This requirement of a "Choice of rates" was rooted in the consideration doctrine, but became later on independent of its historical origin. The underlying idea is not restricted to the common law systems but it is of general importance. A customer who has the free choice whether he wants full protection of his goods for a higher price or only partial protection for a lower price may not complain if according to his own choice - the liability of the supplier is limited.

(D) **Insurance**:

The last mentioned consideration touches another factor, namely, the factor of insurance. The German Bundles Gerichtsoff has in several decision pointed out that the question of whether the customer has, or could have, protected himself by insurance can in certain cases be relevant. But the cases were exceptional one 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 up insurance in favour of the customer, he should be allowed to exclude his liability so far as, the customer is protected by the insurance coverage. Thus, according
to the German "General conditions of Forwarders" of 1927, the forwarding agent is relieved of his liability by insuring the goods in favour of the owner.

(E) **Kind of violated obligation and of Affected.**

**Interest:**

The more important the obligation is, which the before offends against the less an exemption clause should be admitted. This idea underlies the English 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 rule 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 in principle admitting exemption clauses 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 the Debtor's fault (gross, average of slight negligence) should be taken into account, the more the debtor's 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 the American Courts which allow common carriers and innkeepers to exonerate themselves within certain limits for strict liability, but not from liability for negligence.
4. Exemption clauses when invalid or inoperative.

(A) Unreasonableness: A number of dicta support the view that exemption clauses are not invalid merely because they are unreasonable. But, there are two possible exceptions to this general rule:

1. Exemption clauses may be invalid if there are "unreasonable in themselves or irrelevant to the main purpose of the contract", or if they are so unreasonable that no one could contemplate that they exist, for example, if a deposit goods at a cloakroom is made on condition that £1,000 shall be forfeited if the goods are not collected within forty-eight hours. These dicta suggest that an exemption clause would be invalid if it grossly unreasonable.

2. A somewhat broader exemption is stated in Clarke v West Ham Corporation.

The defendants ran a tramway undertaking under statutory powers. They were bound by their statute to carry passengers at no more than specified maximum fares. They charged lower fares, but limited their liability for personal injury to £25. A passenger who was injured while riding on one of the trains recovered full damages although he knew of the limitation clause. One

1. This part is totally based on the book of Tritel "The Law of Contract".
5. Packer v. South Eastern Rly (1877) 2 CPD 416, 428.
6. (1909) 2, H.B. 858.
possible ground for the decision was that the imposition of unreasonable conditions amounted to a refusal to perform that duty. Here the conditions were unreasonable and void and they did not give the passenger the choice of travelling cheaply at his own risk, or at the full maximum fare, but at the defendant's risk. There is no doubt that the common law in some cases restricted the power of a person who was bound by law to enter into a contract to protect himself by exemption clauses. Inkeepers at common law could not do so at all. But common carriers could and often did, so protect themselves, and the view that they could only do so by reasonable conditions is quite inconsistent with the history of nineteenth century legislation on his subject. Hence it seems safe to base Clarke v. West Han Corporation on the construction of the relevant statutes, even though only one member of the Court of appeal squarely based his decision on the ground.

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1 See Now Hotel Proprietors Act, 1956.


3 Kennedy L.J. Cozens Marly M.R. and Farewell L.J. too the wider view stated above.
(B) **Excluding Natural Justice**

Members of an association may agree to submit certain disputes to a domestic tribunal, such as the disciplinary committee of a trade union. Such a tribunal is prima facie bound by certain rules of "natural justice". It must give each party a fair hearing and a chance to rebut the case that is made against him, and its members must not have any pecuniary interest in the dispute or any other interest which is likely to bias them.

In two cases Denning L.J. has said that a provision in the rules of a union purporting to oust rules of "natural justice", would be void.

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1 See De Smith, Judicial Review of Administrative Action, Chapters 4 & 5 for a full account of these rules.

The rules of Union, "are more like bye-laws than a contract\textsuperscript{1} and can, like bye-laws\textsuperscript{2}, be held invalid for unreasonableness. An attempt to insist the rules of "natural justice", would be unreasonable and thus ineffective. This view has not been universally accepted\textsuperscript{3} but there is no conclusive authority against it, and it seems to be eminently reasonable. But it only protects persons who are member of the association. A person who is refused admission can not argue that the refusal is ineffective because he was not given a full hearing, before his application for membership was refused\textsuperscript{4}.

\begin{enumerate}
  \item Bonsor's Case (1954) Ch. at 485.
  \item Kruse v. Johnson (1898) 2 QB 291.
  \item Maclean v. The Worker's Union (1929) Ch. 502 603 Citirine, Trade Union Law, 2nd ed. pp 230-231; cf Reussel v. Duke of Norfolk (1949) 1 All E.R. 109 where a majority of the court of appeal held that an undertaking to observe the rules of natural justice could not be implied into a contract giving the domestic tribunal an absolute discretion.
  \item Farmanns v. Film Artists Association (1964) AC 925 Rideout, 21 M.L.R. 436, Wodderburn (1964) CB.J. 17.
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Excluding Liability for Breach of Fiduciary Duty.

The promoter of a company is under a fiduciary duty to the company not to make a profit out of the promotion without disclosing it to the company. He cannot contract out of his duty. It is submitted that any attempt by a person who is under a fiduciary duty to exempt himself from liability for a deliberate breach of that duty would be similarly ineffective.

Excluding Liability for Fraud.

It has never been precisely decided whether a person can contract out of liability for fraud. In Tullis v. Hazen, Jacson, the parties to a building contract agreed to submit disputes to the arbitration of an architect, whose award was to be final and not to be set aside for "any pretence, suggestion, charge or insinuation of fraud".

An attempt to challenge the award on the ground that it was not made in good faith failed because of this provision. But this decision has been criticised and is in any event limited in two ways. Such a clause would not validate a contract procured by fraud, it could at most cover fraud in the performance of the contract. Nor would it protect a party from liability for his own fraud. Moreover, an exemption clause cannot by general words exclude liability for fraud.

1 See Gower, Modern Company Law, 2nd Edn. P. 258.
2 Gludestein v. Barnes (1900) A.C. 240.
3 (1892) 2 Ch. 441.
4 Czarnikow v. Roth, Schmidt and co. (1922) 2-KB 478.
5 Tullis v. Jackson (Supra)
6 S. Dearson & Sons Ltd. v. Dubhu Corporation (1907)
In S. Pearson and Sons Ltd V. Dubhin Corporation, a contract for the erection of sewage works provided that contractors should satisfy themselves of the accuracy of all plans supplied by the corporation and that the corporation should not be responsible for their accuracy of all plans supplied by the corporation and that the corporation should not be responsible for their accuracy. It was held that this provision did not protect the corporation where the plans contained fraudulent accuracies; it only applied to honest mistakes. For this purpose fraud means some active concealment, by words & conduct. A seller of goods "with all faults" is not liable for defects simply because he knows of them.

**Over-riding Undertaking.**

An exemption clause in a document with reference to which the parties contract can be over-riden by an express oral undertaking given at the time of contracting. Thus a buyer of goods by auction can recover damages for breach of an oral undertaking given at the time of sale although the printed conditions of sale exempt the seller from all liability for defects.

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1 Czarnikow V. Roth, Schmidt and Co. (1922) 2 KB 478.
   Super and Re Englefield Holdings (1962) W.L.R. 419.
2 At common law liability for negligent misrepresentation including a contract can be excluded. Boyd & Forrest V. Glasgow and S.W. Rly. (1915) S.C. (HL). The law reform committee has proposed that this should no longer be possible (10th Report (1962) mnd. 1782)
4 Couchman V. Hill (1947) K.B. Harling Eddy. (1951)2 K.B. 739
A contracting party cannot rely on an exemption clause if he has induced the other party to accept it by misrepresentation. In Curtis v. Chemical Cleaning and Dyeing Co. Ltd., the plaintiff took a dress to the defendants to be cleaned. She signed a receipt after being told that it exempted the defendants from liability for certain specified kinds of damage. In fact, it exempted them from liability for any damage, however arising. The dress was stained in some unexplained way. It was held that the defendants could not rely on the exemption clause as they had induced the plaintiff to sign the receipt by misrepresenting its contents. Denning L.J. said that mere failure to draw attention to the existence or extent of the exemption clauses might in some circumstances amount to misrepresentation. It remains to be seen whether this very wide view of misrepresentation will be accepted.

1 (1951) 1 K.B. 805.
5. Judicial Control of Exemption clauses in India.

There have been two sets of cases in India dealing with exemption clauses. One set of cases reveals that Indian Courts have adopted the standard of enforceability of a contractual clause so long as it found a place in the contractual document relied on by both the parties while in the latter they adopted the standard of "fundamental principles of contract" or section 151 of the Contract Act or Section 23 dealing with public policy for concluding that the objectionable clause should be nullified.

In the former, the claim was by persons aggrieved by loss of life or goods agreed to be carried by the defendant and he could escape liability although negligent by virtue of the exemption clause, in the latter the claim was by persons who lost their goods agreed to be demand and redelivered by the defendant and he could not, however, escape liability for the full value of goods lost, in spite of a contractual clause limiting his liability. This double standard of fixing liability for bailee is not justified, if anything, there is all the more reason why a person in the position of a carrier by air should be held liable, where it is a case of more serious and irreparable loss of a life or damage of valuable goods than in the case of loss of cloths given for dry cleaning. There can not be valid criterion to distinguish between these sets of cases which would justify the contrary conclusions arrived at in them.

The same unjustifiable quality of criteria for testing the validity of contractual clauses in standard form contracts is also to be noticed in another situation where the aggrieved party is to act in the matter of asserting his rights against the other party of the contract.

In one set of cases of which perhaps the leading example is a full Bench decision of the Punjab High Court in Pearl Insurance Co. V. Atma Ram, a clause in the contract limiting the time within which the aggrieved party was to bring his act was hold to be valid. It was observed by the court that as the clause does not limit the time within the insured, could enforce his rights and only limits the time during which the contract will remain alive. It is not hit by the provisions of section 28 of the Contract Act.


2 A.I.R. (1960) Punjab 236(F.B)
In another comparable situation, however, the court has struck down the time limit clause as not valid. In Ramula V the Director of Tamil Nadu Raffle, a writ petition was filed by the purchaser of a prize winning ticket in the raffle conducted by the State of Tamil Nadu, challenging the validity of a clause in the Raffle rules under which the State purported to forfeit the prize amount for delayed presentation of ticket. The said clause interalia stated that "prize amount not claimed within three months from the date of the draw shall lapse and he automatically forfeited to the government." The contention of the State that the entire subject matter emanated from a contract, the term of which the petitioner had agreed and so he had no remedy that could be sought by way of a writ petition. The Court (Ramprasad Rao J) however, rejected this contention and held the clause "unconscionable" as it would cause undue hardship besides public policy. As the learned judge explained.

If the terms of contract are so unconscionable and if one of the terms is in terrorom and without any consideration known to law and is thereof against public policy, then the party affected can approach the High Court under Article 26 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 State, as the learned judge himself described it "as the supreme repository of all that is good for the subject", can not seek to aid forfeiture clause which was held to be "highly unreasonable", however, validly the contract itself might have been entered into.

1 (1972) 11 Mad. L.J. 239.
This clause uphold the power of the Court to ignore or nullify a contractual clause, if it offends the conscience of the Court however it may be termed, like public policy and so on as unjust and enforce the contract without the clause. Thus, it goes for towards alleviating a well known evil arising from standard form contracts. The question, however, remains whether such a right or power is interent in the Court under the existing law. Public policy can not at any rate be the open seasmec for drawing upon or justifying such a power.

Contracts which are unconscionable, unfair, unreasonable and opposed to public policy are void¹.

¹ Central Inland Water Transport Corporation Ltd; V. Brojo Nath Ganguly (1986) 3 SCC 156.
6. **Exemption Clauses and Third Parties.**

The rule that a third party can not sue on a contract though made for his benefit is intimately connected with the doctrine of consideration. This rule was established in English law as early as in 1861 in the case of Tweedle *v.* Atllinson\(^1\) which was re-affirmed by the House of Lords in Dunlop *Pneumatic Tyre Co. v. Selfridge & Co.*\(^2\)

Even if the excluding or limiting term is an integral part of the contract and even if its language is apt to meet the situation that has in fact occurred, it may be used only by the contracting party. No stranger may seek the shelter of its protection. The proposition is elementary and there seems no reason to deny its validity in the present context. In Adler *v.* Dickson\(^3\).

The plaintiff was a passenger in the peninsular and oriental steam Navigation Co.’s vessel Himalay, and was travelling on a first class ticket. The "ticket" was lengthy printed document containing terms exempting the company from liability. There was a general clause that "passengers are carried at passengers entire risk" and a particular clause that "the company will not be responsible for any injury whatsoever to the person of any passenger arising from or occasioned by the negligence of the Company's servants. While the plaintiff was mounting a gauging, it moved and fell and she was thrown on to the what from height of sixteen feet.

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\(^1\) (1861) 1 Band S. 313.
\(^2\) (1915) A.C. 848 (853)
\(^3\) (1955) 1 Q.B. 158.
and sustained serious injuries. She brought an action for negligence, not against the company, but against the master and boatsman of the ship.

The Court of Appeal, affirming Pitcher, J. held that, while the clauses protected the company from liability, they could avoid no one else. The master and boatsman were not parties to the contract and could not claim its advantages.

The House of Lords held that the principle of vicarious immunity was not the ration decidenti of the Elder, Dempster case, and that the other two reasons for that decision did not help the stevedores here. No contract between the plaintiffs and the stevedores could be implied as these parties had never come into contract with each other, and the shipping company had not acted as the agents of the stevedores for the purpose of limiting liability.  

The contract was to be limited, it only limited the liability of "the carrier".

As a result of the Midland Silicomex case, the effectiveness of exemption clauses is severely limited. A person injured by a negligent breach of contract will generally have a remedy against someone, if only against the actual workman who was negligent.

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1 Lord Denning Dessenting, see also his judgement in Adler v. Dickson, White v. Warwick (John) and Co. Ltd. (1953) 1 W.L.R. 1285 and Marris v. C.W. Martin and Sons Ltd. (1965) 3 W.L.R. 276.
Such a remedy may be worthless, but some employers will in common decency and in the interests of good business feel bound to satisfy judgements given against their servants in these circumstances.

An interesting, if inconclusive, case is that of Morris V. C.W. Martin & Sons Ltd.

The plaintiff sent her (mink) for state to a furrier to be cleaned. The furrier told her that he himself did not cleaning but that he could arrange for this to be done by the defendants. The plaintiff approved this proposal. The furrier accordingly, acting as principle and not as an agent made a contract with the defendants, a wellknown firm, to clean the plaintiff's fur. While in the possession of the defendants, the fur was stolen by their servant. The plaintiff sued the defendants, who pleaded exemption clauses contained in their contract with the furrier.

The Court of Appeal held the defendants liable. The three members of the Court agreed (A) that when the defendants received the fur in order to clean it, they become bailies for reward, (B), that, as such bailies, they owned a common law duty to the plaintiff, (C) that the clauses on which they relied were not adequate to meet the facts of the case. It was unnecessary, therefore to answer the question whether, if the clauses had been unambiguous and comprehensive, they would have protected the defendants as

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1 In Adler V. Dickson, Supra, the employers said that they would satisfy any judgement that might be given against their servants.

2 (1966) 1 Q. B. 716.
against the plaintiff, who was not a party to the contract.
Lord denning thought that the plaintiff might have been bound
by those clauses because she had impliedly agreed that the furrier
should contract for the cleaning of the fur on terms usual in
the trade. Diplock and Salmon L. JJ. preferred to keep the
question open.

Further two cases have raised the problem of Third parties
as it touches the incidents of daily life. In Genys v. Mathews,
an old age pensioner signed a written application form to obtain
from Liverpool corporation a free pass to travel on their buses.
The form contained the following clause:

"In consideration of my being granted a free pass for use
on the buses of Liverpool corporation, I undertake and agree
that the use of such pass by me shall be subject to the
conditions overlead, which have been read by me prior to
signing."

One such "Condition" stated that,

"The pass is issued and accepted on the understanding that
that it merely constitutes and grants a licence to the holder
to travel on the Liverpool corporation's buses subject to
the condition that neither the Liverpool corporation nor any
of their servants or agents responsible for the driving,
management, control or working of their bus system, are to
be liable to the holder..... for loss of life, injury, or
delay or other loss or damage to property however caused."

The free pass itself contained "the express condition that the corporation and their servants shall be under no liability either contractually or otherwise to a pass holder when boarding alighting from being carried on corporation house".

The old age pensioner was injured while travelling on a corporation bus owing to the negligence of the bus driver, and sued him. It was held by the presiding judge of the Liverpool court of passage that the bus driver was liable. He rules, indeed, that, as the "condition" in the form stated, the plaintiff was a licence and could not plead its protection.

In Gore v. Van der Lann (Liverpool corporation International), the facts were similar though not identical. The plaintiff was an old age pensioner who sought a free pass on the Liverpool corporation's buses. She signed form of application and duly received a pass and each document was conched in the same terms as in Genys v. Mathew. She alleged that, when boarding a bus, she was injured owing to the conductor's negligence. The majority of the court of appeal were of opinion that, despite the wording of the application forms, the relationship between the plaintiff and the corporation was one, not of licence, but of contract, Willmer L.J. said(1):

"It appears to me that all the elements of contract were present by signing and submitting the application, the plaintiff was accepting the offer of the corporation to carry her free on its buses subject to the conditions specified. Each party gave good consideration by accepting a detriment in return for the advantages gained."

The contract was "for the conveyance of passenger in public service vehicle and the clause excluding liability for loss of life or injury was therefore void under Section 151 of the Road Traffic Act, 1960. If the court had agree with the presiding Judge of the Liverpool Court of passage in Gonys v. Mathews and with an earlier Court of Appeal in Willie v. London Passenger Transport Board, and had held that the plaintiff was a licence, this section would not have been void relevant and the exclusion would not have been void. But, whether licence or contract, the conductor was still a third party, and could not plead the terms of an arrangement made between pensioner and corporation.

The rule, however, resulted in certain hardships as where a person was entitled to some benefit under contract to which he was not a party. This hardship was sought to be removed by courts of equity by the application of the doctrine of constructive trust. This involved a fiction and the device failed to work in a number of cases since the judge insisted on a strict application of the fiction.

1 (1947) All E.R. 258.

2 Gore's case critically examined by Professor F.J. Odgers in 86 L.Q.R. 69.88 It is hard to resist his conclusion that the distinction drawn by Willmer L.J. between this case and Wilkie v. London Passenger Transport Board is tenable, and that the reasoning in Wilkie's case is to be preferred.

3 Grandly v. V. Grandly (1955) 30 Ch. P.57.

4 Vandepitte v. P.A. Corporation (1933) A.C. 70.
Legislation was found necessary to modify the operation of the rule e.g., Section 36 (4) of the Road Traffic Act 1930 and Section 56(1) of the Law of Property Act 1928. The English Law Revision Committee recommended legislation to remedy the defect arising out of rigid adherence to the view that a contract should not confer any rights on a stranger to the contract even though, the sole object may be to benefit him.

The recommendation was

"Where a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third party in his own name subject to any defences that would have been valid between the contracting parties. Unless the contract otherwise provides, it may be cancelled by the mutual consent of the contracting parties at any time before third party has adopted it expressly or by conduct".

Where performance of a promise in a contract will benefit a person other than the promises, that person is a done beneficiary, if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promise in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary. Under this section third parties under certain circumstances laid down from Section 4133 to 147 claim the benefit of the contract. The Section lays down the exceptions to the doctrine of privity of contract.

1 Sixth Interim Report, Para 41.

2 Ibid Para 48.
The doctrine of privity of contract was viewed differently by different courts of India. The Law Commission of India in its thirteenth report summarised the position thus:

"15(a) In some cases the view has been taken that the words 'any other person' in Section 2(D) which depart from the English rule that consideration must proceed from the promise necessarily implied a corresponding deviation from the English rule as to privity of Contract.

The preponderating view, however, is that the English rule of Privity of Contract applies to India, notwithstanding Section 2 (d). The rule was applied by the privity council in Jamnadas V. Ram Avtar. In Krishnalal V. Pramila, Rankin C.J. struck a decisive blow to the argument based on the language of Section 2(D) of the Contract Act. While conceling that the clause might be construed as implying a departure from the corresponding English rule he observed that the definitions of promisor and promisee in section 2 rigidly excluded the notice that a stranger to a contract can sue thereon.

At the same time, following the English law, a number of exceptions have been held that a person who is not a party to a contract may nevertheless sue upon it:

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1 Krishnalal Sadhu V. Pramila Bala Dasi, AIR (1928) 55 Cal. 518
National Petroleum Co. V. Popatilal (1936) 60 Bom. 954.

2 (1911) 399. A. All 63. 13 IC 304.

3 Khwaja Muhammad Khan V. Husaini Begam (1910) 37 I.A. 152 Mukherji V Kiran (1938) 42 C.W.N. 1212.

4 Dan Kuer V. Sarla Devi. 73 I.A. 288 (1947) AFC 815.
(a) Where the contract implies a trust in favour of third party. Whether any property is specifically charged or not.

(b) Where money to be paid under the contract is charged on some immovable property.

Several exceptions have also been introduced by Section 23 of the Specific Relief Act, in favour of beneficiaries under a marriage settlement or compromise of doubtful rights.

That a strict adherence to the doctrine of privity is bound to cause hardship is obvious. The present state of law in India is not quite certain and the particular exceptions which have been acknowledged by case law and statute do not cover all cases of hardship and thus enhance the bewilderment of the layman. As we anticipated in our report on the Specific Relief Act, the better course would be to adopt a general exception to cover all cases of contracts conferring benefits upon third parties and dispense with the particular instances where the rule of privity should not apply.

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As everything has two sides, such as coin and good and bad, so in the case of Acts. The Indian Contract Act, 1872, has the following drawbacks:

Nowhere do we find the provision in the Act insisting upon an offer or its acceptance to be made with the intention of creating legal relationship.

The test of contractual intention is objective, not subjective, what matters is not what the parties had contemplated in their mind but what a reasonable person would think, in the circumstances, their intention to be.

It is for the Court in each case to find out whether the parties must have intended to enter into legal obligations.

The law of contract deals with agreements which can be enforced through Courts of Law only. Section 2 (h) of the Indian Contract Act, provides that "An agreement enforceable by law is a contract" only. An agreement is thus regarded as a contract only when it is enforceable by law. There are various social, religious and moral obligations e.g. marriage, conveyance of deeds etc; which are not enforceable by law as contracts.

The Indian contract Act is not exhaustive in itself as other acts relating to the special types of contracts. The Negotiable Instruments etc; Internal carriage by air in India is governed by the common law and a carrier can exempt himself from liability for the negligence of his servants. The Law of Contract does not lay down a number of rights and duties, which the law will protect or enforce.
An agreement to do something for others, for nothing (e.g. without consideration) is usually not enforceable. A bare promise without intention to affect legal relations between the parties is of no legal consequence.

Section 10 of the Indian Contract Act, 1872 has defined that the agreement may either be oral or in writing, but there are certain agreements which are required to be in writing e.g. Lease, Gift, Sale, Mortgage of immovable property, negotiable instruments, certain matters under the Companies Act 1956. Registration of such agreements is compulsory in cases of documents falling within the scope of Section 17 of the Indian Registration Act, 1908. If the agreement does not comply with these legal formalities it can not be enforced by law.

A contract to negotiate a contract is not recognised by law.

Indian Law does not so divide contracts according to their mode of formation, altogether different from the English Law e.g. it may be implied from conduct or custom or by law.

Standard from contracts contain a large number of terms and conditions in fine print which restrict and often exclude liability under the contracts. In all such instances, individual dealing with such large organisations have hardly time and patience to bargain with them. They are left with no choice. They are there for them to take or leave. "No customer in a thousand ever read the conditions". The big company exploits this weakness of the individual customer by incorporating such terms which may exempt the company from all liability under the contract.
In the Indian Contract Act 1872, contract strictly binds the parties to it and no third party can either enjoy any right or suffer any liability under it. Life and safety of millions using the articles would be totally in the hands of the two parties to the contract. The duty of the third party does not arise out of contract, but independently of it.

According to Section 25 of the Indian Contract Act 1872, consideration should be of value, but agreement through natural love and affection is enforceable even if there is no consideration. Similarly "No consideration no contract" principle does not apply to completed gifts, and voluntary services, and time-bound debt.

Past, present and future considerations are good consideration according to Indian Contract Act 1872, though it is submitted that past consideration should not have place in the Indian Contract Act, as English Contract Act do not recognise the past consideration.

The effect or consequences of illegality is in general to render the contract void and enforceable (Section 23 of Indian Contract Act) the distinction is subtle and formal, since it is not easy to determine in which clause an illegal contract would fall.

In India the law relating to discharge of contracts by frustration is contained in Section 56 which lays down positive rules of law and does not leave anything to be determined according to the intention of the parties, in fact intention of the parties is the pivot of the contract.
Every contract must be performed within the stipulated period of time or within a reasonable time of contract as per Section 55 of the Indian Contract Act; is in contravention of the provisions of The Limitation Act, barring the right to bring an action to enforce the contract under the Limitation Act.

The standard form are not drafted with the interests of only party in view.
We consider the recommendations of the Law Revision Committee best suited for the purpose, and recommend that a separate section be incorporated on the same of the benefits conferred on respective contracting parties.

The recommended Section 37 A runs as follows:

"37 A Benefits Conferred on third parties"

(1) Where a contract expressly confers a benefit directly on a third party, then unless the contract otherwise provides, it shall be enforceable by the third party in his own name, subject to any defences that would have been valid between the contracting parties.

(2) Where a contract expressly conferring a benefit directly upon a third party has been adopted, expressly or impliedly, by the third party, the parties to the contract can not substitute a new contract for it or rescinded or alter it so as to affect the rights of the third party.

The Law Commission has recommended amendment of the contract Act to protect consumers against unfair terms in contracts which are imposed on them by business houses.

The Commission's recommendations which are contained in its latest report, will go a long way to protect consumers from unfavourable terms in standarised contracts which are put before them on "take it, or leave it basis".

The Commission on a detailed study reportedly found that the characteristics usually and traditionally associated with the contract such as freedom to contract and consent are absent from these so-
called contracts, which appear in printed forms. Large scale business houses get expert advice and introduce terms most favourable to them in these printed contracts which also contain wide exemption clauses most favourable to them.

The individual can not bargain for a change in any of the terms since he has to accept the giant organisation's offer whether he likes it or not. This gives an opportunity to the organisation to exploit the individual's helplessness and introduce clauses, which may exempt the organisation from all liability under the contract.

The Commission is understood to have found that the present law as laid down in the Indian Contract Act was inadequate in protecting the interests of the consumer under the standard forms of the contract. In England the situation has been remedied by passing the Unfair Terms Act 1977. Similarly in the USA the Uniform Commercial Code offers or remedy for consumers.

The Commission has observed that there is no general provision in the Contract Act itself under which Courts can give relief to the weaker party. The existing sections on the contract act do not seem to be capable of meeting the mischief and jargous of the formidable provisions.

A working paper circulated by the Commission's Secretary Mr. A. K. Srinivas Murthy on the subject had suggested insertion of the following chapter and Section in the Indian Contract Act.

(1) Where the Court on the terms of the contract or on the evidence adduced by the parties comes to the conclusion that the contract or any part of it is unconscionable, if may refuse to
enforce the contract or the part that it hold to be unconscionable.

(2) Without prejudice to the generality of the provisions of this Section, a contract or part of it is deemed to be unconscionable if it exempts any party from the liability for wilful breach of the contract or the consequences of negligence.

It is understood that the Commission has recommended to Government the insertion of these clauses in the Contract Act.
CONCLUSION

To conclude it can be said that exemption clauses are an international phenomenon and an international problem. In all the countries under treaty, it has been realised that a certain control an exemption clauses, is indespensable. The reason for this is the protection of weaker party. As has been pointed out already the "freedom of contract" which the supplier involves, 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 pròlific and persistent litigation it is possible to regard certain conclusions which can help to control the unfair exclusion 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, affection, performance, such as strikes, fire and transportation difficulties 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 judgements indicate to the fact that in order that conditions 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 specifically 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 realise 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 hostilities.

A court can construe language into patently not meaning what the language is patently trying to say. It can find inconsistencies between clauses and throughout the trouble some
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 notices etc, clause can also be rejected on grounds of inequality of 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, Gibard rule, four corner rule, followed by the Courts to control exemption clauses are not sufficient. The objection to such techniques are obvious. They fail to develop general criteria for making out a clear boundary between admissible and inadmissible clauses. And since they are 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. Convert techniques followed by the Courts in England to Control unfair exemption clauses can not be relied on. Instead, there should be direct control of the clauses.

In comparison to English judges, American judges have been more active in fighting exemption clauses. Unbriddle power has been granted to the Courts in America under Section (2) 302 of the Uniform Commercial Code. But the basis 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.

It is highly surprising that the Courts in India are completely unaware of this challenge, except few, their decisions are outdated, showing complete indifference to the efforts make by English and American Courts in this respect. Whether power to declare any exemption clause void or unconscionable is inherent with the court and whether section 23 dealing with public policy is consolidated enough to grant such power or it can not be a open seasame for drawing upon or justifying such a power? It is surprising that law commission has also remained silent on this point.

So far the legislative control of exemption clauses is concerned, it is picemeal and its purpose has been to remedy individual cases e.g. Hire Purchase Transactions, carrying Goods by Air, Land or Sea and Boilment etc. Except in America, there is no general provision providing any restriction on unfair exemption in standard form contracts. Therefore, need of the dany is the protective legislation for controlling unfair exclusion clauses not in any particular breach but in general.

In the amendment as proposed by law commission a list should be added with it enumerating various "obvious cases" of "Offensive terms" or unconscionable clauses. In the preparation of such a list help can be taken from Iszael Code of Standard form contracts. Definition of these terms a used 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 entitled the supplier to cancel or change the conditions of a contractor 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 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 the 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) Terms which are "Warranties" yet give the purchaser no right to cancel the purchase for defects in the goods, even if the purchaser receives some other right e.g. to have the goods repaired. "Warranty" clause, which grants apparently attractive conditions but in reality, places the consumer in a worsened position.

(6) "Force Majeur" term which give a seller the right to postpone indefinitely full performance of his obligations on ground of circumstances outside his control.
(7) Terms which give the seller the right to raise the contract price because of circumstances within or outside his control.

(8) 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.

(9) Terms which forms a waiver declared beforehand on the part of the receiver in regard to right which would arise out of the contract, but for the existence of such a waiver.

(10) A term which empowers the supplier of somebody else on his behalf to act in the name of the receiver in order to realise a right of the supplier towards the receiver.

(11) 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 terms.

(12) A term which makes the right of the receiver to obtain relief in legal proceeding depend upon the fulfilment 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.

(13) 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 Court.